



Law Enforcement Executive
FORUM

Police Integrity and Ethics

July 2006

Law Enforcement Executive Forum
Illinois Law Enforcement Training and Standards Board Executive Institute
Western Illinois University
1 University Circle
Macomb, IL 61455

Senior Editor

Thomas J. Jurkanin, PhD

Editor

Vladimir A. Sergevnin, PhD

Associate Editors

Jennifer Allen, PhD

Department of Law Enforcement and Justice Administration
Western Illinois University

Barry Anderson, JD

Department of Law Enforcement and Justice Administration
Western Illinois University

Tony Barringer, EdD

Division of Justice Studies
Florida Gulf Coast University

Lewis Bender, PhD

Department of Public Administration and Policy Analysis
Southern Illinois University at Edwardsville

Michael Bolton, PhD

Chair, Department of Criminal Justice and Sociology
Marymount University

Dennis Bowman, PhD

Department of Law Enforcement and Justice Administration
Western Illinois University

Oliver Clark

Chief of Police, University of Illinois Police Department

Weysan Dun

Special Agent-in-Charge, FBI, Springfield Division

Kenneth Durkin, PhD

Department of Law Enforcement and Justice Administration
Western Illinois University

Thomas Ellsworth, PhD

Chair, Department of Criminal Justice Sciences
Illinois State University

Larry Hoover, PhD

Director, Police Research Center
Sam Houston State University

William McCamey, PhD

Department of Law Enforcement and Justice Administration
Western Illinois University

John Millner

State Senator of 28th District, Illinois General Assembly

Michael J. Palmiotto

Wichita State University

Frank Morn

Department of Criminal Justice Sciences, Illinois State University

Gene L. Scaramella, PhD

Dean of Criminal Justice Graduate Studies, Kaplan University

Wayne Schmidt

Director, Americans for Effective Law Enforcement

Editorial Production

Document and Publication Services, Western Illinois University, Macomb, Illinois

Production Assistant

Linda Brines

The *Law Enforcement Executive Forum* is published six times per year by the Illinois Law Enforcement Training and Standards Board Executive Institute located at Western Illinois University in Macomb, Illinois.

Subscription: \$40 (see last page)

ISSN 1552-9908

No part of this publication may be reproduced without written permission of the publisher.

Disclaimer

Reasonable effort has been made to make the articles herein accurate and consistent. Please address questions about individual articles to their respective author(s).

Table of Contents

Editorial	i
Thomas J. Jurkanin	
Police Integrity and Ethics	
The Impact of the Police Academy Experience on the Ethical Orientations of American Police Recruits	1
James R. Maupin	
Lisa J. Bond-Maupin	
Dennis W. Catlin	
Using Risk Management to Manage Police Liability and Enhance Police Professionalism: Current Applications	17
Carol A. Archbold	
We Are Cops. We Are Not Soldiers at War with the Community.	31
Michael W. Quinn	
Ethical Changes and Challenges: Policing on the Texas/Mexico Border	39
Bonnie A. Rudolph	
Reducing Corruption and Supporting Integrity-Based Policing in Central Europe: The Case of Hungary	47
Rob C. Mawby	
Alan Wright	
Mike King	
Transformation Through Personnel Systems	63
Terry D. Anderson	
Pat Holliday	
Guidelines for Conducting Law Enforcement Backgrounds	83
John L. Bellah	
Winning Mind, Warrior Spirit, Cop Body	89
Brian Willis	
Court of Appeal Affirms Reinstatement of Deputy Fired for Dishonesty: Justices Chide Department Officials for Being “Hell-Bent to Fire Smith, No Matter What”	99
Michael P. Stone, Esq.	
Stephen J. Horvath, Esq.	
Can Police Departments Be Sued as “Rackateer-Influenced and Corrupt Organizations” Under the “Rico Act”?	
En Banc Ninth Circuit Panel Rules Ten to One, “Yes”	105
Michael P. Stone, Esq.	
Marc Berger, Esq.	

Liability

Are Take-Home Cars a Benefit or a Liability for St. Clair County Employees and Residents?	109
Dominic Lauko	

Analyzing and Understanding Federal Civil Rights Law to Yield Better Supervision and Management of Police and Prisons	127
Robert L. Bastian, Jr.	

Mental Health

Persons with Mental Illness Post Prison Release	175
Stephanie W. Hartwell	
Sarah Kuck Jalbert	
Karin Orr	

Materials/publications are available through the Illinois Law Enforcement Training and Standards Board Executive Institute.

Editorial

Integrity is defined as “the firm adherence to a code or standard of values.” Police integrity implies that officers maintain a set of personal and professional standards that places them above compromise; that guarantees their commitment to honor, trust, and fairness; and that places duty and public service above personal gain.

The level of police professionalism and service provided is influenced most significantly by the quality of personnel employed. Therefore, persons of excellent character, who are committed to the principles of fairness, trustworthiness, justice, and the maintenance of public trust, must be recruited and trained if our police agencies are to gain and maintain public confidence.

The police profession, by its very nature, operates in a social environment that is ever-changing and is, in fact, chaotic. Police deal with many unpredictable people and events. Police have little control over most of what they encounter on the street; however, one critical component of their working environment that police always have control over is their own integrity. Each individual police officer can choose to remain ethical, honest, and fair, no matter what common or dramatic event or opportunity may tempt them to do otherwise. When it comes to police integrity, police officers control their own destiny. And, choosing integrity brings a sense of stability and comfort to an otherwise unstable, chaotic work environment. The ability to say (at the end of the day) that, “I did my best, and I did it with honesty and integrity,” provides confirmation of one’s commitment to excellence of character and to honoring the public trust.

This issue of the *Law Enforcement Executive Forum* is dedicated to police integrity and the hundreds of thousands of police officers who place personal and professional integrity and honoring public trust above all else; to those men and women who exhibit the excellent character to which Adlai Stevenson referred in the following quote:

Without individuals of good character and institutions that apply high ideals to daily practice, the goals of liberty, order, and justice cannot be achieved. Therefore, the public has the right to insist that the obligations of public service are very high and sacred.

Thomas J. Jurkanin, PhD
Executive Director
Illinois Law Enforcement Training and Standards Board

The Impact of the Police Academy Experience on the Ethical Orientations of American Police Recruits

James R. Maupin, PhD, Department Head and Associate Professor, Department of Criminal Justice; Director, Master of Criminal Justice Program; New Mexico State University

Lisa J. Bond- Maupin, PhD, Associate Professor, Department of Criminal Justice; Director, Community Violence Prevention Program; New Mexico State University

Dennis W. Catlin, PhD, Associate Professor, Department of Criminal Justice; Coordinator, Distance Learning Program, Northern Arizona University–Tucson; Codirector, Law Enforcement Command Institute of the Southwest

Abstract

The ethical orientation of American local police academy recruits was identified using an Ethical Position Questionnaire (EPQ) that measures scales of ethical idealism and ethical relativism. Two classes of recruits in a large regional police academy were administered the EPQ at the beginning and at the end of the academy. This research examined the ethical orientations for the two recruit classes, the ethical orientation differences between the beginning of the academy and the end, and characteristics associated with those differences. Statistically significant differences were found in ethical orientations. Operational, training, and sociopolitical implications for these findings are discussed.

The Impact of the Police Academy Experience on the Ethical Orientations of American Police Recruits

There is a rich history of research that addresses the question of whether or not certain characteristics of police personnel are influenced by the experience of professional socialization. This line of research grew out of the socialization theories of the 1960s. These theories held that “the beliefs, attitudes, and values possessed by officers are developed as a direct result of occupations experiences rather than from previously learned behavior” (Lyman, 1999, p. 52). Kappeler, Sluder, and Alpert (1998) suggest that much of the research based on the sociological paradigm supports the sociological perspective and that “recruit and probationary officers are profoundly affected by their training and socialization” (p. 87). This line of research has investigated characteristics such as authoritarianism, cynicism, and values, among others, in an effort to determine whether recruits come to the profession with certain characteristics or personal characteristics are shaped by the academy training experience and the subsequent socialization into the profession. The question of whether or not personal values and ethics are impacted by the socialization process has been largely ignored (Zhoa, Ni, & Lovrich, 1998).

Statement of the Problem

The literature with respect to the impact of training and socialization on the values of police recruits reflects mixed conclusions. Bennett (1984) suggests that the recruit training process does have an impact on values. Catlin and Maupin (2002) studied the ethical orientations of a state police recruit class using the EPQ and compared that

class to a group of state police officers with one year of experience. They found that there was a statistically significant difference in ethical orientations between the two groups. Catlin and Maupin (2001) also studied two cohorts of state police officers. Each cohort was studied for a two-year period. The first cohort was administered the EPQ in the recruit academy and again after one year on the job. The second cohort was administered the EPQ at one year and two years on the job. There was a significant difference in the ethical orientation of Cohort 1 between the recruit academy and one year on the job. Cohort 2 demonstrated a similar identifiable change, but the change was not statistically significant. This suggests a major shift during the first year on the job followed by a decrease in the degree of the change in subsequent years. On the other hand, Rokeach, Miller, and Snyder (1971), in studying the values of police officers in a middle-sized, Midwest police department using the Rokeach Value Survey, concluded that the values patterns of less experienced and more experienced officers were not a function of occupational socialization. Caldero (1997) used the Rokeach Value Survey with police officers of the Tacoma, Washington Police Department. They found that "once hired, values don't change much" (as cited in Crank & Caldero, 2000, p. 60). Zhao, et al. (1998) replicated the work of Rokeach et al. (1971) with employees of the Spokane Police Department. Their findings were similar to Rokeach et al. in that the values of officers "were very similar regardless of years in service" (p. 29).

This research sought to contribute to the debate regarding whether or not the academy training experience has an impact on the ethical orientation of those who select police work as a profession. The article begins with a theoretical discussion of ethical orientations, followed by a review of the ethical orientation measurement tool used in this research project. The results of the application of the measurement tool to the two police academy classes are discussed. The article concludes with a discussion of the implications of the results of this analysis.

Personal Ethical Orientations: A Theoretical Framework

Scales Measuring Ethical Orientation

Historically there have been two major problems confronting researchers in conducting empirical research to identify personal ethical orientations: (1) identifying a theoretical framework based on accepted ethical philosophies and (2) operationalizing that theoretical framework. In an attempt to address these problems, Forsyth and Schlenker (Forsyth, 1980; Schlenker & Forsyth, 1977) proposed that the current major schools of ethical thought could be most parsimoniously defined in terms of two major scales. The first scale draws on the two ethical philosophies of ethical absolutism and ethical relativism. The second scale focuses on ethical idealism.

The first scale is based on the proposition that in making ethical judgments, some people draw on universal ethical rules while others reject ethical absolutes. Ethical absolutism suggests that "objective standards of moral truth exist independently of us" (Harris, 1997, p. 103) and that there "exists an eternal and unchanging moral code that transcends the physical world and is the same for all people at all times and places" (Holmes, 1998, p. 165). Ethical relativism, on the other hand, holds that there is no such thing as universal ethical truths and that ethical dimensions of right and wrong vary from person to person and culture to culture (Holmes, 1998; Polloch, 1998; Rachels, 1999).

The second scale focuses on idealism in ethical judgment. At one extreme, ethical idealists assume that “right” action will result in desirable consequences. Those who are less idealistic believe that “right” action does not always result in desirable consequences (Forsyth, 1980).

To operationalize this theoretical framework, Forsyth (1980) conducted research to develop a valid, reliable, and easily administered instrument to determine personal ethical orientations of individuals. His goal was to develop and validate an Ethical Position Questionnaire (EPQ) that would facilitate the classification of individuals according to ethical orientation (Forsyth, 1980, p. 177). He proposed that ethical judgments can be found to lie on two major dimensions: (1) ethical idealism and (2) ethical relativism. The resulting taxonomy of ethical orientations is presented in Table 1.

Table 1
Taxonomy of Ethical Orientations

	High Relativism	Low Relativism
	<i>Situationist</i>	<i>Absolutist</i>
High Idealism	Rejects ethical absolutes; advocates individualistic analysis of each act in each situation; relativistic	Assumes that the best possible outcome can always be achieved by following universal ethical rules; absolutist
	<i>Subjectivist</i>	<i>Exceptionist</i>
Low Idealism	Appraisals based on personal values and perspective rather than universal ethical principles; relativistic; ethical egoist	Ethical absolutes guide judgments but pragmatically open to exceptions to these standards; utilitarian

Forsyth’s (1980) work resulted in the development of the EPQ, consisting of 20 statements. Ten of the statements concern idealism, and ten concern relativism. A Likert-type response scale consisting of nine points from “completely disagree” to “completely agree” is used for each item. Individuals are classified as to ethical orientation by calculating their mean scores on the relativism items and the mean scores on the idealism items. Tests of concurrent and discriminate validity as well as predictive validity were conducted.

Subsequent to its development, the EPQ has been used and validated in ethics research among numerous professional disciplines. Studies have been conducted in education (Deering, 1998), medicine (Furham & Olfstein, 1997; Ganzini, Fenn, Lee, Heintz, & Bloom, 1996), business and management (Bass, Barnett, & Brown, 1999), criminal justice education (Byers & Powers, 1997; Catlin & Maupin, 2002), advertising (Treise, Weigold, Conna, & Garrison, 1994), market research (Vitell, Lumpkin, & Rawwas, 1991), and animal research (Wuensch & Poteat, 1998).

Categories of Ethical Orientation

Situationists and Subjectivists

Situationists and subjectivists are high on the relativism scale. These individuals “reject the possibility of formulating or relying on universal moral rules when drawing conclusions about moral questions” (Forsyth, 1980, p. 175). Relativism

belongs to the school of philosophy known as skepticism. A skeptic uses the argument that “there is no morality as such, only differing practices in different cultures” (Solomon, 1992, p. 440).

Situationists, while high on the relativism scale, also are high on the idealism scale. The situationist “distrusts absolute moral principles and argues instead that each situation must be examined individually” (Forsyth, 1980, p. 176). Ethical ideals are, however, applied in judging each situation. The situationists hold that love or *agape* is intrinsically good. *Agape* love is a higher love that acknowledges all people are part of God’s creation and should be treated as such (Fletcher, 1966). The situationist would ask, “What in this concrete situation would be the most loving act?” (Holmes, 1998, p. 198).

The subjectivist is high on the relativism scale and low on the idealism scale. The subjectivist is very closely associated with the school of ethical thought known as ethical egoism. Rachels (1999) suggests that “according to ethical egoism, there is only one ultimate principle of conduct, the principle of self-interest, and this principle sums up all of one’s natural duties and obligations” (p. 84).

Absolutists and Exceptionists

For Forsyth (1980), absolutists and exceptionists are low on the relativism scale. While the sources of ethical rules are different, these rules influence their actions. To fully understand the two categories, absolutists and exceptionists, it is necessary to discuss two systems of ethical philosophy: (1) nonconsequentialism (deontological) and (2) consequentialism (teleological). Ethical absolutism is associated with a deontological system of ethics. Deontological systems of ethics are concerned only with whether or not the act is “right.” If the act is right, it is ethical regardless of the ultimate consequences of the act; therefore, whether the outcome is good or bad is nonconsequential (Holmes, 1998; Polloch, 1998). Ethical absolutism is nonconsequential (deontological). Ethical absolutists believe that there are universal unchanging ethical rules and that persons should obey these rules, regardless of the consequences (Harris, 1997).

Forsyth’s (1980) category of exceptionist is consistent with a teleological ethical system. Teleology refers to ethical systems that focus on the outcome of the ethical decision or the consequence. In this case, if the outcome or consequence is good, then the act was ethical (Harris, 1997). Forsyth (1980) suggests that “one is bound to act in a way that produces ‘good’ consequences” (p. 77). This orientation is closely associated with utilitarian ethics that suggests one should act in ways that maximize the good for all people. Holmes (1998) suggests, “The utilitarian (as teleologist) insists the only thing relevant to moral decision making is the value of the consequences . . .” (p. 35).

This distinction between consequential and nonconsequential systems of ethics has specific implications for those who practice in the criminal justice system. It can be argued that the United States Constitution, especially the Bill of Rights, contains guarantees such as “due process” that are essentially nonconsequential in nature. Due process is not ultimately concerned with the desirability of the outcome in an individual case but rather the rightness of the process. Using this analysis, the police officer who is an ethical absolutist might see protecting individual rights as his duty regardless of the potential consequence of possibly seeing a guilty person set free. A police officer who is an ethical relativist (exceptionist) would judge the act of violating rights by whether or not society was protected. Police are in a very

precarious position when the formal rules of conduct are in conflict with what a public in general sees as valuable outcomes of police action.

Method

Participants

There were two measures of two groups of police officers attending a large regional police recruit training academy. The first measure occurred as each group began training, and the second measure was taken on the final day of the academy. Each group experienced the same level and type of training from the same instructors. The first group is referred to as “Class A” (N = 40), and the second group is referred to as “Class B” (N = 49).

Both groups completed the EPQ developed by Forsyth (1980) and used successfully in subsequent studies (Bass et al., 1999; Byers & Powers, 1997; Catlin & Maupin, 2002; Deering, 1998; Furham & Olfstein, 1997; Ganzini et al., 1996; Treise et al., 1994; Vitell et al., 1991; Wuensch & Poteat, 1998).

Table 2 displays the characteristics of Class A and Class B separately and combined. The average age was consistent at approximately 30 years. At the beginning of the academy, 93% of Class A and 84% of Class B were male, while 88% of the combined class were male. Seventy-three percent of Class A and 47% of Class B were Anglo. Twenty percent of Class A and 47% of Class B were Hispanic. For the combined class, 58% were Anglo while 31% were Hispanic. Twenty-eight percent of Class A and 35% of Class B have earned bachelor’s degrees.

Table 2
Characteristics of Training Classes

Characteristic	Class A		Class B		Combined	
	Beginning	End	Beginning	End	Beginning	End
Number	40	32	49	29	89	61
Average Age	29.67	29.68	29.85	29.89	29.76	29.79
Males	37	28	41	25	78	53
Females	3*	4*	8	4	11	8
Anglos	29	21	23	14	52	35
Hispanics	8	8	20	13	28	21
African-Americans	2	1	1	0	3	1
American Indian	1	1	2	1	3	1
Asian/Pacific Islander	1	1	2	1	3	1
Other Ethnicity	0	0	1	0	1	0
High School Graduate	11	9	12	4	23	13
Some College	18	14	20	14	38	28
Bachelor’s Degree	11	9	17	11	28	20

* One female from a previous recruit class joined Class A midway through the academy.

Research Questions

The following research questions were the focus of this study:

- Does the training experience affect the ethical orientation of recruits?
- What characteristics are associated with the ethical orientation of recruits?

Research Question #1

The ethical orientation questionnaire was divided into two parts that individually measure the primary ethical dimensions of idealism and relativism. Table 3 displays the descriptive statistics of our analysis of these two ethical dimensions. There was no statistically significant correlation across the scores on these two dimensions.

Table 3
Idealism and Relativism Scores

Class	Mean Idealism	Median Idealism	Mean Relativism	Median Relativism
Class A Beginning N = 40	67.13	68.00	54.05	55.00
Class A End N = 32	63.84	66.50	51.66	51.50
Class B Beginning N = 49	65.24	69.00	50.57	54.00
Class B End N = 29	56.62	57.00	47.59	48.00
Combined Beginning N = 89	66.09	68.00	52.11	54.00
Combined End N = 61	60.41	63.00	49.72	49.00

Table 4 displays the results of t-tests assessing differences in ethical orientation between the beginning and ending measures of the idealism and relativism scores. Although there was a downward shift in the mean idealism and relativism scores for Class A, that shift was not statistically significant. There was a similar downward shift in the mean idealism and relativism scores for Class B. The downward idealism shift for Class B was statistically significant, but the shift in the relativism score was not statistically significant. There was a downward shift in the mean idealism and relativism scores when the two classes were combined. The downward idealism shift for the combined classes was statistically significant, but the shift in the relativism score was not.

Table 4
T-Test of Mean Idealism and Relativism Scores

Score	Combined Classes Beginning & End	Class A Beginning & End	Class B Beginning & End
Idealism Score	0.885	2.890*	2.288*
Relativism Score	0.649	1.003	1.018

* $p \leq 0.05$

An additional t-test comparing the mean Idealism and Relativism scores between Class A and Class B at the beginning of training and at the end of training separately

was conducted. There was no statistically significant difference between the classes at either point in time ($t = 1.38; p > 0.05$).

Based upon the work of others utilizing this questionnaire (Bass et al., 1999; Byers & Powers, 1997; Catlin & Maupin, 2002; Deering, 1998; Forsyth, 1980; Furham & Olfstein, 1997; Ganzini et al., 1997; Treise et al., 1994; Vitell et al., 1991; Wuensch & Poteat, 1998), the respondents were placed in one of the four ethical orientation categories previously described. The actual, as opposed to theoretical, midpoint of the Likert response options was used to delineate the four ethical orientation categories. Table 5 displays the distribution of the respondents across the four ethical orientation categories (Chi-Square = 9.52; $p \leq 0.05$).

Table 5
Distribution Across Four Ethical Categories

Class	Exceptionists	Situationists	Absolutists	Subjectivists
Class A				
Beginning	13 (32.5%)	14 (35.0%)	9 (22.5%)	4 (10.0%)
End	8 (25.0%)	9 (28.1%)	9 (28.1%)	6 (18.8%)
Class B				
Beginning	20 (40.8%)	12 (24.5%)	10 (20.4%)	7 (14.3%)
End	5 (17.2%)	5 (17.2%)	7 (24.1%)	12 (41.4%)
Combined Classes				
Beginning	33 (37.1%)	26 (29.2%)	19 (21.3%)	11 (12.4%)
End	13 (21.3%)	14 (23.0%)	16 (26.2%)	18 (29.5%)

Chi-Square = 9.52; $p \leq 0.05$

In Class A, there is a shift from the situationist and absolutist categories to the subjectivist and exceptionist categories with the greatest increase occurring in the situationist, absolutist, and exceptionist categories. In Class B, a similar shift occurred. Here the greatest changes were the same as for Class A, but the change in the situationist and exceptionist categories was much greater than that in Class A. The analysis for the classes combined mimics the changes in Class A and Class B individually.

Research Question #2

A t-test compared the idealism and relativism scores between Class A and Class B at the beginning and the end of training. No statistically significant differences were identified ($t = 1.27, p > 0.05$ for A and B beginning and $t = 1.43, p > 0.05$ for A and B ending).

As indicated in Table 4, there are no statistically significant differences in the relativism score for any of the parings, but there is a statistically significant difference in the idealism score for Class B and the combined classes. To better understand these statistically significant differences, we conducted regression analysis for Class B and both classes combined using the idealism score to identify characteristics of the trainees that might explain some of the difference. Four of the demographic characteristic variables were regressed against the idealism score (ethnicity coded as 0 for non-Anglo and 1 for Anglo, education coded as 0 for high school and some college and 1 for bachelor degree or higher, and sex coded as 0 for females and 1 for males, and the age of each respondent). Table 6 displays the results of the regression analysis.

Table 6
Regression Coefficients for Idealism Score

Variable	Class B Beginning (Std. Er.)	Class B Combined (Std. Er.)	Class B Combined (Std. Er.)	Class A & B Combined (Std. Er.)
Constant	54.56** (12.63)	55.92** (16.93)	51.82** (12.04)	63.88** (6.89)
Ethnicity	-7.55* (3.19)	-10.50* (4.64)	-8.98** (2.75)	-5.39* (2.26)
Education	3.05 (3.44)	-6.45 (4.92)	-4.48 (92.93)	-9.38** (2.45)
Age	0.62 (0.26)	0.814 (0.47)	-0.39 (0.24)	0.20 (0.18)
Sex	-4.23 (4.35)	6.68 (6.77)	-0.39 (3.81)	-0.07 (3.63)
R ²	0.194	0.171	0.187	0.128
F	3.882**	2.440	5.424**	6.420**

*p ≤ 0.05

**p ≤ 0.01

One variable consistently achieves statistical significance across all categories for the idealism score. That variable is ethnicity. Anglos consistently score lower on the idealism score. For Class B, the regression model explains approximately 19% of the variation in the idealism score. When Class A and Class B are combined, both ethnicity and education are statistically significant, and the model explains 12.8% of the variation in the idealism score across the two classes. For the combined classes, the idealism score is lower for Anglos and for those with a bachelor’s degree.

Discussion

Research Question #1

Research question one focuses on whether or not there is a change in the ethical orientation of the recruits from the beginning of the academy to the end of the academy. The analysis looked at each class individually and also as a combined group.

Class A

There was a discernable shift in scores on the EPQ, but these were not statistically significant. Table 7 reflects the percentage distribution among the ethical positions at both the beginning and end of the academy.

Table 7
Distribution of Ethical Orientations for Class A at Beginning and End of Training Academy

	High Relativism	Low Relativism
High Idealism	Situationists Beginning 32.5% End 25.0%	Absolutists Beginning 35.0% End 28.1%
	Subjectivists Beginning 22.5% End 28.1%	Exceptionists Beginning 10.0% End 18.8%

Tables 7 and 4 suggest that while the shift is not statistically significant, there is a downward shift in both the idealism and relativism scores. From the beginning of the academy to the end, the percentage of recruits identified as situationists and absolutists decreased while the percentage of subjectivists increased.

Class B

For Class B, there was a downward shift in both the idealism and relativism scores. The downward shift was statistically significant for the idealism score but not for the relativism score. Table 8 reflects the percentage distribution of recruits among the ethical orientations at both measurement times.

Table 8
Distribution of Ethical Orientations for Class B at Beginning and End of Training Academy

	High Relativism	Low Relativism
	Situationists	Absolutists
High Idealism	Beginning 40.8% End 17.2%	Beginning 24.5% End 17.2%
	Subjectivists	Exceptionists
Low Idealism	Beginning 20.4% End 24.1%	Beginning 14.3% End 41.4%

Table 8 indicates a substantial decrease in those occupying the situationist orientation, from 40.8% to 17.2%. There is a similar substantial increase in those occupying the exceptionist orientation when the percentage went from 14.3% to 41.4%.

Combined Classes

The two classes were combined for purposes of further analysis. Both of the academy classes attended the same academy, participated in the same curriculum, and had the same instructors. Also, the statistical analysis reflected in Tables 3 and 4 indicates that there was no statistically significant difference between Class A and Class B when the idealism scores and relativism scores were compared at both the beginning and end of training. The combined analysis indicated a downward shift for both idealism and relativism scores from the beginning to the end of the academy experience. That downward shift was statistically significant for idealism scores but not for relativism scores. Table 9 indicates the percentage distribution for the combined classes.

Table 9**Distribution of Ethical Orientations for Combined Classes at Beginning and End of Training Academy**

	High Relativism	Low Relativism
High Idealism	Situationists Beginning 37.1% End 21.3%	Absolutists Beginning 29.2% End 23.0%
	Subjectivists Beginning 21.3% End 26.2%	Exceptionists Beginning 12.4% End 29.5%

Table 9 shows a decrease in those occupying both the situationist and absolutist positions and an increase in those occupying the subjectivist and exceptionist positions. The largest relative changes were in the situationist position and exceptionist position.

This result seems to support the position that something happens during the academy process that influences a change in the distribution of recruits among the four ethical positions. At the beginning of the recruit experience, the majority of recruits in the combined class were found in ethical positions associated with high idealism scores. At the end, they were found in ethical positions associated with low idealism. Those with low idealism scores are almost evenly distributed between the subjectivist and exceptionist orientations. The question, of course, is what in the academy experience would account for the shift?

Research Question #2

The second research question focused on the characteristics that were associated with the ethical orientation of the academy participants. For Class B and the combined class, the ethnicity variable was statistically significant both at the beginning and end of the academy. Anglos consistently scored lower than non-Anglos on the idealism scale. In looking at the demographics for Class B and the combined class, the percentage of Anglos to non-Anglos is more balanced than is the case with Class A. For example, in the case of Class A, 73% of the class were identified as Anglos at the beginning and 66% at the end. This is compared to Class B in which 47% were Anglos and 53% were non-Anglos.

It is unclear why Anglos consistently score lower than non-Anglos on the idealism scale. Without knowing more specifics about such characteristics as religious training or other cultural values, it is impossible to draw definitive conclusions. Since a majority of non-Anglos identified themselves as Hispanic, it could be speculated that there might be strong religious ties or cultural ideals that resulted in identification with moral ideals. Since there is no research using the EPQ that addresses this issue, this result must remain an open question.

Education was the other variable that was statistically significant as related to the idealism scale. This occurred only with the combined class in which it was found that those with bachelor's degrees scored lower on the idealism scale. It is possible that those with bachelor's degrees have been exposed to a variety of ethical and moral philosophies that have already challenged their ethical idealism. Catlin and

Maupin (2002) found a relationship between ethical orientation and education in which the relativism score increased as education increased for state police recruits. As with the ethnicity variable, the reason for this difference cannot be definitively explained without more detailed information about individual characteristics.

Conclusions

This research suggests that something occurred during the academy that resulted in a shift among the recruits across the four ethical positions. The question, of course, is what in the academy experience that would account for the shift? There are at least two possible explanations. The first would support the contention that the socialization process that occurs during the academy has an impact on ethical orientation. The second explanation has to do with attrition.

Socialization

First, it is possible that the acculturation process into the police subculture during the academy results in a shift of ethical orientations. There is a clear and statistically significant trend away from ethical orientation associated with high idealism to those associated with low idealism. The trend is a shift away from moral situationists and absolutists to orientations associated with ethical egoism and ethical utilitarianism. In reviewing these results with training commanders, they observed that this shift may be, in fact, due to a number of training and acculturation factors. From the first day of the academy, there is significant emphasis on the necessity to protect oneself physically and emotionally. Firearms, training, defensive tactics, as well as arrest tactics focus on self protection. This emphasis on self protection could explain the increase in the ethical egoism orientation. In addition, it is possible that those who come to the law enforcement careers have a concept that enforcing the law is based on moral (legal) absolutes. It is wrongly assumed by many that the enforcement of the law is done in relationship to the absolute nature of law. In reality, there is a wide range of discretion and frequently conflicting goals that must be mediated by officers on the street. Moral absolutism may be in conflict with the broad exercise of discretion. As this reality sinks in both psychologically and emotionally, it is possible that the moral idealism brought to the profession gives way to a more utilitarian view of the enforcement role.

Attrition

It is also entirely possible that given the attrition rate, the trend could be accounted for by officers self selecting out of the profession. It is possible that those who came into the profession as moral absolutists or situations found their personal ethical orientations were in conflict with the ambiguity inherent in the police role and chose to leave the profession.

One limitation of this study relates to being able to track the scores of individuals. To ensure the anonymous nature of the responses, there were no unique identifiers used; therefore, the results are limited to the analysis of the group scores. This limitation made it impossible to determine the ethical orientations of specific individuals, and therefore, the impact of individual attrition on the group ethical orientation shift cannot be definitely analyzed. As a group, however, there was an attrition rate of 31% in the combined classes. There were 89 subjects who started the academy and 61 who finished. This possibility is somewhat supported by the fact that in comparing Class A

with Class B, the attrition rate in class B was 40.8% compared to Class A's attrition rate of 20%. It was in Class B that the shift in ethical orientation was statistically significant. It seems possible that the attrition rate could at least partially explain the shift in ethical orientation. Catlin and Maupin (2002) found similar trends in which there was a 29% attrition rate among state police officers when ethical positions were measured during the academy and during training after one year on the job. In this study, there was a similar statistically significant downward shift on the idealism scale as well as a statistically significant shift toward high relativism.

Implications

Regardless of the reasons for the differences found in this study, there are operational, training, and sociopolitical implications. Operationally, an officer's own ethical orientation and the perception of the ethical orientation of those he or she encounters may have an impact on decisionmaking. In at least one other study of human service personnel, there was a relationship between ethical orientation and decisionmaking. Furnham and Olfstein (1997) studied the allocation of kidney machines among competing patients in England. They looked at the ethical orientations of both the medical and nonmedical personnel who were involved in the allocation decisions. They found a significant relationship between ethical orientations as measured by the EPQ and allocation. Both situationists and absolutists favored patients who they perceived to be honest.

In police management training, styles of management and leadership are frequently used to explain the nature of conflict in organizations. The understanding that conflict in organizations is not always necessarily personal conflict, but rather can be attributed to differing decision-making styles, allows conflict, in general, to be more objectively understood. Similarly, by understanding and acknowledging that people also have differing personal ethical orientations, there is the possibility of reducing conflict on the organizational level as well as improving police-public relations on the operational level in policing.

There are several implications for police training. If, in fact, a number of police recruits are going to experience a major challenge to their ethical framework, they should be personally prepared for this potential shift. Unless a person is trained as a philosopher, ethicist, or theologian, little instruction in the normal course of the education process ever allows one to objectively identify and analyze one's own personal ethical orientation. Some consideration should be given to providing for this analysis in police ethics curricula. Furthermore, police recruits should be prepared through the ethics curriculum to deal with the challenge to their own personal ethical orientations.

Using the theoretical framework of personal ethical orientations as part of an ethics curriculum has additional benefits. In other training settings, law enforcement trainers frequently use conceptual frameworks to discuss differences in decisionmaking.

There are broad sociopolitical implications of the outcomes of this research. If this research is analyzed in the context of the relationship of ethical orientations to the two traditional models of the criminal justice process, there are significant policy questions. Packer (1968) suggests that there are two models of the criminal justice process: (1) the Crime Control Model and (2) the Due Process Model. The Crime Control Model is concerned with outcome or ends of the criminal justice

process while the Due Process Model is concerned with means or process. Crank and Caldero (2000) have suggested that these models are consistent with the traditional way various ethical systems are categorized. Teleological ethical systems are concerned with the ends and therefore are consistent with the Crime Control Model. Deontological ethical systems are concerned with the means or process and are consistent with the Due Process Model. The absolutist and situationist ethical orientations are deontological ethical systems. The subjectivist and exceptionist ethical orientations are teleological ethical systems. If the United States Constitution, which is concerned with due process, is essentially based on a deontological view, then there is a serious policy question: Does a democratic society want its police organizations composed of officers whose ethical orientations are inconsistent with the Constitution?

There are several questions this research does not answer. The primary question is whether the trend identified here is due to a personal change in orientation or self-selection out of the profession. In order to maintain confidentiality and maximize participation, the researchers chose to keep the instrument anonymous. This question can only be answered with certainty by tracking individuals. Also, yet to be answered is the question of whether the personal ethical orientation of a police officer would influence decisionmaking on the street. Would two officers faced with the same ethical dilemma resolve it differently based on personal ethical orientation? More extensive research would be needed to answer that question.

Notes

This research was approved through the Human Subject Review Committee at New Mexico State University, Las Cruces, NM IRB #4834. The Ethics Position Questionnaire was used with the permission of Donald R. Forsyth.

References

- Bass, K., Barnett, T., & Brown, G. (1999). Individual difference variables, ethical judgments, and ethical behavior intentions. *Business Ethics Quarterly*, 9, 183-205.
- Bennett, R. R. (1984). Becoming blue: A longitudinal study of police recruit occupational socialization. *Journal of Police Science and Administration*, 12, 47-58.
- Byers, B., & Powers, W. B. (1997). Ethical orientations and criminal justice: The effects of major and gender. *Journal of Criminal Justice Education*, 8, 162-179.
- Catlin, D. W., & Maupin, J. R. (2001, April). *A cohort study of the ethical orientations of state police recruits*. Paper presented at the meeting of the Western Social Science Association, Reno, NV.
- Catlin, D. W., & Maupin, J. R. (2002). Ethical orientations of state police recruits and one-year experienced officers. *Journal of Criminal Justice*, 30, 491-498.
- Crank, J. P., & Caldero, M. A. (2000). *Police ethics*. Cincinnati, OH: Anderson.

- Deering, T. E. (1998). The ethical perspective of British and American pre-service teachers. *Educational Research*, 40, 353-358.
- Fletcher, J. F. (1966). *Situation ethics*. Philadelphia: Westminster.
- Forsyth, D. R. (1980). A taxonomy of ethical ideologies. *Journal of Personality and Social Psychology*, 39, 175-184.
- Furham, A., & Olfstein, S. J. (1997). Ethical orientation and the allocation of scarce medical resources. *British Journal of Medical Psychology*, 70, 51-63.
- Ganzini, L., Fenn, D. S., Lee, M. A., Heintz, R. A., & Bloom, J. D. (1996). Attitudes of Oregon psychiatrists toward physician-assisted suicide. *American Journal of Psychiatry*, 153, 1469-1475.
- Harris, C. E. (1997). *Applying moral theories*. Boston: Wadsworth.
- Holmes, R. L. (1998). *Basic moral philosophy*. Boston: Wadsworth.
- Kappeler, V. K., Sluder, R. D., & Alpert, G. P. (1998). *Forces of deviance: Understanding the dark side of policing*. Prospect Heights, IL: Waveland Press.
- Lyman, M. D. (1999). *The police: An introduction*. Upper Saddle River, NJ: Prentice Hall.
- Packer, H. (1968). *The limits of the criminal sanction*. Stanford, CA: Stanford University Press.
- Polloch, J. M. (1998). *Ethics in crime and justice* (3rd ed.). Boston: West/Wadsworth.
- Rachels, J. (1999). *The elements of moral philosophy*. Boston: McGraw-Hill.
- Rokeach, M., Miller, M. G., & Snyder, J. A. (1971). The value gap between police and the policed. *Journal of Social Issues*, 27, 155-171.
- Schlenker, B., & Forsyth, D. R. (1977). On the ethics of psychological research. *Journal of Experimental Social Psychology*, 13, 369-396.
- Solomon, R. C. (1992). *Morality and the good life: An introduction to ethics through classical sources*. New York: McGraw-Hill.
- Treise, D., Weigold, M. F., Conna, J., & Garrison, H. (1994). Ethics in advertising: Ideological correlates of consumer perceptions. *Journal of Advertising*, 3, 59-62.
- Vitell, S. J., Lumpkin, J. R., & Rawwas, M. Y. A. (1991). Consumer ethics: An investigation of the ethical beliefs of elderly consumers. *Journal of Business Ethics*, 10, 365-375.

Wuensch, K. L., & Poteat, G. M. (1998). Evaluating the morality of animal research: The effects of ethical orientation, gender, and purpose. *Journal of Social Behavior and Personality, 13*, 139-151.

Zhao, J., Ni, H., & Lovrich, N. P. (1998). Individual value preferences among American police officers. *Policing: An International Journal of Police Strategies & Management, 21*, 22-37.

James R. Maupin earned his MPA from Southwest Missouri State University and his PhD in political science from Arizona State. James is an associate professor, director of the Master of Criminal Justice Program, and academic head of the Department of Criminal Justice at New Mexico State University. He has published numerous articles on decisionmaking within the juvenile justice systems of the southwestern United States.

Lisa J. Bond-Maupin received her MSW and PhD in justice studies from Arizona State University. Lisa is an associate professor in the Department of Criminal Justice and Director of the Family and Community Violence Prevention Program at New Mexico State University. She has published numerous articles on decisionmaking within the juvenile justice systems of the southwestern United States, the depiction of crime in reality crime shows on television, and criminal justice issues within American Indian communities.

Dennis W. Catlin, PhD, is an associate professor in the Department of Criminal Justice at Northern Arizona University's Tucson Campus. In addition to teaching, he coordinates the Criminal Justice Department's distance learning bachelor's degree program, designed specifically for working criminal justice professionals. He also serves as codirector of the Law Enforcement Command Institute of the Southwest, a cooperative project of the Tucson Police Department, Northern Arizona University, the University of Arizona, and Arizona State University. Dr. Catlin served as a police officer, special agent for the Federal Bureau of Investigation, and training supervisor for the Michigan Law Enforcement Officers Training Council. He was executive director of the Michigan Judicial Institute, an agency of the Michigan Supreme Court. He taught law enforcement, police supervision, and court administration courses at several community colleges in Michigan and at the School of Criminal Justice at Michigan State University. Prior to coming to Northern Arizona University, he was assistant professor in the Department of Criminal Justice at New Mexico State University. Dr. Catlin has consulted on "rule of law" and judicial reform projects in Egypt, Botswana, Croatia, Bulgaria, the Philippines, Barbados, Slovakia, and Armenia. He received his master's degree in criminal justice and his PhD in administration and higher education from Michigan State University. His areas of teaching and research are justice system organization and administration, education and training of justice system personnel, comparative justice systems, and ethics and law enforcement.

Using Risk Management to Manage Police Liability and Enhance Police Professionalism: Current Applications

Carol A. Archbold, PhD, Assistant Professor of Criminal Justice, North Dakota State University

Police accountability and professionalism are frequent topics of discussion among police administrators in the United States. In recent years, some police executives have begun to implement innovative programs and management strategies with the hope of increasing police professionalism. Most of these programs and management strategies have focused on issues related to police liability. One recent example of such an innovation is the adoption of risk management programs by American law enforcement agencies.

Risk management is a process used to identify and control exposure to potential risks and liability incidents both within and outside of a variety of organizations (Liability Assessment and Awareness International, Inc., 2001). Practices based on risk management strategies can be used by both private and public organizations. Many organizations adopt risk management practices to avoid increasing threats of litigation, reduce the risk of physical harm to their clients and themselves, and provide a higher quality of service to their clients (Wong & Rakestraw, 1991). Risk management appears to be a good fit with liability management efforts in most police organizations, as police managers face these issues in the day-to-day operation of their organizations. In addition, the increasing costs resulting from settlements and payouts in police litigation cases and increased pressure from public insurance pools to cut losses are just a few reasons that some U.S. law enforcement agencies have begun to implement risk management programs.

What Do We Know About the Use of Risk Management in Policing?

In the last two decades, little has been published on the use of risk management by police agencies in the United States. Most of the literature published on this topic has been based on the experiences of professionals working with risk management in U.S. police agencies (Ceniceros, 1998; Gallagher, 1990, 1992; Heazeltine, 1986; Katz, 1998). This body of literature is important because it presents practical information on the implementation and potential benefits of using risk management as a police liability management tool.

Gallagher (1990) identified an increase in police professionalism as one potential benefit when risk management is used by police agencies. He contends that, "factors that decrease the chance of liability ultimately increase the agency's overall professionalism" (p. 40). In his book, *Risk Management: Behind the Blue Curtain: A Primer on Law Enforcement Liability*, Gallagher (1992) provides a list of issues that should be addressed within police agencies before risk management can be effective

in the management of liability. Some of the issues on the list are as follows: (1) an examination of department policies and procedures, (2) improved supervision by police managers, and (3) effective police training (Gallagher, 1992). In addition, Gallagher provides a suggested plan of action for the implementation of risk management strategies within police agencies. One example of his approach to using risk management in law enforcement agencies is detailed in an article by Heazeltine (1986). In the article, Heazeltine details his experience with implementing risk management into his liability management efforts while he was the director of risk management for Maricopa County in Arizona. Gallagher was part of this process, as he aided in the assessment (Heazeltine, 1986, p. 60).

Some law enforcement agencies utilize the combined experience of both legal personnel and risk managers in their management of liability. Katz (1998) identified significant reductions in legal costs associated with police liability in the Los Angeles Police Department (LAPD) as a result of using both legal and risk management personnel to handle liability cases. More specifically, Katz (1998) reported a 50% reduction (nearly \$10 million) in liability costs over four years after the LAPD adopted a Risk Management Unit within the Legal Affairs Division. Katz believes that the LAPD has enjoyed these significant decreases in liability costs as a result of its increased level of involvement in handling liability cases, implementing risk management into police officer training at various stages in its officers' careers (beginning in the academy and continuing on through inservice training), and also using aggressive post-liability incident approaches in the collection and maintenance of records in anticipation for potential future litigation.

Another risk management strategy used to reduce the costs associated with police liability is to deal with liability incidents before they reach the courtroom. Ceniceros (1998) identifies a technique of "cutting checks" that has been used by the Los Angeles Sheriff's Department (LASD). This technique allows the police agency to offer monetary settlements in the form of checks to individuals that could otherwise file lawsuits against the agency for incidents involving liability or error. An example cited by Ceniceros (1998) included situations in which inmates in the Los Angeles County Jail were incarcerated longer than their prescribed sentence as a result of clerical errors. In these cases, the individuals that were incarcerated longer than necessary could sue Los Angeles County for damages. Instead of going to court, those individuals have the option of receiving a check from Los Angeles County for the mistake. Before receiving the check, the involved parties have to sign an agreement that they will not pursue legal action against Los Angeles County for damages in the future. It is believed that this strategy reduces costs associated with liability incidents because they never reach the courtroom.

It has only been within the last few years that police scholars have studied, and ultimately published, research on the use of risk management by American police agencies. Most recently, Ross & Bodapati (2006) conducted an analysis on litigation and claim records from both law enforcement and detention agencies in Michigan from 1985 to 1999. They identified the most common types of litigated cases from all of the agencies and then analyzed the trends of such cases over a 15-year time period. Similar to earlier studies, data analysis in this study identified topic areas for which litigation is likely, with auto incidents (without injuries), use of excessive force, property damages, pursuit without injury, and false arrest or imprisonment rounding out the top five spots on the list (Ross & Bodapati, 2006). The authors also

discovered an absence of extremely large payouts for most of the liability claims over this 15-year time frame; in fact, the total average costs of claims did not exceed \$300,000 (Ross & Bodapati, 2006, p. 51). These findings are important because they provide police managers with information on some of the most common liability incidents in law enforcement and also guidance for police trainers in tailoring their training efforts toward liability prevention.

The first nationwide study on the use of risk management by large county and municipal law enforcement agencies in the United States was conducted in 2001 (Archbold, 2004, 2005). Using interviews, survey data, and case study analysis, this study explored the prevalence of the use of risk management in American police agencies, as well as some of the factors influencing the adoption; role; and perceived impact of risk management on police liability, professionalism, and accountability.

After conducting telephone interviews with all county and municipal law enforcement agencies employing 200 or more sworn police officers, Archbold (2004, 2005) discovered that less than 4% of the largest police agencies in the United States identified risk management as one of the tools that they use to manage police liability. This is a surprising finding given that costs associated with police liability incidents and litigation have increased significantly in the last three decades (del Carmen & Smith, 1997; Kappeler, 2001; Scogin & Brodsky, 1991). In addition, survey data revealed that most of the police agencies adopted risk management because of an increase in costs associated with lawsuits, changes in the legal and social environment in which police officers work, and negative media publicity resulting from police liability incidents involving citizens (Archbold, 2004, 2005). Several reasons that might explain why some police agencies have not adopted risk management strategies into their liability management efforts include the following: limited published information on the use of risk management in policing, a lack of training that focuses on using risk management strategies to manage police liability, and limited resources available to adopt such programs into law enforcement agencies (Archbold, 2004, 2005).

The case studies presented in this article are part of the national study conducted in 2001. The case studies provide an in-depth look at how risk management has been utilized by three large law enforcement agencies in the United States to reduce exposure to police liability, while attempting to increase police professionalism. It is not my intent to evaluate the effectiveness of each risk management program. Several suggestions for future research on risk management in policing are also included in this article.

Data Collection and Analysis

Case study site visits were conducted with risk management personnel associated with the Portland Police Bureau in Portland, Oregon; the Los Angeles Sheriff's Department in Los Angeles, California; and the Charlotte-Mecklenburg Police Department in Charlotte, North Carolina, during the summer of 2001. These three sites were chosen for case study analysis because each law enforcement agency has a unique approach to using risk management in their police liability management efforts. In addition, all three agencies have been using risk management for a significant amount of time, which made it possible for me to inquire about their perceptions of how risk management influences police liability management efforts.

The purpose of each site visit was to get an in-depth look at the organization and operation of risk managers within each law enforcement agency in all three cities. In-depth, structured interviews were conducted with members of the risk management teams in all three cities, as well as other people that were part of police liability management efforts outside of the police department (e.g., legal personnel, city attorneys, police legal advisors, and other city officials with specialization in managing risks at either the municipal or county level). The interview questions focused on the history/evolution of risk management within each agency, as well as some of the factors that played a role in the decision to adopt risk management practices within each agency. I was also able to collect information on the perceived benefits (to both the agency and the community) of using risk management in police liability management efforts from the interviews. In addition, official records and documents were provided to me by each police agency, which allowed me to trace the implementation and evolution of each of the risk management programs in all three jurisdictions.

Current Applications of Risk Management in Policing

Portland Police Bureau – Portland, Oregon

The Portland Police Bureau uses three groups to manage police liability incidents: (1) the Police Liability Management Unit, (2) the Risk Management Department for the city of Portland, and (3) a police legal advisor housed within the City Attorney's Office.

The Police Liability Management Unit is part of the Management Services Division in the Portland Police Bureau. The unit is responsible for the management of liability and costs associated with liability incidents involving police officers employed by the Portland Police Bureau. The mission of the Police Liability Management Unit is "to increase citizen and employee safety while reducing the Police Bureau's civil liability exposure and monetary losses due to civil claims resulting from Police Bureau operations and practices" (Howen, personal communication, July 2001). At the time of the site visit in 2001, the Police Liability Management Unit employed a police liability manager, two risk specialists/claims analysts, and a fleet claims specialist. The training and professional experience of people working within the Police Liability Management Unit are both extensive and diverse including experience in insurance assessment, investigation, risk and claims analysis, and law enforcement.

The Risk Management Department for the city of Portland also plays a role in the management of police liability involving Portland Police Bureau officers. The Risk Management Department is housed within the Office of Finance and Administration for the city of Portland. The Risk Management Department focuses on three main areas of liability involving the Portland Police Bureau: (1) general liability issues, (2) loss prevention, and (3) issues related to workers' compensation. The liability claims manager (housed within the Risk Management Department) works closely with the Police Liability Management Unit in its effort to manage police-related liability incidents. Each month, the liability claims manager runs a series of reports that can help him identify any patterned problems related to police activities that can lead to liability claims or litigation. Once a pattern is identified, the liability claims manager brings this issue to the attention of the members of the Police Liability Management Unit. At that time, the Police Liability Management Unit can make

recommendations to the Portland Police Bureau to either alter or change department policies, procedures, or training to reduce future exposure to liability incidents.

The police legal advisor is another vital part of police liability management used by the Portland Police Bureau. The police legal advisor is part of the Office of the City Attorney in Portland. The Office of the City Attorney is responsible for providing legal services to all city agencies in the city of Portland. Staff attorneys are assigned to provide specialized legal service to a variety of city agencies, including the Police Bureau. The staff attorney assigned to the position of police legal advisor focuses solely on providing legal services to employees of the Portland Police Bureau.

There are several duties associated with the position of police legal advisor for the Portland Police Bureau. The police legal advisor is responsible for giving legal advice to all police officers involved in liability-related incidents both before and after an incident occurs. This includes answering any questions posed by police officers before they take part in situations that will expose them to risk (such as serving a high-risk search warrant), as well as preparing police officers before they go into court. The police legal advisor also shows up on the scene of more serious incidents involving police personnel when litigation is a possibility as a result of the incident. By going to the scene, the police legal advisor can collect important information that could be used later on in court and also assess the situation to see whether similar incidents could be prevented in the future by making changes to department policies, procedures, or training. The police legal advisor is also responsible for the creation and distribution of training bulletins when there are changes in law or policy that will directly impact the way that officers conduct their work. The police legal advisor disperses training bulletins by placing them in police officer mailboxes, paychecks, or during roll call. The police legal advisor also conducts police liability training sessions at the police academy and other types of inservice training.

Interviews with personnel from the Risk Management Department, the Police Liability Management Unit, and the police legal advisor revealed that a collaborative effort by all three groups is the key to managing police liability in the Portland Police Bureau. Representatives from all three groups agreed that their differences in professional background and training do not pose a problem when deciding how to handle police-related claims. The police legal advisor stated that “my office, the Risk Management Department, and the Police Liability Unit complement each other because they all have the same goal: the prevention of lawsuits against the Police Bureau.” A representative from the Risk Management Department stated, “This is a unique situation because you have three groups that have three different agendas, but it still works out for the most part. . . . there is a sense of balance between the three groups. Efforts of the Risk Management Department to control police-related liability would not be as effective as [they are] today if the level of communication between all three groups was not what they are today.” He also expressed that “it was not difficult to be accepted by members of the Portland Police Bureau.” He said that he “learned more about policing operations as he has been working with the Bureau and also by dealing with a variety of police-related liability claims over the years.”

These three groups also work together by contributing to lesson plans for various levels of police training focused on police liability. A course entitled, “Civil Liability Based Upon Law Enforcement Activities” was created and instructed by both the police legal advisor and personnel from the Police Liability Management Unit. The purpose of the

class is to make police officers aware of activities that may create liability exposure by providing them with methods that are defensible actions in litigation; constitutional statutes and federal regulatory processes and procedures in civil litigation; and procedures for before, during, or after incidents that may create liability exposure.

Another example of these three groups working together is the creation of the Liability/Loss Control Committee. At the time of the site visit, the Liability/Loss Control Committee team members included representatives from southeast and northeast police precincts, the police legal advisor from the city attorney's office, personnel from the training division, two employees from the Risk Management Department, and three representatives from the Police Liability Management Unit. The goals of the Liability/Loss Control Committee are as follows:

- Reduce the frequency of liability claims.
- Reduce claim closure time.
- Eliminate case backlog.
- Reduce financial exposure by immediately responding to high-profile situations.
- Target improvements for police training based on claim trends identified by the Risk Management Department.
- Attempt to increase liability awareness throughout the entire Police Bureau.

This committee is also in the process of creating a Liability Response Team. The Liability Response Team will be responsible for disposing of menial claims for smaller dollar amounts by carrying a checkbook and "cutting checks" at the scene of incidents. This is a similar technique used by the Los Angeles Sheriff's Department as it was described by Cenicerros (1998).

Liability management efforts by the Police Liability Management Unit, the police legal advisor, and personnel from the Risk Management Department contribute to the increase in police accountability and professionalism in the Portland Police Bureau. The importance of police professionalism and accountability resulting from liability management is evident as both items are specifically incorporated into the Portland Police Bureau's goals and objectives. The assumption of having Bureau-wide objectives and goals is that everyone that works both within and in conjunction with the Portland Police Bureau will strive to achieve them.

Los Angeles Sheriff's Department – Los Angeles, California

The LASD uses two groups in their liability management efforts including an in-house Risk Management Bureau and also a Legal Advisory Unit that is housed outside of the Sheriff's Department.

The Risk Management Bureau was created in 1993 to provide a department-wide effort in reducing the loss of department resources, control police liability costs, improve law enforcement services provided to citizens, and increase police accountability within the LASD. A brochure created by the LASD Risk Management Bureau describes the mission of the Risk Management Bureau:

The Risk Management Bureau is dedicated to providing the highest quality service law enforcement and public safety services by enabling LASD employees to perform their duties in a risk-reduced work environment. The

Risk Management Bureau will accomplish its mission by: (1) Continually identifying and evaluating activities that have a high risk and liability potential, (2) Aggressively managing personnel health and safety issues, and (3) proactively managing claims and lawsuits, including an immediate response to incidents with a high liability potential.

The Risk Management Bureau is comprised of several units including the following:

- A Civil Litigation Unit that is responsible for managing the LASD's civil claims and lawsuits (The primary task of this unit is to reduce the Department's financial liability and exposure to incidents that result in costly litigation. Investigators are on 24-hour call to respond to claims-related incidents that could result in litigation. In some cases, the civil litigation lieutenant can resolve liability incidents on site for up to \$2,500. This unit is also in charge of a civil litigation-training program for all LASD employees.)
- A Health and Safety Unit, which is responsible for minimizing costs associated with any injuries or illnesses of LASD employees
- The Risk Impact Unit, which coordinates a reporting system for the department's unit-level risk management plans on a quarterly basis
- The Traffic Services Detail, which is responsible for handling all on-duty employee-related traffic incidents involving property damage and/or injuries
- The Manual and Orders Unit, which maintains and updates the LASD's Policy and Procedures Manual
- The Random Drug Testing Program, which is responsible for administering periodic, unannounced, random drug tests throughout the Department

The Risk Management Bureau has developed two programs that aid in the management of liability involving the LASD: (1) the Command Accountability Reporting System (CARS) and (2) the Sheriff's Critical Issues Forum (SCIF). CARS requires that each unit in the Department enter its own data into the CARS database system (including data on incidents involving use of force, collisions, shootings, and citizen complaints). Once the data is entered, each unit can compare its own risk issues with other LASD units. Monthly reports containing the data entered by each unit are also used to examine management performance at the unit level. This program allows each unit to be constantly aware of risk issues within their units and also allows units with similar risk issues to cooperatively strategize to reduce or eliminate specific types of risk. SCIF meets every month to discuss crime statistics, fiscal management, and the CARS database information for every unit. This meeting requires that divisional leaders including the chief, commanders, and unit commanders come together to discuss the progress of each unit. This process also requires that unit leaders identify risk-related issues within their units and then create strategies to reduce exposure to risks specific to the problematic incidents identified in SCIF meetings. Both the SCIF and CARS program hold unit leaders accountable for risk-related issues that are unique to their divisions. Ultimately, these programs encourage accountability throughout all levels of management within the LASD.

The Risk Management Bureau works in conjunction with the Legal Advisory Unit to manage police liability incidents related to LASD employees. The Legal Advisory Unit is located in a building that is separate from the main Sheriff's headquarters. An interview with a representative of the Legal Advisory Bureau revealed that the primary reason for this is the size of the LASD. It is the largest sheriff's department in the

United States (Reaves & Hart, 1999). The Legal Advisory Unit employs several deputy county counsels that are assigned to work with specialized LASD legal issues including custody, court services, labor, personnel matters, department records and compliance with state and federal laws, and other patrol-related issues. Even though the Legal Advisory Unit and the Risk Management Bureau are housed in two separate locations, they work closely with one another to handle liability issues for the LASD.

The unique approach taken by the LASD to manage liability issues within their organization incorporates the expertise of both police legal advisors and risk managers. Interviews with employees in the Legal Advisory Unit revealed that most of the employees are “cross-trained” to ensure that every case is dealt with in the most effective and efficient manner. It was explained by one legal advisor that “the program has evolved immensely over time. Today, we are better organized as a unit in regard to our workload. Having people with multiple talents in multiple types of liability cases allows us to spread the workload out evenly among everyone in the Department instead of just a few people with limited expertise in a specific area.” It is clear that a “team” approach is used when handling the workload of police-related liability cases in the LASD.

The Legal Advisory Unit works closely with the Civil Litigation Unit, which is part of the LASD Risk Management Bureau. These two groups discuss strategies about how to handle certain types of liability cases. For example, the Legal Advisory Unit will often check with the Civil Litigation Unit about specific Department policies and procedures that may be related to a liability case they are working on, or they will inquire about officer training that may or may not contribute to police-citizen interactions that often result in liability claims or lawsuits.

The exchange of information between the Legal Advisory Unit and the Risk Management Bureau is another way that these groups work together to manage liability in Los Angeles County. An example of the importance of this information exchange was mentioned in an interview when both groups identified the need for improved documentation of events by all police personnel. Each group noticed that the LASD was losing a significant number of use-of-force cases because LASD officers were not collecting and recording all of the important information that would be needed for potential legal defense in the future. The lack of documentation resulted in the lack of proof on the part of the accused police officer in the courtroom. Together, the Risk Management Bureau, the Civil Litigation Unit, and the Legal Advisory Unit worked together to make changes to the procedures of documenting and reporting incidents that involve any use of force by LASD officers. All three groups agreed that these actions resulted in a decrease in the frequency of use-of-force claims involving LASD personnel.

One thing that sets the LASD apart from all other large law enforcement agencies is its ability to track and publish the impact of risk managers and police legal advisors on liability within the organization. In 1993, Merrick J. Bobb was appointed to be the special counsel to the Board of Supervisors. The special counsel is responsible for monitoring and reporting the progress of the LASD’s efforts to make changes to the use of force against citizens, sensitivity of deputies, and handling of citizen’s complaints filed against the LASD. Since 1993, Merrick Bobb and his staff have published semi-annual reports that detail the efforts made by the LASD to improve police services provided to citizens, police accountability, and professionalism. The reports identify the work of both the Risk Management Bureau and the Legal

Advisory Unit within the LASD. The semi-annual reports are available to the public on the Los Angeles County website at <http://lacounty.info/mbobb21.pdf>. By making this information available to the general public, the LASD is demonstrating its commitment to achieving a higher level of professionalism and accountability to the citizens of Los Angeles County.

Charlotte-Mecklenburg Police Department – Charlotte, North Carolina

The Charlotte-Mecklenburg Police Department incorporates the expertise of both the Risk Management Division and the Police Attorney's Office to manage liability for police personnel in the Charlotte-Mecklenburg area.

The Risk Management Division is physically housed within the Finance Department in the government offices. There are various aspects of liability management within the Risk Management Division including liability claims involving property, workers' compensation, insurance management, financial coordination, and risk control. Recently, the Risk Management Division added the Loss Control Team. This team is responsible for tracking the history of claims filed for every government-related agency in the Charlotte-Mecklenburg area. If the Loss Control Team identifies a pattern of liability claims within any given agency, it contacts the agency to discuss the identified pattern. Next, the Loss Control Team meets with the agency to come up with strategies to reduce or eliminate future exposure to the identified risks. The employees of the Loss Control Team have various types of training and professional background including risk management training, insurance assessment, loss control experience, and law enforcement experience. At the time of the site visit, the Loss Control Team employed one person that worked solely on police liability issues.

Interviews with personnel in the Risk Management Division revealed that the types of claims most often involving police officers are auto-related (fleet) incidents:

One way that we (the Risk Management Division and the Police Attorneys Office) have worked together to reduce the costs related to fleet is to make changes to the police pursuit policy. Essentially, we made the policy more stringent so that police officers are more cautious when they are making their decision to pursue a suspect that is fleeing by car. Other than that, we also have fender-benders and various other incidents with unmarked police vehicles and motorcycles that result in some type of loss.

The Risk Management Division also sends out risk assessors immediately after incidents involving police personnel have occurred in an attempt to settle claims on the spot. "On-the-spot" settlements usually take place in cases in which it is obvious that the Department is legally liable for any injuries or property damages to another party. In an interview with an employee of the Risk Management Division, it was explained that "outside of property damage incidents, 'on-the-spot' settlements are somewhat rare. The adjuster is authorized to settle liability incidents for up to \$5,000. This amount can go up to \$12,000 for property damages and \$10,000 for bodily injury if Risk Management supervisors authorize it." This risk management technique is similar to that used in Portland and Los Angeles County.

The second group involved in the management of liability involving personnel in the Charlotte-Mecklenburg police agency is the Police Attorney's Office. The Police Attorney's Office is housed within the Charlotte-Mecklenburg Police Department. The Police Attorney's Office is considered part of the Office of the Chief within the Charlotte-Mecklenburg Police Department. At the time of the site visit, there were five lawyers on staff that handled police-related liability cases. One of the five lawyers holds the title of "deputy city attorney." This person serves as the supervisor and manager of the Police Attorney's Office. The deputy city attorney answers directly to the chief of police but is also accountable to the city attorney. The Police Attorney's Office only handles legal matters that involve the Department. This office does not provide any legal services to any other city or county agencies in the Charlotte-Mecklenburg area.

In an interview with the police attorney, he described the "open door" policy he practices with Charlotte-Mecklenburg police officers by answering their questions regarding criminal law and criminal procedure that can potentially result in liability claims or litigation. One example would include questions about serving search warrants where officers are looking for evidence, guns, drugs, and other illegal items in private homes. The police attorney believes that being housed within the Department increases the likelihood that police officers will ask questions before they do something that could result in complaints, liability claims, or lawsuits. The police attorney believes that this "open-door" policy enhances the quality of police service provided to citizens of the Charlotte-Mecklenburg area.

Even with the Risk Management Division being located in a building outside of the Department, these two groups are still able to easily work together to solve liability problems. Interviews with both groups revealed that the Risk Management Division and the Police Attorney's Office have contact with each other an average of two to three times per week. Both groups agreed that constant communication is essential for them to be able to work together in an effective manner. The two groups work together to decide how liability claims should be handled. They also discuss tracked liability claims that have resulted in litigation or liability claim payouts or that have emerged as a patterned problem over an extended period of time. These two groups also review Department policies and training standards to make sure that they reflect the guidelines provided by state laws.

Personnel from both the Risk Management Division and the Police Attorney's Office expressed that their jobs are significantly impacted by the efforts of the other group's involvement in managing police liability. The police attorney stated that he . . .

relies on the Risk Management Division to identify "hot spots" in areas of our work that generate the most claims. They analyze claims and cases in order to point out patterns that emerge from specific procedures we use every day on the job. They also tell us which areas we should consider changing in regard to police training. It is then our job to make the changes and to then disperse the information about the changes throughout the police organization.

Both groups also agreed that they probably would not have the same effect on police-related liability if they did not have help from each other. By working together, the Risk Management Division and the Police Attorney's Office also believe that they influence police professionalism and accountability. Both groups stated that improved

police professionalism and accountability result when changes are made to Department training, policies, and procedures according to the police attorney . . .

Police officers become more aware of their actions and behaviors, specifically in instances where exposure to liability is imminent. Professionalism and accountability are enhanced each time that the Risk Management Division recognizes a problem with police procedure, policy, or training and recommends changes to the police department. The constant alteration of procedures, policies, and training allows the police officers to give better service to the citizens, and it keeps everyone safe and happy.

Employees within the Risk Management Division also believed that their efforts to reduce exposure to risk and liability incidents involving the police have had a significant impact on police professionalism and accountability. "By identifying patterns of liability claims that could be reduced or eliminated by making changes to police policy, procedure, and training, the Risk Management Division directly contributes to liability control."

Conclusion

Each of the case studies presented in this article use a unique combination of risk management and legal personnel to manage liability within their police agencies. Each site physically houses risk management and legal consultants in a variety of combinations both inside and outside of their police organizations. One common link shared by all three of the cases study sites is that they all have risk management employees to handle the financial aspects of police liability, while legal personnel manage the legal aspects. The unique combinations used by each agency result from a variety of specialized needs unique to each community, as well as the amount of resources available to the police agency in each of the cities.

Another similarity among all three case study sites is that each program has adopted specialized units beyond risk managers and legal advisors to assist in police liability management in each city. For example, the Risk Management Division in Charlotte recently adopted a Loss Control Team that focuses their efforts specifically on police-related liability issues. The Risk Management Bureau in Los Angeles has also adopted a Civil Litigation Unit that focuses primarily on handling lawsuits filed against the Sheriff's Department. In Portland, they use the Police Liability Management Unit to handle all police-related liability incidents, in addition to the citywide Risk Management Department and a police legal advisor from the City Attorney's Office. No matter what the similarities or differences are among these cases study sites, they all share the same goal: to manage police-related liability incidents and reduce the costs associated with claims and lawsuits filed against employees of their law enforcement agencies.

Suggestions for Future Research

There are several limitations that should be noted when considering the case studies presented in this article. For example, the present study does not provide any evaluation-based information on the effectiveness or impact of risk management efforts on police liability in any of the three cities. The purpose of visiting all three case study research sites was to learn more about how these groups are organized and how they function as a team to manage police liability; it was not to determine whether or not they have been effective. Future research should concentrate on

longitudinal studies that trace the impact that risk management efforts have on police agencies by using financial records (similar to the study mentioned earlier by Ross & Bodapati, 2006).

In addition, the findings from the case studies might not apply to other law enforcement agencies across the United States. Since this is the first nation-wide study on the use of risk management by American police agencies, it is important to first understand how risk managers fit into the organizational structure of police agencies (which was the purpose of the study presented in this article). Future research on risk management in policing should include police agencies of a variety of sizes and from all regions across the United States.

Future research on the use of risk management in American law enforcement agencies should also examine organizational characteristics of police agencies that both use and do not use risk management strategies in their liability management efforts. Researchers should also explore how the characteristics of local city government or political culture are associated with the use of risk management by law enforcement agencies. Finally, future research should examine the extent to which crisis incidents and high-profile lawsuits impact the adoption of risk management and police legal advising programs in law enforcement agencies.

Findings from this study can serve as an informative resource for police managers, city/county attorneys, risk managers, and various other city/county agents that are interested in learning about risk management as an additional way to manage police liability. This information could be valuable to police managers who are trying to figure out how to deal with police liability incidents within their organizations.

References

- Archbold, C. A. (2004). *Police accountability, risk management and legal advising*. New York: LFB Scholarly Publishing.
- Archbold, C. A. (2005). Managing the bottom line: Risk management in policing. *Policing: An International Journal of Police Strategies and Management*, 28(2), 30-48.
- Ceniceros, R. (1998). Policing their own risks: Formal risk management growing in law enforcement. *Business Insurance*, 32, 10-13.
- del Carmen, R.V., & Smith, M. R. (1997). Police, civil liability, and the law. In G. Alpert (Ed.), *Critical issues in policing: Contemporary readings*. Prospect Heights, IL: Waveland Press.
- Gallagher, G. P. (1990, June). Risk management for police administrators. *The Police Chief*, 18-29.
- Gallagher, G. P. (1992). *Risk management: Behind the blue curtain: A primer on law enforcement liability*. Arlington, VA: Public Risk Management Association.
- Heazeltine, H. (1986). Case study: A risk audit of law enforcement. *Risk Management*, 33(10),60-63.

- Kappeler, V. E. (2001). *Critical issues in police civil liability* (3rd ed.). Prospect Heights, IL: Waveland Press.
- Katz, D. M. (1998). LA cops lop \$10M off tort costs. *National Underwriter*, 102(26), 11-12.
- Liability Assessment and Awareness International, Inc. (2001). *Fundamentals of Risk Management*. Available online at www.laaw.com
- Reaves, B., & Hart, T. (1999). *Law enforcement management and administrative statistics, 1999: Data for individual state and local agencies with 100 or more officers*. Washington, DC: Bureau of Justice Statistics, United States Department of Justice.
- Ross, D. L., & Bodapati, M. R. (2006). A risk management analysis of the claims, litigation, and losses of Michigan law enforcement agencies: 1985-1999. *Policing: An International Journal of Police Strategies and Management*, 29(1), 38-57.
- Scogin, F., & Brodsky, S. L. (1991). Fear of litigation among law enforcement officers. *American Journal of Police*, 10(1), 41-45.
- Wong, K. R., & Rakestrawm, K. M. (1991). *The A, B, Cs of risk management*. Washington, DC: International City/County Management Association.

Carol A. Archbold, PhD, is an assistant professor of criminal justice at North Dakota State University in Fargo. Her research and teaching interests include a variety of policing issues (including police accountability and liability, police and race relations, gender issues in policing, and rural police issues); media presentation of crime, criminals, and the criminal justice system; and qualitative research methods. She has published several articles in such journals as *Police Quarterly*, *Policing: An International Journal of Police Strategies and Management*, *Journal of Crime and Justice*, and *Police Practice and Research: An International Journal*. In 2004, Dr. Archbold published a book on the first national study of risk management in policing in the United States entitled, *Police Accountability, Risk Management and Legal Advising* (LFB Scholarly Publishing, New York). Dr. Archbold is currently working on a research project involving formal and informal citizen complaints filed against police officers in a large, Midwestern police agency. She is also studying gender and promotion issues in a large, midwestern police agency.

We Are Cops. We Are Not Soldiers at War with the Community.

Michael W. Quinn, Quinn and Associates; Adjunct Faculty Member, Criminal Justice Program, Rasmussen College

Abstract

Police officers face many ethical challenges in a world that seems to be more unethical every day. Their unique responsibilities to “protect and serve” can put them in a difficult ethical dilemma when they have to decide whether it is more important to be ethical or effective. It would be easy to take a Machiavellian view of policing and admit that the ends justify the means, but being more effective is not necessarily in the community’s best interests. Far too many innocent people are being convicted of crimes they didn’t commit, and were it not for DNA, at least 14 of them would still be on death row. You cannot separate social justice from individual justice. Legal justice is not concerned with moral justice.

Policing is moving away from being community cops to soldier cops, and we are paying a terrible price in the gulf it is creating between cops and the community. Our failed War on Drugs has become a war on neighborhoods, and it is major factor contributing to the militarization of our police departments. We need to get back to being peace officers who do “for the community” not “to the community.”

We Are Cops; We Are Not Soldiers at War with the Community.

I am a retired Minneapolis cop, and I wrote a book about cops and the police code of silence—a code that keeps even good cops from telling you what unethical cops are doing in the name of “protect and serve.” Before you label me or put in the company of those in the press that attack cops at every opportunity, you need to know that I loved being a cop, and I will always think of myself as a cop. When I drive by a cop on a traffic stop, I slow down to see if everything is OK, ready to jump out and help if necessary. When I see someone about to challenge a cop, I always wait to see what is going to happen. If possible, I try to make eye contact with the challenger. I want him to know what the stakes are if he is going to play that game. And I still carry a gun.

I don’t do these things for fun. I do it because I owe a life-debt. Over a 23 ½ year career, many cops put their lives on the line for me. They didn’t stop to ask whether was right or wrong; they just stepped in. And I wasn’t always right. Like every cop, I made mistakes, but cops know that’s part of the deal. Many of those willing life-savers didn’t even know me. The mere fact that I carried a badge was enough for them.

I know that not all cops are willing to take those kinds of risks, and I feel sorry for them, but I don’t think any less of them. No cop is all good or all bad, all bravery and no fear. I know cops who can only be described as racist and brutal but are the most compassionate and tender-hearted people you can imagine around children of all races. And, can there be any greater example of police bravery and commitment

to the public they serve than the demonstrated acts of heroism on 9/11? No one had to ask whether those cops or firefighters would go into the towers—we all knew they would. That's what they do. Cops are at their best when things are at their worst.

So, when I am critical of cops or police policies, it is criticism born out of my passion for justice for citizens, cops, and the communities they serve.

When communities allow their cops to ignore the rules and marginalize any part of the community, they are only trading one form of violence for another—and it is a bad trade. You cannot separate individual justice from community justice. It is a symbiotic relationship. For either to survive, they both must survive.

In a wonderful article titled "Of Sheep, Wolves, and Sheepdogs," Lieutenant Colonel Dave Grossman likens the police community relationship to that of sheepdogs and sheep. The sheepdog is responsible for protecting the flock from predators. That doesn't mean the sheep like the sheepdog, not at all. I think we have to assume that the sheep fear the sheepdog, especially when they see the kind of violence of which the sheepdog is capable (Grossman, 2005).

Cops are the human version of sheepdogs. They do the many things citizens cannot or will not do; they are ready to unleash their own form of violence on those who would impose their criminal violence on innocent citizens. As citizens, we have a social contract with these guardians, a contract that presents a dilemma for cops, and I am not talking about the proverbial free cup of coffee. The dilemma is this: Is it better to be moral and ethical, or is it better to be more effective and put more bad guys in prison? I don't mean to imply that you have to be unethical to be effective. You can certainly be an ethical cop and make good arrests, and I promote that ideal. It is hard to argue with numbers, however, and the most effective cops may be the ones that are willing to sacrifice their ethics for effectiveness. Notice that I am talking about numbers, not justice. Most police departments place some value on the number of arrests, with more credit being given to felony arrests as opposed to misdemeanor arrests. If numbers are what get you promoted, then you go for the numbers.

And, if you know someone is guilty, what difference does it make if you tell small lies on the arrest report or affidavit for a search warrant? After all, you're just being effective, aren't you?

Machiavelli would have loved modern-day police officers. In this quote from Chapter 15 of *The Prince*, he makes a strong argument for using any and all means necessary to put the bad guys away. "And many have imagined republics and principalities for themselves which have never been seen or known to exist in reality, for the distance is so great between how we live and how we ought to live that he who abandons what is done for what ought to be done learns his ruin rather than his preservation" (as cited in Rehborn, 2003).

Protect the public by doing what works! That's the Machiavellian way. Don't struggle with trying to meet pure ethical standards, especially since that's a standard that has never been met. Besides, if citizens had a choice, would they choose ethics or protection? And yet, ethical conduct is exactly what we ask of our cops. We ask them to do the impossible—to be ethical when all those around them are not. It's no

surprise to a police officer that the same community that condemns cops for excessive force is more than willing to ask for unethical favors in the form of overlooking traffic violations, dismissing citations, ignoring code violations, etc.

There are plenty of unethical cops. If you need proof, open a newspaper, and don't deny the existence of the code of silence; that's just plain insulting. The job of policing will never be a completely moral profession. The learning curve when you start this job is steep, no matter what kind of education you have. Cops will make mistakes, and other cops will cover for them.

At what point do we stop covering for other cops? If your work culture and your administration allow you to cover for the "small mistakes," what do you do when the big issues come up?

You could make a convincing argument for being effective as opposed to being moral in an immoral world. We could put away more criminals, reduce crime, and feel safer. But what price do we pay as individuals and as a society when we allow injustice to prevail in the name of security? There are a lot of things wrong with the criminal justice system. No one would argue that. I take that back; I'm sure you could find an attorney to argue it. But is it so wrong or is it misconstrued expectations? We tend to equate legal justice with moral justice, and that's a mistake. In *The Myth of Moral Justice*, Thane Rosenbaum writes . . .

Judges and lawyers have a very narrow view of what the law can and should accomplish. What seemingly matters most is that final judgments comport with constitutional procedures, prior legal precedents, or statutory mandates. A rule gets applied to the facts. The result is justice. It may be morally wrong, but the focus on doing what's legal rather than on what's right overrides all other considerations and concerns. (Rosenbaum, 2005)

You see it in the courtroom. Juries can acquit a guilty man and convict an innocent man, but justice is served if the defendant's rights were not abridged in the process. Legal justice is not concerned with moral justice, but moral justice is the fabric from which we weave our system of legal justice. We must not disregard one in favor of the other. Real justice requires that we weave them together for the strength of our system. One without regard for the other is meaningless. If we concern ourselves with only the ends, then it would make no difference in how we apply the means. It would mean Machiavelli was right, and ethics would have no place in policing.

Why is this happening? There are many social issues that we could discuss, but I want to point to a very specific and deliberate policy decision that I believe is having a dramatic effect on police ethics. That policy is the militarization of the police.

When I started policing in 1975, I was taught that cops are problem solvers. Our job was to preserve the peace, to protect and serve. If force was needed, we were only allowed to use the minimum force necessary to get the job done. Unless I am mistaken, that is the way it is still supposed to be done. There was a clear distinction in the training I received between the minimum force necessary to control a suspect and the overwhelming and deadly force used by the military to destroy a target. There was a clear distinction between cops and soldiers.

To protect myself, I was taught to use tactics that reduced my risk of injury or death to the extent possible. I was still required to abide by the 4th Amendment, however, policing was headed in a new direction in the 1970s. This was the beginning of SWAT. SWAT cops were trained in the use of automatic weapons, body armor, military tactics of establishing perimeters, containment of suspects, the use of explosive devices and chemical agents—tactics that had all previously been limited to military operations. There was also a new motto born: “Either you’re SWAT, or you’re not,” (meaning that not all cops were good enough for SWAT). At that point, we also started wearing military uniforms.

It’s important to remember that the goal of the original SWAT teams was to contain and isolate critical incidents until negotiators resolved the incident. On the rare occasion that negotiations failed, the SWAT team was ready to use deadly force with high-powered rifles and military-style close combat weapons and tactics. Early on, many police departments relied on military experts to design their training and tactics. Shotguns were the weapon of choice for the SWAT team.

In the 1980s, police agencies took the next step. There was a “war” on drugs—a war that has failed miserably in my opinion. The use of the word *war* was significant because in a war, you need military tactics and weaponry.

What it accomplished for SWAT teams was to provide situations in which they could use their training and tactics on a regular basis. Every drug warrant became a “high-risk” warrant if there was even the tiniest chance that a gun was present, and in fact, over 50% of the time, chances are that a gun will be present at any given drug raid. Ten years prior, only the SWAT teams had semiautomatic hand guns and fully automatic weapons.

Now even street cops carry semiautomatic handguns with capacities for up to 20 rounds in a single magazine. Body armor was not just for the hot dogs and SWAT anymore. Everyone wore it, and it began saving more lives. Fully automatic weapons were being deployed on every drug raid. The tactics escalated, and training became even more intense. Black leather “gunfighter” gloves became popular.

Drug raids are not a SWAT operation. There is no containment and negotiation on drug houses. The drugs would be destroyed, and there would never be any evidence, except in rare cases. So we eliminated the whole containment idea and made an all-out assault on homes and businesses that were suspected of dealing drugs. I know exactly how this works. I served over 300 of these high-risk warrants in Minneapolis. They are very high-risk both to the officers and the subjects in the houses. We often encountered children, dogs, and people so drugged up they couldn’t distinguish between cops or drug dealers trying to rip them off. We also found guns—often in the hands of people ready to use them against us.

The “rules of engagement,” another military term, for these warrants are simple: if someone has a gun and they don’t drop it after the first command, shoot them. Fortunately most cops don’t operate like that. We spend so much time and energy in our training to make our deadly force policies conform to the 4th Amendment that we don’t usually kill based just on the presence of a deadly weapon in someone’s hand.

It was shortly after the Federal Building in Oklahoma was blown up in 1995 when my team executed a high-risk warrant on a gang drug house. We had to go through a large solid oak double door on the second floor. In order to do that, we used munitions that blew up the hinges and locks on the door. Then, we hit it with a ram that laid both doors flat on the floor on the inside of the apartment.

There, lying only a couple feet from where the door crashed down was a tiny feverish infant wearing just a dirty diaper while momma was in the back bedroom providing sex for the dealer in exchange for crack cocaine. If that infant had been only a little closer to the door when we knocked it down, we would have crushed her either with the door or when we charged into the house as a team. What did we recover on that raid? One naked dealer, a very small amount of crack cocaine, an addicted mother, and her very sick three-month-old daughter. These warrants are being served every day in every state, and it seems like every week you can read about another tragic death as a result of our “war on drugs.” Here just a very few of the tragedies that have occurred as a result, as reported by Victims of U.S. Drug Policy:

- Delbert Bonar, 57 years old, Belpre, Ohio, October 1998 – This victim was shot eight times by police in a drug raid. They were looking for his son.
- Annie Rae Dixon, 84 years old, Tyler, Texas, January 1993 – This victim was bedridden with pneumonia during a drug raid. An officer kicked open her bedroom door and accidentally shot her.
- Pedro Oregon Navarro – On July 12, 1998, Pedro Oregon Navarro, a 22-year-old father of two, was shot to death in the bathroom of his home by at least six Houston, Texas, police officers. The officers had entered Navarro’s home by kicking in his door without a warrant on the word of a drug suspect who told them that there were drugs being sold in the apartment. No drugs were found in the home, and blood tests on Navarro’s corpse came back negative. Officers claimed that they believed that Navarro had fired upon them, but ballistics tests showed that all 30 shots were fired by the officers. Twelve of those shots hit Navarro, nine from above and behind him. The shooting started when one officer accidentally discharged his handgun and hit another officer.

All drug raids. All with tragic endings. ETS Pictures out of St. Paul, Minnesota, has two excellent, thought-provoking videos available on the subject of security and cops: (1) *Security and the Constitution* and (2) *Urban Warrior*. They are well worth viewing.

Skip ahead to Tuesday, April 20, 1999, Columbine High School, near Littleton, Colorado. Two teenage students kill 12 fellow students and a teacher, as well as wounding 24 others before committing suicide. The SWAT team contains and isolates the school, and it takes the police over three hours to find all the dead and wounded. There is a lot of criticism of the cops for not responding more quickly to the shooters. Based on that incident, police departments have started new training programs called “Active Shooter Response.” In reality, it is the military method for clearing a building in a war zone or doing a hostage rescue: overwhelming force with devastating weapons. The idea behind the active shooter response is simple; stop the threat.

In the event you have a situation in which the bad guys have shot innocent people and they are continuing to shoot people when the police get there, the police will

move to the suspect's location as quickly as possible to shoot the suspect. They don't stop to set up a perimeter. They don't wait for a lot of backup. Once they enter the building or area, they don't stop for wounded victims. Their focus is on the shooter, and their goal is to get to that shooter as quickly as possible to end the threat with a focus on killing the shooter.

This is a military response that is appropriate in only the direst of circumstances, but like SWAT, it is infiltrating the ranks of street cops in our major cities. Automatic weapons are becoming common place in squad cars; active shooter training is one of the most popular SWAT training exercises in the country; and we are slowly but very surely becoming soldiers. Cops in many major cities are acting more like an occupying army rather than part of the community they serve.

As we adopt more and more military tactics and military weapons, we are losing the distinction between cops and soldiers. The Posse Comitatus Act of 1878 forbids the military from performing civilian police functions. It doesn't forbid civilian police from executing their duties in a military fashion and, so we get around the Posse Comitatus Act by going at it from the back side. The act no longer has any meaning.

Since 9/11, we have looked to the government and our police to provide us with more security. But can cops really "protect" anyone? On 9/11, Flight 93 was prevented from being a weapon of mass destruction by civilians, not the military or the police. It was the passengers that made a democratic decision to stop the hijackers knowing they would probably lose their own lives in the process. When the shoe bomber attempted to blow up the airliner, it was citizens that subdued him and prevented that plane from going down. Again, it was not the military or the police. On the Red Lake Reservation, it was not a SWAT team or team trained in active shooter training that ended the assault. It was a conscientious and smart security officer that prevented that tragedy from becoming worse, and in Oklahoma, it was good old basic police traffic work that caught Timothy McVeigh.

People who have power want more power, and your police are not immune from that desire. The military has weapons and technology that the police do not have, and in terms of feeling secure, it seems better to have more. Military tactics, however, are not compatible with the bill of rights. The military is not required to abide the 4th amendment; cops are.

Good policing is still done by individual officers, one call at a time. To protect and serve is still the best strategy for cops, and it can and should be done in concert with the community not from the vantage point of an occupying force.

We want cops in our neighborhood as part of our neighborhood. That kind of partnership takes effort on both sides. If all you want is a better sense of security and you are willing to give the police whatever they say they need to make that happen, then you need to be prepared for the consequences. There will be no partnership with soldier-cops; they will do it their way. No one gives up power easily once it is given to them. Cops are no different.

Many good cops take leadership roles in their organization and their community. They are working hard to make us the profession the public expects and deserves.

They warrant the support of their communities, but there are far too many operating like combatants in a war. Too few see themselves as “Peace Officers” and part of a community effort. The idea that we are at war with our communities is taking us down the wrong road, and we need to find our way back. We need to get back to doing “For the People” not “To the People.”

Bibliography

Columbine High School massacre. Retrieved May 22, 2006, from en.wikipedia.org/wiki/Columbine_High_School_massacre

Ehling, M. (Producer). (2002). *Urban warrior*. Documentary for Broadcast. St. Paul, MN: ETS Pictures.

Ehling, M. (Producer). (2004). *Security and the constitution*. Documentary for Broadcast. St. Paul, MN: ETS Pictures.

Grossman, D. G. *Of sheep, wolves, and sheepdogs*. Retrieved May 20, 2006, from <http://hobbes.ncsa.uiuc.edu/onsheepwolvesandsheepdogs.html>

Quinn, M. W. (2005). *Walking with the devil: The police code of silence*. Minneapolis, MN: Booksbyquinn.

Rebhorn, W. A. (2003). *The prince and other writings of Niccolò Machiavelli*. New York: Barnes and Noble.

Victims of U.S. Drug Policy. Citizens meet violent death at hands of government. Retrieved May 20, 2006, from www.injusticeline.com/victims.html

Michael W. Quinn has been in law enforcement for over 26 years, with over 23 years with the Minneapolis Police Department; 18 months with the Minnesota Police Corps, where he oversaw the design and development of the federally sponsored Police Corps Academy; and 18 months as a court security officer at the Minneapolis Federal Courthouse. He is currently a part-time special deputy contract guard for the U.S. Marshal’s Service in Minneapolis.

During his tenure with the force, Mike worked in some of the toughest high-profile units, serving over 300 high-risk warrants without a critical incident.

He is the recipient of numerous awards, including departmental commendations, awards of merit, and a unit citation. He received an outstanding service award from the FBI, a leadership award from the Urban League, two Meritorious Masts from the United States Marine Corps, and the Lifetime Achievement in Law Enforcement Training Award from the Association of Training of Officers of Minnesota. He is an acknowledged contributor to *The Tactical Edge* by Calibre Press, and he regularly teaches and has testified as an expert witness on such topics as self defense for civilians, search and seizure, firearms, rappelling, defensive tactics, pressure point control tactics, deadly force, chemical agents, high-risk warrants, and SWAT tactics.

Mike was a member of the Emergency Response Unit for 17 years and was part of the joint FBI/Minneapolis Police SWAT team for 8 years. An active member of the Hibbing Community College Law Enforcement Advisory Board, Mike is still trying to make a difference in police training.

Mike's success in law enforcement is reflected in the passion and commitment he brings to being an ethical cop. Mike's first book, *Walking with the Devil: The Police Code of Silence*, is being used in several colleges nationwide and has received glowing reviews from police professionals across the nation. Mike is a member of the Academy of Criminal Justice Sciences and the International Association of Ethics Trainers. He sponsors a \$1,000.00 scholarship through the ACJS for members of the criminal justice honor society. He is an adjunct faculty member of Rasmussen College Criminal Justice Program and writes a monthly ethics column for *Officer.com*.

Mike will be speaking at the NACOLE conference in September 2006 and the Canadian Association of Police Boards Conference in Edmonton, Canada, in August 2006.

Ethical Changes and Challenges: Policing on the Texas/Mexico Border

Bonnie A. Rudolph, Interim Chair, Department of Behavioral, Applied Sciences and Criminal Justice, Texas A&M International University

The author thanks the DEA agent, customs agent, police officer, and border patrol agents who shared their experience and perspectives with the author. The author promised these contributors anonymity and takes full responsibility for the opinions expressed herein.

Abstract

This article provides a general overview of how ethical practice has changed for those policing the South Texas/Mexico border and notes some pressing challenges for present-day police ethics. As a result of the 1994 implementation of North American Free Trade Agreement (NAFTA) and global commerce, the traffic through this border region has increased exponentially; however, illegal migration and narcotics smuggling have dramatically increased as well. The terrorist attacks of 9-11 brought national focus to border security and escalated policing to this “hardening” but still very porous border region. Based on interviews with a variety of policing agents and literature reviewed, the author offers some recommendations to help address the ethical challenges brought about by these rapid and complex changes.

The border between Texas and Mexico extends for about 1,200 miles, from the mountain setting in El Paso/Juárez to the coastal plains of Brownsville/Matamoros. Along that expanse, it is policed by a variety of city, county, state, and federal agencies. The U.S. Border Patrol, now a part of the U.S. Customs and Border Protection Agency, under the Department of Homeland Security, has major responsibility for securing this rambling and often unpopulated border; however, the Drug Enforcement Agency (DEA), local sheriffs, police departments, customs agents, and sometimes the National Guard, also participate in this policing effort. Recently “Minutemen,” local volunteer citizens, have also joined the Herculean effort to “seal” this immense border.

Ethical Changes and Challenges: Policing on the Texas/Mexico Border

This article focuses on the ethical changes and challenges policing agents encounter in one region of this border, South Texas. For the purposes of this article, South Texas is defined as the Laredo Sector of the U.S. Border Patrol. The Laredo Sector encompasses 116 counties; the cities of Laredo, Freer, Hebbronville, Cotulla, and Zapata; and scores of smaller communities covering 101,439 square miles of southwest and northeast Texas. The Rio Grande is the southwest and international boundary for this sector. There are approximately 171 miles of the Rio Grande to patrol within South Texas. The McAllen Border Sector is to the immediate south, and that area has been termed *Deep South Texas*. Maril (2004) has recently described attempts of the Border Patrol to police that area.

The Texas/Mexico border is as diverse as it is long. Narrowing the study to one section avoided overgeneralization, and review of ethical issues in South Texas was geographically convenient for the author. South Texas also encompasses the second

fastest growing city in the country, Laredo. This city is a very important center of import and export with Mexico and also provided ample opportunities to interview agents from a wide variety of enforcement authorities. The city of Laredo further offers a fascinating sociological and political study; 95% of the population is Mexican American, and Anglos represent a small minority (Arreola, 2002).

Just across the Laredo Bridge lies the Mexican city of Nuevo Laredo, Tamaulipas, home to *maquiladoras* (Mexican corporations that are allowed to temporarily import materials without paying export tax on the products they produce), competing Mexican drug cartels, and over 500,000 Mexicans. Nuevo Laredo is the gateway to the principal highway to Monterrey and Mexico City, and the Nuevo Laredo-Laredo International Bridge is the busiest commercial crossing point between the two countries (Arreola, 2002).

The purpose of this article is to describe the ethical changes and challenges experienced by police agents in the rapidly shifting political, social, and international environment of South Texas. Rather than focus on one policing agency, a systemic review was used, which included traditional literature searches and interviews with a variety of field personnel from various enforcement agencies. It was hoped that this combination of methods would identify the universality of some of the ethical issues facing police in this region, as well as clarify the more unique aspects of this border police experience. The article focuses on changes within the last two decades and current challenges.

The South Texas Border: Multiple Policing Tasks and Players

The historical role of police along the South Texas border has been to prevent and minimize smuggling of illegal materials and undocumented Mexicans into the United States from our neighbor to the south. Hemispheric and global trends of the last few decades have radically changed and expanded the tasks of policing agents along this border. The unfortunate developments of a flourishing drug trade, the politicization of immigration, and the spread of terrorism to United States soil have rocked this border region and the police who attempt to protect the border with Mexico (Andreas, 2000; Maril, 2004). Complicating these developments for border police agencies is the 1994 implementation of NAFTA, which has more than doubled the total trade back and forth across our borders, with Mexican exports to the United States jumping from \$49.4 billion in 1994 to \$138.1 billion in 2003 (Anderson, Cavanaugh, & Lee, 2005).

These economic, social, and political changes have also brought greater national attention to the Border Patrol, which has been transformed into the fastest growing, largest, and most armored civilian police force in the nation, one that increasingly uses high-tech surveillance and detection equipment (Bonner, 2003). Over 670 border agents are employed in the South Texas area, triple the number stationed there 20 years ago. As immigration has become a political "football," the Border Patrol has also come under attack from those who feel the government is "soft" on illegal immigrants and those who see the Border Patrol as behaving harshly and with "excessive force" in their apprehension of illegal immigrants (Andreas, 2000).

The terrorist attack of 9-11 prompted the creation of the Department of Homeland Security and the U.S. Customs and Border Protection Agency (USCBP) within it.

Over 6,000 Border Patrol agents have been hired since 2002 (USCBP, 2005). Given the threat that terrorists may use the immigrant and drug smuggling lines to enter the United States via Mexico, the Border Patrol is now mandated to achieve “operational control” of the border. “The priority mission of CBP, specifically including all Border Patrol Agents is homeland security—nothing less than preventing terrorists and terrorist weapons . . . from entering the United States” (Bonner, 2003).

The expanding drug traffic from Mexico has also brought the U.S. Drug Enforcement Administration to South Texas as a major policing force. The South Texas border is designated as a High Intensity Drug Trafficking Area (U.S. Office of the National Drug Control Policy, 1991). In 2005, the DEA reported seizures of cocaine (16,431.1kg), heroin (189.3kgs.), marijuana (398.937.3kgs), hashish (26.kgs), as well as methamphetamine in Texas. While Dallas is considered the major distribution center for these drugs, a substantial portion of illicit drugs smuggled into the country comes via South Texas (Placido, 2005).

Local sheriffs also patrol areas around the border and intercept illegal immigrants and drug shipments. “Operation Linebacker” uses local deputies as a second line of defense for the U.S. Border Patrol and was initiated by the Texas Border Sheriff’s Coalition. Governor Rick Perry awarded \$367,500 in December of 2005 to each county sheriff along the border to fund this initiative (Perry, 2005). County sheriffs are locally elected officials. Local police departments, like those in Laredo, also participate in the war against smugglers. In the last months, volunteers, self-named “minutemen,” have joined the “hide and seek” on the South Texas border.

In summary, the priorities South Texas border police have to pursue have multiplied, and at the same time, the national media spotlights border police performance. In the past, border police were largely ignored by the media and minimized in policing in general (Andreas, 2000). Today, South Texas border police must deter smuggling, seal and maintain control of a long and environmentally hostile border, stop terrorists and terrorists’ weapons from entering the country, daily apprehend hundreds of illegal immigrants, process and return them to Mexico, and of course continue to interdict drug trafficking. The size, technical sophistication, and variety of agencies policing the border has also increased and runs the gamut from agents of the Federal Bureau of Investigation, the DEA, the National Guard, a variety of special task forces, as well as Customs and Border Protection agents, city police departments, and county sheriffs. Add to the mix, minutemen and occasional incursions of military personnel from Mexico, and the complexity of the policing situation becomes obvious.

The Interviews

The author asked field agents from four different police agencies to talk about any ethical changes and challenges they experience in their attempts to fulfill their duties in this complex environment. Six respondents were interviewed with the promise of anonymity and review of the draft manuscript before it was submitted. Volunteers were recruited via word of mouth, and respondents suggested other agents who might agree to be interviewed. All respondents were male, and they ranged in years of policing experience from 5 to 20 years. Of the agents interviewed, 75% were Mexican American. All were bilingual (Spanish/ English), but the interviews were conducted mostly in English.

The interviews lasted from 50 to 90 minutes, and a semi-structured interview format was followed. All respondents were asked the same questions in the same sequence, but relevant or pressing topics suggested by the officers were also pursued. The interviewer always introduced the interview purpose and confidentiality of respondent identity at the beginning of the interview and invited questions about the process. The author took notes on the structured interview format form as the interview progressed. A literature search of the following terms was conducted via the university library search service and Google: *South Texas border*, *South Texas border police ethics*, *South Texas police integrity and corruption*, *NAFTA*, *drug trafficking in South Texas*, *immigration*, *terrorism (South Texas border)*, and *South Texas Minutemen*.

Ethical topics were divided into the forms of behavior that represent the major law enforcement ethical violations according to Barker (1996): corruption of authority, kickbacks, opportunistic thefts, shakedowns, protection of illegal activities, fixes, direct criminal activities, and internal payoffs. The topic of police discretion to enforce the law was also included (Goldstein, 1998). Police misconduct was categorized into police brutality, sex on duty, nonsexual contact, voyeuristic contact, contacts with crime victims, contacts with offenders, contacts with juvenile offenders, sexual shakedowns, citizen-initiated sexual contacts, sleeping on duty, drinking on duty, use of drugs, and police lying, again using Barker's system (1996). Ethical changes and challenges vary somewhat according to the job description and duty assignment of the officer. Below are some common changes and challenges.

Changes

Perhaps the biggest change impacting ethical police behavior has been the amount of time that is devoted to training border police in ethics and the quality of that training. All police interviewed reported receiving ethics training annually. The officers employed by federal agencies particularly reported the training as extensive, highly interactive, and influential. In addition, the influx of over 6,000 new recruits to the Border Patrol in the last five years has added patrolmen and patrolwomen who have been through an extensive selection process (about 1 in 20 are chosen to proceed to the academy) and then inculcated with in-depth ethics training at the academy (USCBP, 2003). Following this, Border Patrol agents are on a three-year probation period that reinforces careful following of the rules and avoidance of any behavior that could smack of misconduct.

Police hired by local elected officials seemed to receive less training, and the training appeared more passive (viewing videos and CDs). Furthermore, sheriff's deputies tend to be political appointees, involving a more "subjective" and nonuniform selection process. Applicants to the city police department of Laredo must have only a high school degree and are mandated to receive 40 hours of training every two years, which is a requirement of the Texas Commission on Law Enforcement Officers Standards and Education. Within that 40 hours every two years, there may be some hours on ethics in law enforcement.

Police discretion to enforce the law also appears to have undergone substantial revision over the last decades. Interviews supported this assessment. All officers reported that they still had discretion in law enforcement but that working in pairs and teams, closer supervision, and the threat of media coverage if a mistake were uncovered causes police to be more hesitant and cautious in exercising discretion.

Younger officers with less experience did not spontaneously report this as a change, but more experienced officers uniformly did. One of the older officers noted that the “stakes are higher now with terrorism, media coverage, and internal affairs everywhere.” Another officer noted that there is now very little discretion available in domestic violence situations as local and state training and court mandates emphasize arrest of perpetrators in these situations.

Another change noted in both the literature and the police interviews is a reduction in the use of force by border police as a consequence of the attention given police brutality claims both internally, via preventive training and reactive investigation, and externally in the media. All officers noted that reports of use of force, merited or questionable, were given much greater scrutiny under current border conditions. Again, this seemed to be more emphasized by the federally employed police agents and may reflect the greater budget and priority given ethics training in federal police administrations. One respondent noted that officers patrolling in their cars alone, (standard practice within the Laredo Police Department, due to lack of funds and personnel), “have to really watch for any violations of the 4th Amendment (seizure and search restrictions). We have to be especially careful as our training goes up, and as the local citizens become more educated as well.”

A final change impacting ethical behavior is the extent to which South Texas border police now interact with other policing bodies. The abundance of players on the policing field has both positive and negative consequences for ethical behavior. On the positive side, interaction with agents from federal agencies seems, overall, to increase the level of professionalism in border policing. The standards of professional conduct for federal police seem to “rub off on some local officers, especially the younger ones,” reported one officer.

One negative consequence of the growth of agents from diverse agencies for ethics is the common use of “professional courtesy.” An officer of another law enforcement body, as a professional courtesy, may not report violation of a law by an agent from a different law enforcement body. One respondent noted, “traffic tickets are almost never issued to law enforcement agents. You don’t want your agency to get a bad rap with the other one.” Another negative consequence of so many police players for ethical behavior seems to be that officers can sometimes feel cut out of the “action,” and some become less enthusiastic and diligent in their performance. Lack of coordination between enforcing agencies can also lead to officer demoralization and reduced work investment. One officer reported, “Sometimes with all the paper shuffling between agencies and the paperwork to process a violation, it just seems easier to do less. Don’t make waves. Sometimes if you work too hard, you end up shooting yourself in the foot and getting a lot of attention you don’t need. With all the politics between agencies, it’s just better to stay out of it.”

Challenges

There are many challenges to ethical behavior for police along the South Texas Border. At first glance, it might appear that the biggest ethical challenge is for police to resist corruption related to the flourishing drug trade (corruption is using the authority of official office for personal gain; Goldstein, 1977). Opportunities abound for South Texas police to make substantial amounts of money via drug trafficking. In fact, the greatest number of arrests involving law enforcement personnel reported in South

Texas involve drug trafficking (Common Sense for Drug Policy, 2006). Agents from every border policing organization have been caught in the web of drug money. Border agents, DEA, local sheriffs, even the military has recorded arrests of soldiers for drug related offenses (Common Sense for Drug Policy, 2006).

As a social scientist, however, the author sees a more subtle, and perhaps just as dangerous, challenge to ethical police conduct on the South Texas border. The insidious processes of progressive demoralization of police agents can foster unethical conduct. A major motivation of most humans is mastery, overcoming an obstacle, defeating an enemy, “the great upward drive” (Adler, 1930). At best, police along the South Texas Border experience sporadic “mastery” and instead consume a steady diet of frustration in a situation that seems designed to thwart the goals of their sworn occupation. How are South Texas border police to maintain the highest standards of professional ethical conduct when they know that the vast majority of smuggled drugs, potential terrorist weapons, and human slave trade is in the tractor-trailers and trains spinning past them daily within the NAFTA-created traffic flow?

Those who are knowledgeable in the world of police work recognize the frustrations, paradoxes, and difficulties inherent in policing (Fuller, 2005; Goodman, 1998; Kappeler, Sluder, & Alpert, 1998; Perez, 1997). The author argues, however, that South Texas border police experience these difficulties in the extreme. They apprehend poor undocumented workers seeking a job “al Norte” daily, but yet, they know that more sneak through than are caught—perhaps among them, a terrorist. And worst of all, they know that they will be held “accountable” for this, and under the current circumstances, there is nothing they can do about it.

The author’s training as a psychologist suggests that such constant frustration and sense of powerlessness typically leads to difficulties managing aggressive impulses or to depression, burnout, and alienation. Either outcome threatens ethical police behavior. The former predisposes to excessive force and police brutality, the latter to failure to enforce the law and police misconduct (e.g., sleeping on duty, drinking on duty, lying).

The major deterrents to falling prey to these ethical challenges are officer personal integrity (Trautman, 2000), officer training in managing the early signs of demoralization and other occupationally induced counterproductive responses, and the continuing threat of internal affairs investigations. The most essential of these, and the hardest to engender, is officer integrity. Given this reality, the importance of careful selection and screening of applicants becomes paramount, especially in a political climate that clamors for more “policing bodies on the border now,” and endorses minutemen (unscreened volunteers) as patrolling agents.

It is possible that building in more active social support within the “brotherhood” of police could help buffer officers from demoralization and vulnerability to ethical challenges; however the “code of silence” (Kleinig, 1996) and the para-militaristic design of police agencies make creation of such social support complicated, as officers neither readily reveal difficulties, nor comfortably facilitate help-seeking within the ranks.

When asked what impact the deployment of 6,000 National Guard personnel would have on the border, opinions among the officers were more diverse. Some agents said that “we’ll take any help we can get,” while others were worried that soldiers would not be adequately trained to deal with the “civilian” nature of border patrol and might stumble into use of their weapons when a more experienced border agent would be able to avoid it.

As for the minutemen, most respondents were concerned that lack of training and supervision leaves too many opportunities for ethical and moral violations. At least one agent reported that he felt that some minutemen were motivated by racist attitudes. All agreed that the principle of civilians assisting law enforcers was a good one, but the implementation along the border of patrolling civilians was the problem.

When asked for recommendations to support ethical police behavior on the border, officers interviewed suggested three main strategies. They recommended an interagency internal affairs force with the best, most ethical officers from each agency assigned to it on a rotating basis. They also recommended continued careful screening of all police applicants, local as well as federal, and enhanced budgets for police training in ethical dilemmas and stress management. Most importantly, they suggested that the nation’s leaders realistically review the impact of NAFTA and other impending trade agreements on the social problems of smuggling, terrorism, drug trafficking, and immigration for the United States and the police who enforce the law and protect the border.

Bibliography

- Adler, A. (1930). Individual psychology. In C. Murchison (Ed.), *Psychologies of 1930*, (pp. 395-405). Worcester, MA: Clark University Press.
- Anderson, S., Cavanaugh, J., & Lee, T. (2005). *Field guide to the global economy* (2nd ed.). New York: New Press.
- Andreas, P. (2000). *Border games*. Ithaca, NY: Cornell University Press.
- Arreola, D. D. (2002). *Tejano South Texas: A Mexican American cultural province*. Austin, TX: University of Texas Press.
- Barker, T. (1996). *Police ethics: Crisis in law enforcement*. Springfield, IL: Charles C. Thomas.
- Bonner, R. C. (2003). *Statement of the Commissioner of U.S. Customs and Border Protection*. Retrieved April, 19, 2006, from www.cbp.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2003/apr032003.xml
- Common Sense for Drug Policy. (2006). *Official corruption and the war on drugs*. Retrieved May 20, 2006, from www.csdp.org/news/news/corruption.htm
- Fuller, J. R. (2005). *Criminal justice: Mainstream and crosscurrents*. Upper Saddle River, NJ: Pearson/Prentice Hall.

- Goldstein, H. (1977). *Policing a free society*. Cambridge, MA: Ballinger Publishing.
- Goldstein, J. (1998). In G. Cole & M. G. Gertz (Eds.), *The criminal justice system: Politics and policies* (7th ed.). Belmont, CA: West/Wadsworth Publishing Company.
- Goodman, D. J. (1998). *Enforcing ethics: A scenario-based workbook for police and corrections recruits and officers*. Upper Saddle River, NJ: Prentice Hall.
- Kappeler, V. E., Sluder, R. D., & Alpert, G. P. (1998). *Forces of deviance* (2nd ed.). Prospect Heights, IL: Waveland Press.
- Kleinig, J. (1996). *The ethics of policing*. New York: The Cambridge University Press.
- Maril, R. L. (2004). *Patrolling chaos: The U.S. border patrol in deep South Texas*. Lubbock, TX: Texas Tech University Press.
- Perez, D. W. (1997). *The paradoxes of police work: Walking the thin blue line*. Incline Valley, NV: Copperhouse Publishing Company.
- Perry, R. (2005). *Border security plan for Texas*. Retrieved May 19, 2006, from www.governor.state.tx.us/priorities/other/border/border_security/view
- Placido, A. P. (2005). DEA Congressional Testimony, June 14, 2005. Retrieved May 20, 2006, from www.dea.gov/pubs/cngrtest/ct061205.html
- Trautman, N. E. (2000). *The cutting edge of police integrity*. New York: The National Institute of Ethics.
- U.S. Customs and Border Protection (USCBP). (2003). Retrieved May 17, 2006, from www.cbp.gov/linkhandler/cgov/border_security/border_patrol/national_bp
- U.S. Customs and Border Protection (USCBP). (2005). Retrieved May 20, 2006, from www.cbp.gov/xp/cgov/border_security/border_patrol
- U.S. Drug Enforcement Administration. (2005). Retrieved May 20, 2006, from www.dea.gov/pubs/states/texas.html
- U.S. Office of the National Drug Control Policy. (1991). Retrieved May 25, 2006, from www.ncjrs.gov/ondcppubs/publications/enforce/hidta2001/stex-fs.html

Bonnie A. Rudolph, PhD, is currently the interim chair of the Department of Behavioral, Applied Sciences and Criminal Justice at Texas A&M International University. She earned her BA in Spanish and political science from Indiana University in Bloomington, her MA in psychology from DePaul University in Chicago, and her PhD in philosophy from the Illinois Institute of Technology in Chicago. She has received various awards and honors for excellence in her field. Most recently, she was honored with the 2005 Judith Zaffirini Award for Scholarship and Leadership. She has also authored and coauthored numerous publications.

Reducing Corruption and Supporting Integrity-Based Policing in Central Europe: The Case of Hungary

Rob C. Mawby, Reader in Criminal Justice, Centre for Criminal Justice Policy and Research, UCE Birmingham, UK

Alan Wright, Independent Scholar, Wright Associates

Mike King, Research Professor of Criminal Justice, Centre for Criminal Justice Policy and Research, UCE Birmingham, UK

Introduction

The issue of police integrity has been brought into sharp focus in recent years as a consistent and worrying world-wide problem (Crank & Caldero, 2000; HMIC, 1999; Klockars, Irkovic, & Haberfeld, 2004; Moran, 2002; Newburn, 1999; Neyroud, 2003; Prenzler, 2003;). It has proven a pertinent problem in Europe's transitional states. The revolutions of 1989 in the countries of Central Europe and the collapse of the Soviet empire were events of global importance, which threw the region and its individual countries into a period of political, social, and economic change (Cox & Furlong, 1995). The police of these countries faced particular problems of transition. Formerly police "of the state" most often associated with authoritarian repressive regimes, many of these forces have attempted to reinvent and legitimate themselves as police "of the people." At the same time as facing changes to their own role and organisational structures, these police forces have undertaken the complex task of policing societies in change (King, 1998; Víggh, 1995). Entwined with these processes, one specific problem of integrity, namely that of police corruption, has emerged as a potent challenge to the legitimacy of both policing and the good governance of transitional states.¹ This article focuses on one such state, Hungary, and draws on our experience of implementing an anticorruption project there. The program was funded by the European Commission PHARE Democracy Programme, with the Institute for Constitutional and Legislative Policy (COLPI) in Budapest providing supplementary funding (Bendzsák et al., 2000a; 2000b). From this experience, we suggest that training programmes developed from empirical research can contribute to reducing corruption and the support of integrity-based policing. The article is organised as follows:

- We provide some contextual information concerning corruption, Hungary, and the Hungarian National Police.
- We present an overview of the anticorruption project, with which we were part, and its research design.
- We briefly describe the research findings before explaining how these were used to develop a "Coping with Corruption" training package.

Albeit focused on one jurisdiction, the initiative has relevance for the policing of democracies generally, and we conclude that, combined with other measures, such training can support integrity-based policing, although more needs to be done.

Hungary and Police Corruption in Context

Corruption is not a problem limited to Europe's transitional states, nor indeed policing *per se*. The world's media relay details of state, public bureaucracy and private business corruption across continents and political systems, exposing or challenging individuals in positions of power or even institutions themselves (see generally Thompson, 2000). In Western states, an ex-President of the United States, an ex-Chancellor of Germany, and the outgoing Prime Minister of Italy have all been accused of corrupt practices, and the British Labour Government are currently recoiling from accusations of "sleaze" made against the Deputy Prime Minister. In the states of Eastern and Central Europe, as Holmes (1999) has documented in meticulous detail, there has been a significant number of cases of official corruption, actual and alleged, in countries including Albania, Bulgaria, the Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

Prior to the accession of eight Central European states² to full membership of the European Union in 2004, Hungary together with other countries such as Poland and the Czech Republic, was a "leading edge" transitional state in terms of its democratic institution-building based on such criteria as the basic stability of institutions, the independence of the judiciary, and respect for fundamental human rights. One of the European Union's consistent concerns regarding accession had been the level of corruption in the candidate states. A European Commission report on Hungary in 1998 stated that additional measures were necessary to combat corruption in police forces, the customs service, local administration, and national regulatory agencies. Increasing the level of cooperation between different anticorruption entities is also recommended (European Commission, 1998). Subsequent reports in 2002 and 2003 reiterated a number of corruption issues. Both pre- and post-accession, independent monitoring groups have highlighted concerns over the level of corruption and the measures in place to prevent it (see for example EUMAP, 2002).

Corruption in Hungary, as elsewhere, is not a modern phenomenon; however, in the transition stage from socialism to capitalism, reported crime increased steadily, quadrupling between 1981 and 1991. During the 1980s, fighting criminal corruption was not perceived as the most pressing priority, and as privatisation gathered apace, so did the opportunities for corruption. By 1992, Hungary was claimed to be the largest money launderer in Central Europe (Kranitz, 1994, p. 108; see also Bruszt & Reti, 1994; Irk, 1997), and as the 1990s progressed, Hungary became an important hub for transnational organised crime (Wright, 1997; 2006, p. 153).³

As a subtype of state corruption, police scandals and the prosecution of corrupt officers question the effectiveness and accountability of the public police. Where incidents of corruption become consistent and frequent, the legitimacy of public policing itself is threatened. While corrupt policing practices and the consequent institutional responses attract media coverage and generate public debate, in the so-called mature liberal democratic societies, they rarely undermine the established system of government. In transitional democratising states, however, the police, of all the agencies, are the visible face of government, and public perceptions of the police could severely affect public attitudes to democracy itself. The police are also one of the agencies most likely to come into conflict with citizens over malpractice concerning human rights issues. These difficulties are exacerbated by uncertainties about continued militarisation of the police and their role in state security. In some cases, the legal basis of policing

has not been sufficiently realigned to bring it into accordance with developments in democratic government and policing practice in the European Union states.

Both official state sources and research evidence attest to the presence of corrupt practices in the Hungarian National Police (HNP).⁴ According to statistics released by the Public Prosecutor General's Office, 277 Hungarian police officers were found guilty of corruption between 1994 and 1998; the numbers rose from 14 in 1994 to 113 in 1998. Pap (2001), however, is sceptical concerning the accuracy of official statistics and cites public surveys and research evidence that indicate police corruption is more extensive, existing across all policing functions and contributing to declining public confidence.

Given this background, between October 1998 and March 2000, the authors, working with members of the Hungarian Police Research Association, conducted the project mentioned earlier aimed at supporting democratisation in Hungary by establishing the groundwork for the prevention of corruption in the HNP (Bendzsák et al., 2000a; 2000b). It was the intention of the project to investigate and comment on the types and extent of police corruption existing in Hungary, make recommendations for the control and monitoring of police corruption, and outline options and recommendations to provide systematic and procedural defences against corruption at the individual and organisational levels. In this article, we now focus briefly on the concept of corruption, before discussing the type and extent of corruption in Hungary per se, and then outline the role that case-study-based training programs can play in preparing inexperienced policing students for situations in front-line policing when they may be invited to participate in corrupt activities.

Project Methods

In the 1960s, questions about police integrity and corruption began to appear in academic literature (Simpson, 1977). Although in both the United States and the United Kingdom, the literature relating to police corruption has increased exponentially, it is notable that it shows only a limited amount of rigorous empirical enquiry. Police corruption, because of the very difficulties associated with its clandestine nature, is under-researched. From this premise, the project team determined, as one part of the research, to generate original data through focused interviews with experienced personnel and supervisors in the HNP. The object of the interviews was to draw out the interviewees' knowledge and experience of corrupt practices within the organisation. This was considered an essential part of the research if recommendations were to be generated that reflected the nature and scope of actually occurring police corruption. To complement these interviews, the project team organised a series of consultations and workshops with public prosecutors, police managers, police trainers, academics, and representatives of the media and the Ministry of the Interior. These events were opportunities to share experiences concerning the nature of police corruption and debate how it might be managed and prevented.

To develop the questionnaire for the interviews, it was necessary to tackle the issue of definition. Police corruption is difficult to grasp by simple definition—inspection of the literature shows that there is no overall consensus on what might be included. According to Simpson (1977), many of the attempts to account for corruption have entailed extensive listings of the kinds of activities that constitute the misconduct. Of themselves, categorical listings of this kind are not definitive of police corruption in any particular jurisdiction. Indeed, a single definition covering a range of categories may not be helpful for the purposes of analysis; a more reliable method may be

to ground a theory of corruption in lists of actions or events that are empirically generated in the specific jurisdiction that is being examined; however, a consolidated version of such categories is useful as a practical means through which empirical evidence might be encoded and understood.

In Hungary, corruption is defined by statute. The Hungarian Act IV of 1978 on the Criminal Code defines corruption in formal terms, its sections covering requesting and accepting favours in connection with official functions, or violating duty, or abusing official positions in return for favours. More specifically with regard to the Hungarian police, one definition of corruption is “the requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe” (Toth, 1999, p. 2).

For a wider understanding of the problem and how it affects police forces worldwide, it is helpful to compare this definition from Hungary with other jurisdictions. A review of the literature on police corruption, taking into account jurisdictions, suggests that there are many definitions of corruption. These include a range of activities including “bribery, violence and brutality, fabrication and destruction of evidence, racism, and favouritism or nepotism” (Newburn, 1999, p. 4). It has also been defined as narrowly as accepting bribes (Wilson, 1968). Similarly Waddington (1999) has argued that corruption comprises “accepting bribes” and is a form of police deviancy, which together with procedural abuses and the use of excessive force, occurs under “discernible organizational, sociocultural, and political conditions” (p. 121). He notes that corruption is rarely police specific; it usually occurs throughout public administrations and is often related to impoverished governments’ inability to remunerate adequately. Further he argues, rightly in our view, that although low-level corruption in the form of widespread bribery is less common in liberal democratic industrialised societies, practices of reciprocal benefits in kind are prevalent (e.g., the acceptance of free meals and drinks).

In his study of corruption in the Dutch police, Punch (1985) made the important point that corruption can cover both the profiting from some abuse of power as well as the abuse of power itself. He detailed four categories of corruption: (1) *straight-forward* corruption, in which a police officer does something (or does not do something) for a reward, (2) *predator* (strategic) corruption, in which an officer actively stimulates crime and extorts money, (3) *combative* (strategic) corruption, in which an officer does something illegal or unethical to straighten a case, which might involve planting evidence or attributing words to a suspect that are untrue to incriminate him or her, and (4) corruption can be seen as *perverting justice* when the motivation is either revenge or to avoid prosecution.

However police corruption is defined, the literature suggests that it has one or more of the following characteristics:

- Corruption involves the use or abuse of organisational authority for the personal gain of police officers.
- Corruption can be organised (involving management and coordination) or disorganised.
- Corruption can be pervasive (i.e., found throughout the organisation) or isolated.
- Corruption can involve mutuality in that it has benefits for police officers and the policed.

- Corruption is found at all levels of the police organisation.
- Corruption is a continuing problem as reforms tend to be short-lived.

It is evident that police corruption is deeply concerned with organisational factors. The body of research studies and literature shows us that corruption is rarely an isolated, individual act but is more likely to be a form of group behaviour guided by a contradictory set of norms in the police organisation itself. Lawrence Sherman developed an analytical typology of corruption that enables judgements about the organisational extent of corruption to be established. For Sherman (1974), corrupt actions can be identified and analysed according to the extent to which they are either *organised* (structured) or *pervasive* (frequently found). At the lowest level, *disorganised* corruption is like the so-called “rotten apples” in a barrel. Not all the apples in the barrel, however, are contaminated. Corruption of this type is characterised by individual acts of misconduct, generally unconnected to others. At a higher level, *disorganised pervasive* corruption implies a widespread range of corrupt activities embedded in the operating culture. In such cases, some or many of the apples may be rotten but still at the individual, rather than grossly conspiratorial, level. At the extreme, *organised pervasive* corruption includes a still wider degree of collusion and structure, often involving top management. In such extreme cases, given the widespread conspiratorial nature of the corruption, we could say that the barrel itself is rotten. These classifications proved useful during the project interviews as a means of discriminating between types of corruption and the organisational influences involved.

Drawing on the research and literature, it is possible to generate a typology of corruption against which the range of categories of corrupt practices can be judged. We adopted this approach to develop a standardised questionnaire for the interviews, and each interview included placing the interviewees’ experiences of corruption (if any) within two matrices (see Tables 1 and 2). The first was based upon an elaborated version of Roebuck and Barker’s (1974) typology of corruption, which was intended to generate data on the *specific* forms of corruption of which the interviewees had indirect or direct knowledge. The second matrix was intended to generate data on the *types* and *character* of corruption. The resultant data provided information on the nature and extent of corruption in the HNP and also generated realistic “corruption scenarios,” which would be utilised later for training purposes.

The Research Findings

We completed 47 interviews with police officers. As we had anticipated, it was initially difficult to persuade police personnel to participate, but this was largely overcome by providing guarantees of anonymity. With regard to the specific types of corruption, Table 1 shows the distribution of these 47 officers’ knowledge of, and involvement in, corrupt activities (for ease of reading, the highest scoring cells are emboldened and shaded). In summary, . . .

- Few interviewees admitted to *direct involvement* in corruption; although, six interviewees admitted to a corruption of their authority (category 1) and to internal pay-offs (category 8).
- There was a high level of *direct knowledge* of corrupt activities.
- There was a high level of *direct* and *indirect knowledge* in the categories of illegal fines, intimidation of ethnic minorities, brutality, corruption of authority, and “shakedowns.”

- *Direct knowledge* was the most common category in 12 of the 13 specified categories.
- The highest number of *no knowledge* responses related to the protection of illegal activities (21 interviewees); although, 25 interviewees had *indirect/direct knowledge* of such activities.

Table 1
Interviewees' Involvement with/ Knowledge of Specific Types of Police Corruption

Type	Meaning	a. Direct Involvement	b. Direct Knowledge	c. Indirect Knowledge	d. No Knowledge
1 Corruption of Authority	When a police officer receives some form of financial gain by virtue of his or her position as a police officer without violating the law <i>per se</i> (e.g., free drinks, meals, services)	6	26	11	4
2 "Kickbacks"	Receipts of goods, services, or money for referring business to particular individuals or companies	4	28	10	6
3 Opportunistic Theft	Stealing from arrestees (sometimes referred to as "rolling"), traffic accident victims, crime victims, and the bodies or property of dead citizens	0	21	11	15
4 "Shakedown"	Acceptance of a bribe for not following through a criminal violation (e.g., not making an arrest, filing a complaint, or impounding property)	1	29	11	5
5 Protection of Illegal Activities	Police protection of those engaged in illegal activities (including prostitution, drugs, pornography) enabling the business to continue operating	0	9	16	21
6 "The Fix"	Undermining of criminal investigations or proceedings, or the "loss" of traffic tickets	0	26	10	11
7 Direct Criminal Activities	When a police officer commits a crime against a person or property for personal gain "in violation of both departmental and criminal norms"	0	30	7	11
8 Internal Payoffs	When prerogatives available to police officers (e.g., holidays, shift allocations, promotion) are bought, bartered, and sold	6	26	5	15
9 "Flaking" or "Padding"	Planting of evidence, telling lies, or fabricating evidence (perversion of justice)	1	21	10	13

Table 1 (Continued)

10 Brutality and Assaults	Assaults upon prisoners or members of the public, either to extract evidence or confessions, or to obtain "respect"	0	27	15	5
11 Illegal Fines	Administering "fines" for minor violations (e.g., traffic offences) and keeping the proceeds	1	35	11	0
12 Intimidation of Foreigners	Exercise of arbitrary force or other means for the purpose of intimidating those temporarily in the country such as immigrants or foreigners	1	22	12	11
13 Intimidation of Ethnic Minorities	Exercise of arbitrary force or other means for the purpose of intimidating resident members of ethnic minorities	2	30	10	5
14 Any Other Category	(Specify)	2	9	3	28
	Totals	24	339	142	150

Now turning to the interviewees' perceptions of the extent and character of corruption, interviewees were almost equally split concerning whether corruption was organised or disorganised. The majority, however, perceived corruption to be pervasive, often for mutual benefit, often for personal gain, but sometimes for "noble cause" and rarely of a life-threatening nature (see Table 2).

**Table 2
Interviewees' Perceptions of the Extent and Character of Police Corruption**

Type	Meaning	1	2	3	4
1 Organisation	Extent to which corruption is thought to be organised within the Hungarian police	Very Organised 3	Organised 21	Disorganised 19	Very Disorganised 3
2 Pervasiveness	Extent to which corruption is thought to be pervasive and found throughout the police organisation	Very Pervasive 8	Pervasive 19	Found Occasionally 15	Never Found 2
3 Mutuality	Extent to which corruption is for mutual benefit between police and others	Always 13	Often 24	Sometimes 8	Never 1
4 For Personal Gain	Extent to which corruption is for personal financial or material gain of police officers	Always 10	Often 26	Sometimes 9	Never 0
5 For Supposed "Noble Cause"	Extent to which corruption is for some Supposed "noble cause" (e.g., to ensure that justice is done)	Always 1	Often 7	Sometimes 23	Never 9
6 Life-Threatening	Extent to which corruption is thought to be life-threatening	Always 0	Often 0	Sometimes 13	Never 27

This analysis, although of a small sample, provided us with a picture of the character of corruption within the HNP and also some indication as to its extent. The types of corruption encountered confirmed those acknowledged in the official statistics and were comparable to the forms of corrupt activity practised by police officers across jurisdictions.⁵

Controlling Police Corruption

As indicated earlier, the objective of the project was not only to scope the types and character of police corruption. We were also concerned as to how corrupt practices could be managed and reduced, and how the generated data could be utilised to support integrity-based policing. Police corruption is difficult to control due to its secret nature. It is generally accepted that corruption cannot be totally eliminated but that it can be disrupted and reduced. By undertaking targeted reforms of a police organisation, the corruption becomes deviant behaviour within the organisation as opposed to the organisation itself being considered deviant (Sherman, 1978). This reform, in itself, also helps reduce individually corrupt behaviour.

In general, a mixture of internal and external controls has characterised attempts to manage and reduce police corruption. Internal controls include the adoption of anticorruption policies, discipline regulations, and codes of professional ethics. In particular, integrity testing is used in the United States, the United Kingdom, and Australia (Prenzler & Ronken, 2001). Proactive measures, in which the police use all legitimate means, including surveillance, to investigate police officers who are suspected of corruption, are also widely used. The techniques of Human Resource Management (HRM), such as training and career development, also add to the possibilities of the long-term “professionalisation” of the police. As such, they have an effect on levels of corruption. More comprehensively, the development of Independent Anti-corruption Commissions (notably in Hong Kong and New South Wales, Australia) has had a positive result in reducing police corruption and other corruption in government in those jurisdictions (Dixon, 1999; and see, for example, www.icac.org.hk).

However, the internal and external control models are not mutually exclusive alternative ways of controlling corruption. Elements of each model can be combined to suit the context. Clearly, it is a major policy decision as to what should be the balance of anticorruption strategies. In the authors’ view, factors that influence the strategy to be adopted should include the degree of pervasiveness and organisation of the corruption and its level. Does it simply amount to the disorganised and occasional low-level “mooching” (getting free meals or services) or the imposition of unofficial fines? Or is there evidence of frequency and structure with serious links to drugs and organised crime? Or are both happening simultaneously?

The lessons from our own and other research studies indicate that there is a “minimum package” for the reduction of corruption, which includes the following:

- Improving recruitment and selection
- Improving the training of both new recruits and established personnel
- Providing effective management and supervision
- Testing integrity by monitoring “at-risk” personnel
- Changing the police culture and breaking the code of silence
- Protecting “whistle-blowers” who report cases of corruption

- Providing better appraisal and monitoring systems
- Improving police pay and conditions

The objective of this combination of measures is to make life difficult for police officers who continue with corrupt practices and support police officers who reject corruption. If this approach were successful, it should in turn influence police culture and public opinion to reject corrupt activities—there would be changed expectations of police conduct. One potential consequence of this is that corruption would be driven further underground, becoming an even more secretive activity. This creates different problems for controlling corruption but is a positive step. In the next section, we take one strand of the outline minimum package, namely training, to suggest how research can be applied to control corruption.

Police Training

The body of literature and research on police corruption, supported by the findings of our research in Hungary, makes it clear that the road to corruption can be a gradual one, which may start by accepting small gratuities before moving on to larger forms of corruption. This behaviour would seem to be reinforced by the mutual interaction between more experienced police personnel who may advise the new recruit on “how things are done on the street” and by the recruit’s need to be accepted by his or her peers. This hypothesis encouraged us to think that one way of tackling corruption may possibly be to raise awareness at a very early stage in a police career, namely, during initial training.⁶ With the objective of breaking into the spiral of corruption at the earliest possible time in a police career, the project developed a “Coping with Corruption” package for new recruits. We devised a training workbook (Bendzsák et al., 2000b), the aims of which were to introduce HNP recruits to the problem of corruption and provide them with some coping strategies through which the effects of police corruption upon their work could be minimised. The workbook enabled them to assess the key issues in police corruption and identify the potential for corruption in everyday policing. It also encouraged them to formulate personal action plans for coping with the dilemmas and pressures of corruption that they might meet in police work. Finally, it advocated critical examination of the organisational measures that might be adopted for the control of corruption.

The “Coping with Corruption” package included case studies that provided the basis for focused training sessions. These case studies reflected information collected by the project team from interviews carried out with experienced personnel and supervisors in the HNP. As such, they were based on realistic situations. They were a representative selection of the more frequently reported types of corruption experienced in Hungary as in other police forces world-wide (Klockars et al., 2004; Krémer, 2004;). They include scenarios in which police officers, *inter alia*, appropriate prisoners’ property, impose illegal fines on motorists, and show favouritism to vehicle recovery specialists. They also include scenarios in which police officers are involved in fabricating evidence and extorting protection money. The figure on the following page shows one example of this. The policing students, in their work groups, were asked to consider each case study and then to complete a number of tasks. First, they were asked to classify the type of corruption represented in the case study, using the categories listed in Table 1. They were also asked what they *would* do based on their own values and the constraints of practical police work if they were invited to participate in a similar activity. In addition, they were also asked

what they *would and should* do based on the law and the rules and procedures of the HNP. They were then asked to list up to three factors that might influence them to take some action other than that which was strictly demanded under the law and/or the rules. Lastly, participants worked in their groups to discuss any emerging gaps between what they *would* do and what they *should* do and then to outline a number of possible “coping strategies” that would help them to deal with such situations, should they be invited to become involved.

A Coping with Corruption Case Study

Case Study: Supplying Information – “Money on the Side”

The Detective’s Department has a central records unit, which holds computer databases. These record information on individuals’ registered addresses, their criminal convictions, and whether there are any prosecutions pending. This is confidential information about private individuals.

An officer working in the central records unit has access to the database information. He is contacted by a former colleague who left the police agency several years ago and now works as a private investigator for a company that is involved in debt collecting and also the guarding of private premises.

The security company does not have access to the police databases but recognises the business advantage it would gain if it were able to access confidential information on people they were being paid to investigate. The private investigator accordingly approaches his former colleague with a proposition.

He offers the police officer money in return for providing information on a regular basis. They discuss the matter and come to an agreement whereby prices are fixed for different types of information—one price for registered addresses, another price for previous criminal convictions, etc.

A junior police officer is posted to the unit and receives his training from the aforementioned officer. He is treated well by his more experienced colleague and is grateful for the consideration shown to an inexperienced officer.

However, one day the junior officer receives a phone call from the previously mentioned private investigator, asking for his friend. As he is not there, the investigator tells the junior officer that he has an arrangement with his colleague and could he just check a conviction record for him.

The junior officer, fresh from his training, realises that it is against the department’s regulations to release information to an unauthorised third party. He also knows that it is against the law. However, he feels an obligation towards his experienced colleague who has helped him thus far. What should he do?

Clearly, the Coping with Corruption package and the methodology we implemented in order to scope the prevalent types of corruption and generate realistic case studies are not quick-fixes for the problems of corruption in Hungary or any other jurisdiction. We believe the package is, however, one means for raising awareness of the problem, not just among recruits but in the Hungarian police more generally. Evaluation and assessment with groups of police recruits and trainers showed that this innovation was generally well received. Although Hungarian police training had not previously made use of such methods, it does provide a means of addressing the problems, dilemmas, and real circumstances of police behaviour, rather than just addressing the legal aspects, important though the latter may be. It is also important that such innovations are not introduced in isolation. At the same time that the Coping with Corruption package was being implemented, other measures were also introduced

that aimed to reduce corruption. These included the following: the ending of the system that empowered police to impose on-the-spot fines, which had facilitated bribetaking; immunity being offered to citizens who had been party to bribery incidents; the introduction of name badges for police officers in order that citizens can easily identify them; and the establishment of an anticorruption investigation unit at the National Police Headquarters and a mobile unit that targets police corruption on the streets. Such combinations of measures can work to address both the constant and variable factors that facilitate police corruption (Newburn, 1999, p. 17; Sherman, 1974).

The implementation of Coping with Corruption package combined with the other outlined measures indicated positive steps that evidenced a level of commitment within the Hungarian authorities to tackle police corruption. Nevertheless, the anticorruption work should not be regarded as complete. The international literature and research evidence suggests that police corruption is enduring and likely to recur. Indeed, since we completed our work in Hungary, reports suggest continuing problems: Keresztes Dimovne (2004) cites corruption as one of the remaining critical issues of ongoing police reform, a process characterised by frustratingly incoherent and inconsistent measures (pp. 29-30; see also Krémer, 2004). According to a U.S. Bureau of Democracy, Human Rights, and Labor (BDHRL) report released in March 2006, "low-level corruption among law enforcement officials in Hungary remained a problem' in 2005 and, further, the dedicated mobile anticorruption unit mentioned above was dissolved in 2004" (BDHRL, 2005). There is, therefore, no room for complacency. The measures that have been initiated to fight police corruption require ongoing monitoring and renewal. The Hungarian authorities must remain open to other anticorruption measures. This includes being prepared to undertake in-house and independent research to, *inter alia*, learn about and develop innovative means of countering corruption through observing practices across a range of organisations and jurisdictions, assess the types and levels of actually occurring corruption on a regular basis, and evaluate the effectiveness of measures that are adopted.

Conclusion

In conclusion, although we embarked upon this project cognisant of the importance of tackling corruption to the process of accession to the European Union, it is not primarily for that reason that the question of police corruption should be taken seriously in Hungary and equally so elsewhere. Here, we return to earlier comments about the relationship between policing and democracy. The public has a right to expect that the police, of all institutions in a democracy, will comply with the rule of law. Although they may forgive occasional lapses, they will not forgive endemic malpractice. It is for this reason that it is imperative for democratic governments, transitional or otherwise, to introduce strong measures to tackle the problem of police corruption at the individual and organisational level. Although concerns remain over levels of police corruption in Hungary and similarly the other states that joined the EU in 2004, the measures we have described here are foundational steps on the journey towards integrity-based policing. They are also measures that require ongoing consolidation, reinforcement, and renewal.

Endnotes

- ¹ We refer to *integrity* in the widest sense of the word, taking in *inter alia*, “fairness, behaviour, probity, equal treatment” (HMIC, 1999). Integrity thus includes, but is not limited to, corruption, which is the narrower scope of this article.
- ² The eight states are The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia.
- ³ While Hungary clearly has problems with corruption, we do not imply that it is a defining characteristic of the state or its people. Indeed, pre-accession, Transparency International placed Hungary 31st (of 99) in its 1999 Corruption Perceptions Index (CPI), and Holmes’s review of corruption perception surveys (1999) suggests that Hungary’s corruption rating compared well against other transitional states. Post-accession, Hungary was placed 40th (of 158) in Transparency International’s 2005 CPI (see www.transparency.org/cpi/2005/2005.10.18.cpi.en.html#cpi. Accessed 5/16/2006).
- ⁴ The HNP is a centralised organisation that operates under the 1994 Police Act. The Act “stresses depoliticisation of the police, harmonisation with EU standards, and requirements for the rule of law; police efficiency in fighting crimes; and creating a legal basis for police operations and accountability” (Keresztes Dimovne, 2004, p. 7)
- ⁵ A full discussion of the findings is presented (in Hungarian only) in Bendzsák et al. (2000a). Summaries in English can be found in Pap (2001, pp. 12-13), EUMAP (2002), and Keresztes Dimovne (2004, p. 30).
- ⁶ Police training in Hungary comprises two levels. There are vocational police schools, which are attended for two years following secondary school education, and there is the Hungarian Police Officer College, which provides a three-year higher educational programme (Keresztes Dimovne, 2004, pp. 21-23).

References

- Bendzsák, K., Benke, M., Búzás, P., Endrényi, K., Finszter, G., King, M., et al. (2000a). *Küzdelem a rendőri korrupció ellen (Fighting Police Corruption)*. Budapest, Hungary: Hungarian Police Research Association.
- Bendzsák, K., Benke, M., Búzás, P., Endrényi, K., Finszter, G., King, M., et al. (2000b). *Küzdelem a rendőri korrupció ellen: Otatási munkafüzet a rendészeti tanintézetek számára (Fighting police corruption: A workbook for police training institutions)*. Brussels, Belgium: European Commission PHARE Programme.
- Bruszt, L., & Reti, T. (1994) The rise and expected fall of functional corruption: A Hungarian case study. In R. J. Pohoryles (Ed.), *European transformations: Five decisive years at the turn of the century* (pp. 91-100). Aldershot: Avebury.
- Bureau of Democracy, Human Rights, and Labor (BDHRL). (2005). *Country reports on Human Rights Practices – 2005, Hungary*. Retrieved May 19, 2006, from www.state.gov/g/drl/rls/hrrpt/2005/61652.htm

- Cox, T., & Furlong, A. (Eds.) (1995). *Hungary: The politics of transition*. London: Frank Cass.
- Crank, J. P., & Caldero, M. (2000). *Police ethics: The corruption of noble cause*. Cincinnati, OH: Anderson.
- Dixon, D. (Ed.) (1999). *A culture of corruption: Changing an Australian police service*. Sydney, Australia: Hawkins Press.
- EU Monitoring and Advocacy Program (EUMAP). (2002). *Monitoring the EU accession process: Corruption and anticorruption policy reports*. Budapest, Hungary: Open Society Institute. Retrieved May 16, 2006, from www.eumap.org/topics/corruption/reports
- European Commission. (1998). *Regular report on Hungary's progress towards accession under Agenda 2000*. Brussels, Belgium: Author.
- European Commission. (2002). *Regular report on Hungary's progress towards accession*. Brussels: European Commission. Available online at http://ec.europa.eu/comm/enlargement/report2002/hu_en.pdf
- European Commission. (2003). *Comprehensive monitoring report on Hungary's preparations for membership*. Brussels, Belgium: European Commission. Available online at http://ec.europa.eu/comm/enlargement/report_2003/pdf/cmr_hu_final.pdf
- Her Majesty's Inspectorate of Constabulary (HMIC). (1999). *Police integrity – Securing and maintaining public confidence*. London: Author.
- Holmes, L. (1999, October 29 – November 6). *Corruption, weak states and economic rationalism in Central and Eastern Europe*. Paper presented to the Princeton University-Central European University Joint Conference on Corruption, Budapest, Hungary.
- Irk, F. (1997). Money-laundering – Organised crime: The Hungarian perspective. *European Journal of Crime, Criminal Law and Criminal Justice*, 5(3), 287-293.
- Keresztes Dimovne, E. (2004). Hungarian police reform. In M. Caparini & O. Marenin (Eds.), *Transforming police in Central and Eastern Europe: Process and progress* (pp. 1-45). Geneva, Switzerland: Geneva Centre for the Democratic Control of Armed Forces (DCAF). Chapter 3: Available at www.dcsf.ch/-docs/tranf-police/ch.3pdf.
- King, M. (1998). Policing change in Eastern and Central Europe: Some contemporary concerns. *Innovation: The European Journal of Social Sciences*, 11(3), 277-285.
- Klockars, C. B., Ivkovic, S. K., & Haberfeld, M. R. (Eds.) (2004). *The contours of police integrity*. London: Sage.
- Kranitz, M. (1994). Corruption in Hungary. In D. V. Trang (Ed.), *Corruption and democracy* (pp. 105-109). Budapest, Hungary: Institute for Constitutional and Legislative Policy.

- Krémer, F. (2004). Police integrity in Hungary: How the police have adapted to political transition. In C. B. Klockars, S. K. Ivkovic, & M.R. Habersfeld (Eds.), *The Contours of police integrity* (pp. 116-129). London: Sage.
- Moran, J. (2002). Anticorruption reforms in the police: Current strategies and issues. *The Police Journal*, 75(2), 137-160.
- Newburn, T. (1999). *Understanding and preventing police corruption: Lessons from the literature* (Police Research Series Paper 110). London: Home Office.
- Neyroud, P. (2003). Policing and ethics. In T. Newburn (Ed.), *The handbook of policing* (pp. 578-602). Cullompton, Devon, UK: Willan Publishing.
- Pap, A. L. (2001). *Street police corruption – a post-communist state of the art*. Paper presented to the 3rd Annual Kokkalis Graduate Student Workshop, John F. Kennedy School of Government, Harvard University. Retrieved May 16, 2006, from www.ksg.harvard.edu/kokkalis/GSW3/Andras_Laszo.pdf
- Prenzler, T. (2003). Corruption and reform: Global trends and theoretical perspectives. In T. Prenzler & J. Ransley (Eds.), *Police reform: Building integrity* (pp. 3-23). Sydney: Hawkins Press.
- Prenzler, T., & Ronken, C. (2001). Police integrity testing in Australia. *Criminal Justice*, 1(3), 319-342.
- Punch, M. (1985). *Conduct unbecoming*. New York: Tavistock Publications.
- Roebuck, J., & Barker, T. (1974). A typology of police corruption. *Social problems*, 21, 423-437.
- Sherman, L. W. (1974). Towards a sociological theory of police corruption. In L. W. Sherman (Ed.), *Police corruption: A sociological perspective* (2nd ed.) (pp. 1-39). Garden City, NJ: Anchor Press.
- Sherman, L. W. (1978). *Scandal and reform: Controlling police corruption*. Berkeley: University of California Press.
- Simpson, A. E. (1977). *The literature of police corruption*. New York: John Jay Press/McGraw Hill.
- Thompson, J. B. (2000). *Political scandal: Power and visibility in the media age*. Oxford, UK: Polity.
- Toth, L. (1999, October 7). *The fight against corruption of the Hungarian National Police*. Unpublished presentation. Portsmouth University, UK.
- Vígh, J. (1995). Social changes, crime and the police: Introductory report. In L. Shelley & J. Vigh (Eds.), *Social changes, crime and the police* (pp. 11-26). Chur, Switzerland: Harwood.
- Waddington, P. A. J. (1999). *Policing citizens*. London: UCL Press.

- Wilson, J. Q. (1968). *Varieties of police behaviour*. Cambridge, MA: Harvard University Press.
- Wright, A. (1997). Organized crime in Hungary: The transition from state to civil society. *Transnational Organized Crime*, 3(1), 68-86.
- Wright, A. (2006). *Organised crime*. Cullompton, Devon, UK: Willan Publishing.

Rob C. Mawby is Reader in Criminal Justice at the Centre for Criminal Justice Policy and Research, UCE Birmingham. He is the author of *Policing Images: Policing, Communication and Legitimacy* (2002) and co-author of *Practical Police Management* (1998). His research interests include the police-media relationship, police corruption, and the joint agency management of prolific and priority offenders.

Alan Wright is an independent scholar with research and consultancy interests in criminal justice and policing. He is the author of *Organised Crime* (2006), *Policing: An Introduction to Concepts and Practice* (2002), and co-author of *Practical Police Management* (1998). He is also co-editor of the *Handbook of Criminal Investigation* to be published by Willan in September 2006.

Mike King is research professor of criminal justice at the Centre for Criminal Justice Policy and Research, UCE Birmingham, and an expert on police and policing. He has published widely on national and international policing issues, and his works include *Public Order Policing: Contemporary Perspectives on Strategy and Tactics* (Leicester, Perpetuity Press, 1996, with Nigel Brearley).

Transformation Through Personnel Systems

Terry D. Anderson, PhD, Professor, School of Criminology and Criminal Justice, University College of the Fraser Valley, Abbotsford, British Columbia
Pat Holliday, MA, President, Principal Consultant, Prime HR Consulting Group, Inc.

If organizations wish to be successful in managing the turbulence of the modern world . . . they will view their people as a key resource and value knowledge, information, creativity, interpersonal skills, and entrepreneurship as much as land, labor, and capital have been valued in the past.

–Gareth Morgan

Introduction

The book, *Every Officer Is a Leader* (Anderson & Holliday, 2006) deals primarily with the *personal, interpersonal, team* and *organizational* aspects of leadership. Although it is not the primary focus of the book, the issue of the personnel side of leadership is of great importance. This article has been extracted from one of the online appendices of the second edition of the book.

Leadership is about people. Consider the analogy of building a house. To build a quality house, the first action is to choose the ideal location. Once the house is built, you can alter the house in minor to major ways, but you cannot change its location. Once the site is chosen, you are committed. The same applies to the hiring of people in the organization.

In the building of the house, many activities will be undertaken that will determine what the final house will look like:

- Do you carefully select the lumber from the available stock to ensure it is the best available?
- Or do you simply take from the top of the pile because it is simpler?
- Do you select tradespeople known for their quality work and who will provide you with a quality product?
- Or, do you hire a tradesperson based on the lowest quote?
- Or, worse yet, do you do the work yourself, with some false notion that you have suddenly acquired skills for which you have no training, based simply on the fact that because you have lived in a house, you know how to build one?
- Do you make yourself aware of the latest materials and technology in house building so that the house is up-to-date in terms of those technological advances?
- Or do you build the house based on previous experiences because “we’ve always done it this way”?

By now, you should be seeing similarities between house building and personnel systems. Choosing the wrong location is choosing the wrong person to hire or transfer in your organization. An interview with a recruiter in a major police organization revealed that recruit selection and hiring is just that—recruiting. There is often little

testing or careful consideration of qualities or styles that will serve the individual and the organization in later years as this person progresses in the hierarchy.

Choosing from the “top of the pile” is analogous to the seniority-based reward systems still employed by many organizations. How selective is the organization in ensuring that individuals are best suited, not to just the next level of promotion, but two levels beyond that? Not very selective in most cases.

Choosing tradespeople is analogous to the internal and external resources used by organizations in their personnel matters. Does the organization seek out the best in external consultants or simply look at the cost? Cost-based decisions are all too common and often result in the hiring of consultants who lack the expertise to accomplish the complex tasks associated with personnel management.

One of the practices of organizations, particularly in the public safety area, is to transfer from within the organization to human resources positions. A review of a number of public safety organizations showed that the people who transferred from within to human resources areas such as recruiting and selection, training, labor relations, and personnel management generally had little or no formal training, education, or experience in these areas. This posed some major problems.

In our analogy, this is tantamount to hiring someone with no formal training to do the electrical work in the new house. It will be quite a shock (no pun intended) when the house burns down and the insurance company will not pay for it.

It is an unfortunate reality that many organizations still select, hire, promote, and transfer individuals based on the use of outdated testing instruments (or none at all) and outdated or nonexistent job descriptions. Often, there is also a lack of competency descriptions for each position and/or methods of testing and developing competencies.

The consequence is that there are far too many examples of individuals who are transferred or promoted to positions for which they lack competence. This can also be said of many who are assigned responsibility for making the selections; they are not competent in the skills necessary to function at a high level of effectiveness in the selection process.

Once the house is built and it is discovered that the material used is of inferior quality, it becomes extremely expensive to repair the damage already done.

Good leaders ensure that the house is built right the first time.

One of the most important aspects of leadership, in which a transformative effect can be realized, is the careful assessment, selection, orientation, placement, and development of people. Finding and retaining high-quality, committed employees is absolutely critical to the success of any leader and any organization.

What Are the Tasks That Are So Critical to Success?

Whether an organization reaches its goals depends, to a great extent, on how these resources are recruited, selected, trained, and evaluated. These activities are commonly referred to as personnel or human resource management.

It is not unusual for a large police force or other justice or public safety organization to spend 80% to 90% of its budget on its human resources in areas such as salaries and benefits. Although the percentage will vary depending on the size of the organization, there remains little doubt that the human resource is the most expensive of an organization's resources.

The book, *Every Officer Is a Leader*, can introduce you to the knowledge and skills to assist you in improving your effectiveness as a leader. It is critically important to understand that it is the people who influence everything that occurs in an organization on an ongoing basis and that you, as a transforming leader, can have a positive impact on the organization through the effective and efficient use of personnel systems. In this way, you can become an effective systems manager.

To illustrate the need for enhanced personnel systems, pause for a moment and reflect on your own organization. When you walk into your human resources or personnel office, do you see row upon row of five-level filing cabinets, each bursting with dog-eared, yellowed papers of dubious usefulness? Or have you progressed to the point of having a computer-based system running on proprietary software that provides little of the information required for effective management and that is incompatible outside its own exclusive function?

Are your requests for information met with looks of, "I hope you don't mean anytime soon"?

When you are reviewing candidates for a transfer, are you able to obtain records on training, experience, and education? To what source do you refer when someone asks, "What am I responsible for, exactly?"

Does your organization have an effective performance-management system? What has your organization done to help you plan your career? What does your recruiting section do to ensure that the organization is hiring not only the best recruits, but also those who possess the qualities to become the best future supervisors and managers?

If you are in a police organization, you likely have many effective field-training officers but no leadership-training officers. Where are the people whose job it is to prepare leaders to assume the actual responsibilities of the positions into which they are promoted? Who has been professionally and competently trained in your organization to manage and lead the human resource management function? People promoted into human resource manager positions often are "rotating" in from some other section of the department without any previous training in human resource management.

Let us begin with a brief introduction to the concept of a system. There are four basic parts to any system: (1) *input*, (2) *process*, (3) *output*, and (4) *feedback*. Although it is somewhat of an oversimplification, we can view input in the organization as the "humans" who will become front-line staff.

The processes in a personnel system are separately identifiable but interdependent. A process can be the selection and training of a new hire or the development of existing personnel to become supervisors and managers.

The output is the product in terms of quality. Do we have quality front-line workers, quality supervisors, quality technicians, and quality leaders? To add complexity to these systems, we include subordinate activities as subsystems. Your role as a transforming leader is to introduce, change, facilitate, or manage the system and subsystem processes that will maximize the "human resource" contribution to the organization.

Lastly, the leader uses feedback to evaluate the effectiveness of systems and the people in them.

The questions asked of any organization with regard to personnel issues are virtually without limit. The purpose of this lengthy introduction is to demonstrate the complexities of the human-resource function within an organization and the need for leadership in human-resource management.

When complexity arises, the transforming leader is responsible for seeking and implementing the strategies that will optimize the efforts of the human resources people staffing the organization. Now it is time to identify those areas in which problems will have a significant negative impact on an organization's ability to reach its goals.

To focus this section, we will draw upon information obtained through the use of a print-based human resource instrument known as the Comprehensive Personnel System (CPS) (Anderson & Zeiner, 1989). The CPS was originally designed in 1986 as a print-based introductory seminar program entitled *Selecting and Developing Exceptional Employees*. It was field-tested between 1987 and 1991 with over 400 small- to medium-sized organizations.

The program was evaluated very positively; many of the companies have implemented parts or all of the CPS in their day-to-day operations. Most of the company owners and personnel managers who attended the one- or two-day sessions either had not taken a course in personnel management or had not implemented the principles to which they were introduced in such courses. To their satisfaction, many of the staff problems they encountered on a day-to-day basis were addressed in the seminar.

As a group, they reported that the following 15 of their most frequently encountered problems were causing them moderate to serious concern, from time to time. The information that grew out of the CPS seminars was used as a starting point in the examination of personnel issues.

Since the original seminars and subsequent consulting interventions in the police, corrections, customs, immigration, and private security fields, it has been discovered that there is a commonality of personnel issues regardless of whether an organization is in the corporate, justice, health, or public service sector.

The 15 most common problems identified were the following:

1. Not hiring the right person for a job
2. Failing to communicate clear performance expectations
3. Fear of telling employees the truth about their performance
4. Forgetting to reward or recognize positive performance
5. Losing track of personnel information
6. Failing to collect personnel information

7. Seeing employees make the same mistakes repeatedly without coaching them
8. Fearing legal repercussions when firing low performers
9. Misplacing files or information in files
10. Seeing employees not motivated to perform well
11. Seeing employees not doing what you want them to
12. Failing to capitalize on strengths and talents
13. Noting that absenteeism rates are too high
14. Believing employees can't problem-solve on their own
15. Believing that training takes too much time, is not cost-effective, or is almost always ineffective

Take a moment to reflect on this list.

- Are these comments that you would have made?
- Does your organization lose information?
- Does your organization fail to capitalize on strengths and talents?
- Does your organization fail to communicate clear performance expectations?
- Is yours a "sick" organization with inordinately high absences?

If you are answering "Yes," this article deserves your special attention.

Since it would not be possible in this article to deal with all the issues presented in the CPS seminars, the focus is on the first two critical issues:

1. Ensuring the selection the "right people for the right job"
2. Continuing the development and performance-management of human resources

To use the analogy of Jim Collins (2001) in his leadership bestseller, *Good to Great*, you want to get the wrong people off the bus and the right people on the bus and in the right seats.

Selecting and Developing Exceptional Employees

Often, organizations find themselves without a key person in a given position. This may be due to a poor front-end selection process that ignored future needs, failure to identify performance-specific needs in the position, a lack of succession planning, or simply a failure to properly identify organizational needs.

Usually it is not one activity (or lack of it) that results in this "weak link" in the organization. It is most often a number of interrelated events or activities. Sometimes these events are synergistic and can cause significant problems within the organization, and these problems increase significantly when no coordinated human resource management activities occur. To reduce this circumstance, it is the responsibility of a leader to pursue those activities that will help the organization select and develop the human resources that will support the organizational mission.

As will be seen in the nine-step process presented later in this article, every person in the organization can contribute to the betterment of the human resource processes.

Twelve key activities can be completed when selecting and developing the people critical to the performance and productivity of the organization:

1. Screen applicants more thoroughly, accurately, and efficiently.
2. Build a database of applicant and employee information.
3. Create relevant, behaviorally based interview questions and use them.
4. Assess work behavioral style of the applicant or employee.
5. Assess work behavioral style of each job.
6. Assess past work-performance history and references.
7. Match knowledge and skills of employees with jobs.
8. Contract for employee performance enhancement.
9. Conduct and record performance reviews as a positive learning experience.
10. Develop employee career plans and career path plans as an annual and ongoing process.
11. Reward and recognize employee performance and loyalty.
12. Communicate on a regular basis, using a shared language.

Pause for a moment and reflect on each of the 12 activities listed above. Reflect in terms of how your organization deals with each issue.

- Does your organization have a valid, reliable, and defensible selection process?
- Does your organization have a database of applicant and employee information (i.e., human resource information system) that meets all legislated privacy requirements?
- How does your organization assess work behavior in terms of both behavior required and behavior demonstrated by applicants?
- Do you conduct and record performance reviews? If you do, how effective is the instrument and process (i.e., performance appraisal) that you use?
- How do you reward and recognize employee performance?

The level at which you conduct these activities and the quality of instruments used will determine the output in terms of quality human resources.

Results You Can Expect When Using Personnel Management Systems and Human Resource Information Systems

To this point, the importance of an effective human resource/personnel management system has been stressed. Problems have been identified; you have had an opportunity to reflect upon the competency level of your own organization.

A list of the most commonly identified problems based on the CPS was provided. This was followed by a list of the 12 key activities that can be completed when selecting and developing human resources.

All of this information supports the idea that appropriately designed and used management and information systems and subsystems, with related tools and instruments, add productivity and efficiency to an organization or company by assisting leaders to more carefully manage all aspects of the human resource function. These are the four key components of this effective system:

1. How you select, orient, place, train, and evaluate people
2. How you organize things and people in the work environment to make the best use of people's talents
3. How you record and track all personnel data
4. How you use ideas to improve performance and morale on the job

The primary aim of personnel systems and their related human resource tools and instruments (e.g., CPS) is to provide the leader with the knowledge and tools needed to lead others effectively toward increased productivity, effectiveness, and efficiency. Because employees differ in regard to motivation, age, maturity, experience, competency, and style of approaching people and tasks, it is important to understand each employee or applicant on an individual basis.

These types of instruments (when combined with other data within an organization's human resource information system) will assist those in the organization who are responsible for developing human resources to get to know each applicant or employee more quickly and carefully. A record of this information that can be accessed instantly, thus enabling leaders to make more effective personnel and leadership decisions.

Nine Steps in the Personnel Assessment and Development Process

To further focus studies in the area of personnel systems and human resource management activities, the following nine-step process is presented. The topics are again derived from the Comprehensive Personnel System. These steps will help the leader assess the areas he or she thinks need attention in the organization.

Reflect on each area in terms of your own organization. Where you feel your organization is lacking, you may have identified a problem for your organization and you as a leader.

1. Specify Knowledge and Skills Required in a Position.

Both skills and knowledge areas need to be defined for each position in the organization. Relationship, task, and leadership factors also need to be specified.

Job analysis is the first step any organization should take after identifying a position as an organizational need. A variety of methods are available. Internally, the organization can use questionnaires and interviews of incumbents and specialists or, specifically designed, commercially available instruments to provide insight into the specific knowledge and skills required.

The Comprehensive Personnel Process

One such instrument is the Job Style Indicator. It is used to specify all of the skill areas required by an employee so he or she will be most effective in a given job. It is important to remember that the more carefully the job analysis is conducted, the more accurately the requirements for that job will be understood and communicated to those doing the interviewing to select new personnel.

2. Specify Appropriate Work-Style Behaviors in Each Job.

The job analysis for any position requires the inclusion of work-style behaviors. These dimensions, as they are referred to in an assessment center, are those behaviors deemed acceptable for the position sought; they are included in the job description. For example, a position can require the demonstration of sensitivity when dealing with issues. Such positions could include the coordinator of an employee assistance program or an investigator responsible for sexual harassment complaints.

The Comprehensive Personnel Process

Job Analysis—Job Specification—Screening

1. Job Analysis

Identify Required . . .

- Results
- Job tasks
- Job skills
- Social skills
- Behavioral styles
- Difficulty level
- Training requirements

2. Job Description

Specify in Writing . . .

- Results expected
- Tasks
- Skills
- Extent of authority
- Job style pattern
- Performance criteria
- Progress evaluation date

3. Screening Process

Rate Applicant . . .

- Skills
- Knowledge
- Work history
- Extent of training
- Extent of education
- Application form
- Decide on short list.

Selection—Placement—Orientation

4. Applicant Interview

Assess Applicant's . . .

- Skills
- Knowledge
- Work style (i.e., PSI)
- Perception of job (i.e., JSI)
- Past work experience
- Interview impressions
- Testing results

5. Placement

Rate Applicant's . . .

- Skills
- Knowledge
- Training required
- Work/job style fit (PSI/JSI)
- Interview performance
- Past work references
- General suitability

6. Applicant-Job Fit

Contract for, or Inform about . . .

- Work tasks
- Expected results
- Work behavioral style
- Appraisal criteria
- Appraisal dates
- Work team placement
- Length of probation

Performance Appraisal—Career Path Planning—Research

7. Performance Review

Give Feedback About . . .

- Results achieved
- Problem areas
- Performance of tasks
- Relationship factors
- Work style/job fit
- Performance goals
- Probationary status

8. Development Plans

Give Feedback About . . .

- Results achieved
- Problem areas
- Performance of tasks
- Relationship factors
- Work style/job fit
- Performance goals
- Probationary status

9. Career Path

Specify Agreements About . . .

- Future job potentials
- Plans for development
- Competition dates
- Lateral transfer options
- Research to validate selection criteria

As mentioned, one of the instruments available to determine the appropriate range of work-style behaviors is the Job Style Indicator (JSI). The JSI is a pencil-and-paper job-style analysis tool used to specify a work-style behavioral profile so that it can be compared to an applicant's work behavioral style profile. By seeking agreement on a range of scores on each style dimension of the JSI, managers and supervisors can agree upon an appropriate work style for each position in the organization.

Asking employees in a particular job to complete the JSI is also useful in having them more precisely understand the job they do. (More information regarding the JSI is available at www.CRGLLeader.com/everyofficer.)

This style (or range of acceptable behaviors) can be included as a part of each job description. This agreement can be achieved by using the JSI to define the appropriate work style for each position in the organization, as above. Those employees assessed as being very successful in a position should have input into describing the requirements of that position so that managers who have never done that job can appreciate and consider their successful workers' points of view.

An effective analysis requires a careful assessment of all of the dimensions of a job. An annual (or even more frequent) review of job requirements often reveals that jobs change over time.

3. Specify a Job Description.

Through an effective job analysis and the use of instruments such as the Job Knowledge and Skills Inventory, the organization prepares a job description for every position. A job description must provide a clear explanation of the duties to be performed and the conditions under which they will be performed. It contains the job specification, which outlines the required skills and knowledge (Step 1) and abilities and characteristics (Step 2) necessary for the satisfactory performance of the job.

This description will include the core competencies of the organization. These are the basic but essential qualities required for the position; they relate to what the organization does or would like to do well. For example, the ability of a new police officer to mediate a domestic issue is not only a skill possessed by the officer but also a service that the organization wishes to deliver well. It is critical that each position has a clear job description that attaches all of the information obtained in Steps 1 and 2 and also the following:

- **Any performance objectives and time-line performance requirements.** If evaluation is results-based, specific performance objectives must be provided.
- **A clarification description of roles in relation to other positions.** How does this job fit with other jobs, including functional relationships such as reciprocal interdependence in which the performance is contingent upon the performance of another?
- **A clarification of the extent and limits of authority in the position.** Defining responsibilities and accountability is particularly important for functional (staff) positions. What decisions is the person responsible to make without reporting to a higher authority?

- **A clear line of reporting authority.** Defining reporting responsibilities is particularly relevant in this era of flattened organizations and work teams. Adherence to the concept of unity of command is paramount.
- **Information on how problems can best be solved.** What is the performance expectation in problem-solving? Which problems come under the person's jurisdiction?
- **Progress evaluation criteria (how the employee will be evaluated).** How is success in the position measured?
- **Incentives or rewards that will be given if goals and performance criteria are reached.** This is necessary in a system of increment promotions.
- **Performance evaluation dates and who is to conduct them.** This is relevant to new hires on the increment system and others on a standard evaluation cycle.
- **Terms of probationary appointment.** This is relevant for a new hire or for a position that carries a probationary period (e.g., promotion or specialist unit).
- **Conditions of termination or transfer.** Providing a description of behaviors that will definitely cause an employee to be fired or lose the position.

Again, it is time to stop and reflect. The critical question is whether your organization has up-to-date job descriptions for all positions. If not, why not? Many traditional police organizations (and other rank-based organizations) have emphasized rank rather than function.

In a recent review of job descriptions in a relatively large police organization, job descriptions had not been revised for 20 years. Consider how much policing has changed over 20 years and how relevant those job descriptions must now be.

Some managers prefer generic job descriptions because they proffer the "flexible" management style. Lack of clarity, however, can cause significant problems for the leader.

For example, at one large police organization, it was decided that the operational and administrative roles, at the middle management level within an operational unit, would be separated and staffed by two employees, rather than the previous one. A section of the organization was restructured to show the two separate positions: one operational and one administrative. The two positions reported to a single senior manager. This created a problem because up to 10 operational supervisors, in effect, would now be reporting to both positions.

This organization did not see the need to make one of the positions a *staff position* and remove it from the operational chain, providing functional rather than operational authority. Since policing positions are often based on the rank that is deemed appropriate to fill the position, rather than function, the 10 supervisors saw only the two equal ranks above them, without clear direction regarding the accountability chain.

The result was a gross violation of the standard principle of *unity of command*. The operational advice received depended on which of the middle managers was present during the supervisor's shift. Soon the supervisors began "cherry-picking." If they knew they wouldn't get the answer they wanted from one of the middle managers, they simply went to the other.

Accountability and reporting must generally be the responsibilities of one person. Even when functional authority becomes an issue, authority and lines of accountability must be very clearly specified.

Now that considerable time has been spent extolling the virtues of detailed job descriptions, a significant caveat must be raised. In *Every Officer is a Leader*, the story was told of the acting personnel officer who called the supervisor to inform him of a transfer with, "There's a hole out there and you're available" despite a prior agreement between the supervisor and the personnel officer that this transfer would not occur as this would be the third tour in this position. The acting personnel officer's concern was only to meet his immediate need to staff a position. All he saw was that the supervisor was qualified and available.

There is a tendency in organizations to look for "perfect fits." That is, staffing personnel look only for those skill sets outlined in the job description. The mind-set is to meet the present need with little or no consideration for future needs.

There is also a tendency to train only to those skill sets. The result is often the loss of beneficial skills and qualities that a person possesses outwardly or innately. Growth in the person is not encouraged. It is requested and sometimes demanded that the person do only those tasks specified within the job description; behavior outside those parameters is seen as inappropriate.

When preparing job descriptions, do not build "boxes" from which there is no escape, no chance for freedom, and no chance to grow and contribute in new ways to the position and the organization. Every position should be seen as simply a stepping-stone, whether vertical or lateral, to other areas in the organization.

In one police agency, the job descriptions became the criteria on which all performance reviews were based; the job descriptions were elevated to the status of *working agreements*. This meant the chief and a new hire would both sign the document to indicate between the parties that the job description had been read, understood, and agreed.

This seals the document. The working agreement is reviewed while a new employee or a newly promoted employee is being coached on the job and also when it comes time for a scheduled performance review.

4. Screen Applicants on "Paper" Qualifications First.

Paper screening is relevant at all levels of the organization. Selection processes (e.g., assessment centers) are costly and not welcomed in times of budgetary restraint unless they can be shown to be cost-effective and efficient.

Every effort should be made to ensure that the "right" people move into the appropriate job roles. At this point, the need for an effective human-resource information system becomes especially evident. All information pertaining to an applicant must be centralized in a database.

For a new hire, the information is generally limited to a résumé, background check, educational transcripts, references, employment records, questionnaires, employment application, medical information, security clearances, and hiring

pretests. A note of caution: ensure your hiring pretests and hiring processes comply with the provisions of the appropriate labor legislation in the hiring jurisdiction.

When screening an applicant for promotion or placement, the database for that person becomes considerably larger as service records, training records, awards, disciplinary defaults, and post-hiring education must be compared to the job description/specification.

Computer course instructors often use the expression “garbage in; garbage out.” The ability to make reliable decisions at this stage of the selection process depends almost entirely on the reliability and validity of the accumulated information. This information may be in the form of human resource instruments such as applicant tracking and employee testing or references, applications, education transcripts, pretesting, and investigations.

Checking these documents provides the opportunity to evaluate the extent of each applicant’s training and experience. It will also provide the opportunity to arrive at a shortlist, based on close examination of paper applications, letters of reference, and résumés. Given the significant costs associated with the selection process, early screening is essential, but premature screening should be avoided. If the job specification within a job description requires a specific level of training or education, the selection and placement of a person without the required level is counterproductive.

It is important to remember the importance of reviewing the paper qualifications in terms of the abilities to do the (entry-level) job *now*, the apparent abilities to learn the job during the training provided, and the apparent abilities that will provide the organization with individuals capable of moving well beyond entry-level positions.

Do not look just for good frontline personnel; look for future supervisors and managers. Some recruiters disagree with this approach because they believe in hiring people who are good frontline officers who do not seek promotions. This is based on the presumption that *job satisfaction* will remain high without vertical movement in the organization. Because there are so many variables in the concept of job satisfaction, this selection approach is highly unsound.

5. Assess Information and Prepare for the Interview.

By this stage in the process, there is a clear definition of the skills, knowledge, and behavioral qualities required to fill the position. How well the human resource information system database on the applicant has been constructed will profoundly affect the value of the interview process. As limited time is available, the primary purpose of the interview will be to focus on the *critical factors* in job performance.

The employment record may reveal a pattern of frequent job changes. This needs to be explored. If it is due to the applicant’s inability to *socially adapt* within the workplace, it should “raise a flag” in relation to the workplace culture.

- Is there anything in the database that suggests an integrity issue?
- Do some areas appear unusually vague?
- Did the recruiter provide a realistic job preview, such as time that must be spent in a reserve police program or a victim services unit?

- What was the evaluation of the applicant?
- Does pretesting show anything contrary to information provided by the applicant?
- Is each piece of information relevant? Does each apply to job performance?

While assessing this information, it is important to place the appropriate weighting on all areas relevant to the job function. If there is an identified weakness in an easily corrected skill area, should this weakness be given as much weight as a weakness in an attitudinal area, which may be difficult to correct?

Numerous evaluation instruments are available for assessing an applicant's suitability for employment. Whatever is used, however, must comply with the labor legislation in effect for your area. If a human resource staff is not familiar with the labor laws that impact the hiring processes, steps must be taken immediately to correct this situation.

One of the sources of information an organization may choose to employ is the assessment center. Each level of the center is designed with specific dimensions for the level in the organization that an individual aspires to reach. This may be entry level (recruit), supervisor, manager, or executive. Although the assessment center process has been validated, it is not without controversy.

In a policing example, a candidate for promotion attended the supervisor assessment center where one of the exercises was interviewing a troubled employee. The information provided indicated the likelihood of an alcohol abuse problem.

The candidate had just completed the Senior Police Administration Course at the Canadian Police College, Ottawa. The course included training in employee interviewing provided by highly qualified staff from the academic environment. The candidate scored well in the interview portion of the course in Ottawa, which coincidentally, used a very similar scenario to the one now attended.

At the supervisor assessment center, however, he was given a failing score. The center administrator later reviewed the assessor's notes, which revealed comments such as, "Obviously unsure of himself. Kept answering questions with questions."

Clearly, the assessor (who is generally one or two ranks higher than the position being assessed) was unfamiliar with the *reflective interviewing technique* the candidate was using from his training in Ottawa. This technique was generally preferred in situations dealing with troubled employees when an effort was being made to have the employee accept responsibility for his or her problem. The assessor's bias was for a direct and traditional police "shape up or ship out" approach.

As a consequence of the assessor's lack of knowledge and expertise, the candidate received a low score, which consequently resulted in his elimination from the promotional competition despite his demonstration of a higher level of competence than other candidates. Despite this *anomaly*, an assessment center provides valuable insight into candidates.

Although the assessment center method can be costly and time-consuming, it has demonstrated validity in matching people to jobs. To do this, it is critical that the skills and knowledge required to perform a job satisfactorily be determined and documented.

6. Interview Short-Listed Applicants.

The purpose of the interview is twofold:

1. Does the applicant have the knowledge and skills to do the job (after training, if relevant)?
2. Where does the applicant rate in relation to other applicants?

Superior interviewing skills are critical at this stage. The interviewer must maximize the interview time. Given that a structured format (e.g., use of standard questions prepared in advance, often to comply with labor issues) guides most interviews, the interviewer must have the ability to present problem-solving questions and ethical scenarios to further test the applicant's skills, knowledge, and character.

Also, the use of open-ended questions provides a skilled interviewer the opportunity to lead and focus on areas of concern when more information is desired. Behavioral interviewing is another helpful approach often used to elicit greater specificity of information from applicants. This involves probing into when, where, with whom, and how an applicant has demonstrated specific skills.

There is a propensity in policing to attribute the ability to perform selection interviews based on factors other than specific, task-related training. Consider the investigator who must possess the skills to perform the investigative function. Certainly some of the basic interviewing skills are similar. An interviewer must, however, have intimate knowledge of the selection process, the job requirements of the position, the relevant labor laws, and how to probe for those important hidden qualities that have the potential to affect the organization in a positive or negative way.

Also, it is a fact that no one is endowed with skill by virtue of rank. It is an unfortunate reality that police organizations (and other paramilitary organizations) promote people into positions in which the skills required to perform the job are automatically attributed to them by rank. Not all detectives/investigators make good selection interviewers.

Not all senior officers make good personnel/staffing officers. These are positions that must be clearly described in terms of competencies as outlined earlier in this section. Then only those who possess the skills necessary to demonstrate competency should be placed in these critical positions.

7. Hire, Orient, and Train New Employees.

As soon as the applicant is hired, the socialization process must begin. This is socialization not only with peers, trainers, and supervisors, but also with the organization itself.

There are two performance expectations for a new hire. First, there is a learning expectation in the form of achieving training standards that are clearly articulated. Although this training usually occurs somewhat in isolation by a training section, unit, or off-site facility, the recruit must understand the organizational consequences of not meeting the training standard. The extreme is that failure to meet a training standard may result in termination of employment.

Also, organizational expectations regarding standards of behavior must be outlined. This is particularly true when the training facility is off-site and operated by the organization's training staff or when it is another organization's training facility. Even if the training is conducted outside the hiring organization, never let the recruit feel abandoned. Take steps to ensure that he or she always feels "connected" to the organization.

The real orientation to the organization occurs when people receive the informal "whisper-in-the-ear" approach. Positive or negative role models let new employees know what is really expected of them in terms of acceptable performance. Very positive values or very negative values can be transmitted at this time.

During the orientation process, new employees should be provided with the following information to realize maximum performance with minimum confusion.

- **The vision, mission, purpose, philosophy, and goals of the organization.** If there is a displayed vision or mission statement, provide a copy. (You obviously want your new employees to "buy in" to how and why you want them to accomplish things.)
- **The policies, practices, and procedures.** The new employees will need to know these to be most effective and least confused. (Ideally, you would already have prepared a staff manual with the information in it. If employees are not provided with a manual, make sure a copy of the policies is easily accessible to them.)
- **The job descriptions and working agreements for their new positions.** This will include everything needed for employees to understand what is required of them (as mentioned above).
- **A formal letter describing the terms of appointments.** This includes length of probationary periods and vacations, amount of pay, etc.
- **The way the performance review and promotion system works in the organization and when the first performance review will occur.** If the training facility is off-site, ensure that the new employees understand it is a collaborative evaluation process.

8. Conduct Performance Reviews.

No other segment of personnel systems seems to have caused as much controversy and discord in policing and other justice and public safety sectors. How do you evaluate employee job performance, from a new recruit on probation to a veteran officer seeking promotion? This subject is the topic of many books. The purpose here is not to define the instruments and techniques but to generalize the "when and why and how."

A performance appraisal is required on numerous occasions. These may be administrative in nature, such as an increment pay raise, or in response to an employee who asks, "How am I doing?" New hires are subject to a high level of evaluation during their training. This is usually followed by an on-the-job evaluation.

The results for most are an increment promotion from the probationary stage. Performance appraisals are required as part of a complete performance management program. It is essential that both the employee and the employer have a clear picture of the employee's level of performance. Promotion, assignment, or even continued employment may hinge on a series of appraisals, and a number of issues are of concern.

The performance of the individual must be compared only with established standards of performance or performance objectives. Setting standards of performance is a

task that requires specific skills. When some parts of the job are quantifiable, such as the number of violator contacts for traffic officers, setting standards is relatively easy (provided, of course, the person writing the standard remains realistic).

When, however, a part of the job is not quantitative but qualitative, such as relationship with peers, the task becomes very difficult. Failure to establish the standards results in performance reviews that contain comments such as, “Looks good in uniform” and “Gets along with peers.” Of what value are these comments? Nil!

The organization should review the various types of performance appraisal instruments available today.

- What type of rating scale should be used? Graphic? Behaviorally anchored?
- What type of training will supervisors and managers require to use the instrument?
- How much will it cost?
- What behavior is considered unsatisfactory?
- How does the organization change unsatisfactory behavior?
- What will be done with the appraisal?

The answer to the last question is not as obvious as it appears. One organization forwarded its appraisals to the staffing department, where the front scoring page was removed. The balance of the document, which contained all the dimensions and observed data, was tossed into a box in a corner of the office where it was left for a year and then shredded. When this practice became known, you can well imagine how much effort went into doing a meaningful appraisal.

When conducting an appraisal interview, keep in mind the purpose of the interview. Is it an interview of an “up-and-comer” with outstanding performance and no deficiencies noted or of a young employee who, if behaviors do not change, will be at risk for termination of employment?

Although the interview style will be different, the outcome should be the same. Both are appraised of observed behavior that relates to the performance of their current jobs or that is relevant to a future position such as leadership. Both should be asked for commitments to future behavior. One is continued growth and the other is a commitment to change.

The appraisal interview of an employee whose performance does not meet the standard presents unique issues. It is especially important with these employees to highlight the positive things they have done and identify and write down specific changes. Then, have them commit to those changes by mutual agreement. Supervisors also need to commit to giving the necessary coaching and support to get the desired results. Later, if the employee meets the specified requirements, he or she will have hope to be taken off probation.

To develop morale with those who are underperforming, communicate to them that you believe there is a real possibility they can develop into good employees. Otherwise, their next three to six months will be too stressful (or boring) and will only add to their anxiety—or add to their low performance, while they find another

job at the organization's expense. Give them support and feedback every week or two for a while, until progress is sure.

Because termination of employment is a potential consequence, the employee's commitment should be in writing. It is unlikely that there will be grievances from legal or union sources when the employee has been told ahead of time that certain tasks must be performed to specific standards for the employee to remain in the position.

Also, there must be written documentation that they, in fact, did not perform to those established standards. Most employees will not argue with facts stated in terms of behaviors that they admit to or failed to perform adequately. When in doubt, however, always refer to legal counsel and the labor laws in your jurisdiction.

Commitment cannot be open-ended. If a change in behavior is required, timelines must be set. This is similar to individual goal setting, in which the change must be specific, measurable (observable), and time-constrained.

9. Plan for Career Path.

For those employees who demonstrate leadership or managerial potential or some other needed expertise in the workplace, a career path can be identified and discussed with them in advance of an opportunity or job opening. With the trend toward flatter organizations, *vertical climb* and career path are no longer synonymous. Lateral movement within the organization is a modern-day reality. Fewer promotional opportunities exist, and providing a meaningful career path horizontally is a major human resources task.

Career path planning is a collaborative activity between the employee and the employer. The ultimate responsibility, however, lies with the employee. Only the employee can agree to and follow up on the steps deemed necessary to achieve his or her chosen career path. It is also not up to anyone else to decide what success is.

Think of success as a state of mind. For example, the police officer that becomes a member of a forensic identification unit begins a carefully scripted path of education and experience to become the best forensic identification officer he or she can be. There is a very real possibility that others, who have been socialized in the traditional hierarchy in which success is obtained by traveling vertically, will refer to the individual as "dead-ended" in the job. They do not see the growth that is occurring in the individual and how this person's perception of success is to be the very best at what he or she does.

Career-path planning requires honesty on the part of the organization and the leaders who represent it. During a promotional competition in one police organization, a section manager approved and forwarded a request by one of his staff to enter the competition. The process guidelines were such that by forwarding the request, the manager was acknowledging the member's readiness to compete and, if successful, be promoted.

Within a few days after the request was received, the staffing unit received correspondence from the same section manager now requesting the member's transfer due to his inability to meet even minimal performance standards. Was the manager's approval of the promotional process simply another way of attempting to remove a problem employee without having to resort to confrontation?

Instruments such as the Job Style Indicator and Personal Style Indicator can help an employee understand the style behaviors appropriate for current and future positions. This can help the employee formulate a motivating internal career plan and a personal development plan, feel more challenged by the work, and assume more responsibility. This combination of factors will likely even more strongly motivate him or her to seek specific positions.

People Information Is Performance Information

By using personnel systems, the leader will come to know those who work for him or her better. If a leader knows them well enough, the leader comes to understand what challenges them as individuals. If the leader comes to know what areas of responsibility people want to assume, then he or she has a grasp on incredibly motivating information. People information is leadership information.

Herzberg, Mausner, & Snyderman (1993) assert that we cannot motivate people by improving work conditions, raising salaries, or shuffling tasks:

*KITA—the externally imposed attempt by management to “install generators” in employees—has been demonstrated to be a total failure. The absence of such “hygiene” factors as good supervisor-employee relations and liberal fringe benefits can make workers unhappy, but the presence of these factors will not make employees want to work harder. Essentially meaningless changes in the tasks that workers are assigned to do have not accomplished the desired objective either. **The only way to motivate employees is to give them challenging work for which they can assume responsibility.***

To challenge people, it is necessary to select, hire, and train the “right people for the right jobs.” Leaders need to provide challenging work with rewards that are meaningful. Leaders need information systems that will allow them to do all these things in the most efficient and effective way. Leaders need well-designed personnel systems such as performance management, career development, and computer-based training.

All these things have a significant cost, but the cost pales in terms of the cost of not having a well-motivated, committed, and ever-developing workforce. People are the most expensive resource the organization will have. Treat this resource well, and there will be a significant “return on investment.”

If we can communicate with followers clearly enough to understand and appreciate the desires of their hearts—and provide opportunities for them to find the realization of these desires to some extent—we will likely find increased performance, loyalty, and longevity as a result. In achieving this result, we will have been transforming leaders.

Resources for Leadership Assessment and Development

This article is extracted from an online appendix for the 2nd edition of the book *Every Officer Is a Leader* (2006). The book is available at www.Trafford.com.

Assessment resources that are mentioned in this article, the Personal Style Indicator (PSI) and Job Style Indicator (JSI) are available at www.ConsultingCoach.com/EveryOfficer. These tools can be used throughout the selection, placement, orientation, promotion, and performance management process to enhance

communication about the nature of the person in relationship to the nature of the job and help ensure person-job fit, job satisfaction, and performance.

Bibliography

- Anderson, T. D., & Holliday, P. (2006). *Every officer is a leader: Transforming leadership in police, justice, and public safety*. Victoria, British Columbia: Trafford Publishing.
- Anderson, T. D., & Zeiner, B. (1989). *Selecting and developing exceptional employees*. Abbotsford, British Columbia: Consulting Resource Group International, Inc.
- Collins, J. (2001). *Good to great: Why some companies make the leap . . . and others don't*. New York: HarperCollins.
- Hammer, M., & Champy, J. (1993). *Reengineering the corporation*. New York: HarperCollins.
- Herzberg, F., Mausner, B., & Snyderman, B. B. (1993). *The motivation to work*. New Brunswick, NJ: Transaction Publishers.

Terry D. Anderson, PhD, has experience teaching more than 7,000 adults for over 30 years in the areas of communication, problem-management, and organizational leadership in the School of Criminology and Criminal Justice at the University College of the Fraser Valley in Abbotsford, British Columbia. He has also served as an adjunct instructor/professor at the California Command College, the Justice Institute of British Columbia, Simon Fraser University, Trinity Western University, Union Institute of Sacramento, and the University of British Columbia. In 2002-2003, he taught executive coaching at the graduate level in the School of Business at Royal Roads University.

Dr. Anderson has conducted significant executive coaching and mentoring, organization development, strategic planning, team development, and/or executive leadership development projects for police agencies such as Abbotsford Police, Folsom Police, New Westminster Police Service, Vancouver Police, San Diego Police, and the Royal Canadian Mounted Police. He has done similar work with corrections, the Canada Customs and Revenue Agency (CCRA), the Ministry of the Attorney General, and nonprofit agencies. He has also consulted to small business and Fortune 500 firms such as General Telephone and Electric (GTE) and The TORO Company. Senior executives in business and government sectors have trusted him as a coach, mentor, confidant, strategic planner, and implementation coach. His new focus is on developing strategic leadership competence that has an impact on community safety.

Dr. Anderson has personally authored and published over a dozen assessments, training and development tools, and books (including *Transforming Leadership*, 1998), some of which have been translated into Japanese, Dutch, Swedish, Hungarian, French, and Spanish, and are being used in nine countries. His Personal Style Indicator and related publications have benefited over a million people. He is a professional speaker who has delivered practical, hard-hitting messages on leadership effectiveness at conferences to over 65,000 people.

Dr. Anderson completed his undergraduate work at California State University in psychology and English (BA, 1967), and his master's level work in post-secondary education and counseling (MA, 1973). His professional education certification was completed at the University of Victoria, British Columbia, Canada (1971). He completed his doctoral studies through Columbia Pacific University in San Rafael, California (1992). He received the designation of Certified Executive Coach (CEC) from the Worldwide Association of Business Coaches (2002). He is a former Advisory Board Member for COMDEX, 1997-1998 and former International Network Director (1993) and Member (1990-1995) of the American Society for Training and Development (ASTD). He is currently a member of the Western Society of Criminology.

Pat Holliday is an experienced leader with over 30 years of military and police service in operational and administrative supervisory and management positions. His affiliations have included charter membership in the Institute for Ethical Leadership and a directorship in the National Police Leadership Forum. He is currently the president and principal consultant of Prime HR Consulting Group, Inc. Prime HR assists public and private organizations in the evaluation and development of their people assets so they may effectively respond to the business and "real world" challenges of today and tomorrow. Prime HR, with Pat as the senior consultant, assists organizational leaders, at all levels, in the development of their leadership competencies through processes of evaluation, client-specific training, action learning, and coaching.

Pat's background includes 15 years of service in the Canadian Forces Reserves, Military Police. After reaching the noncommissioned rank of master warrant officer, he commissioned and earned the rank of captain before taking his release. His policing background spans 32 years in the City of Vancouver Police Department. Assignments included the Patrol Division, Dog Squad, Provincial Training Academy, Traffic, Communications, Provincial Joint Forces Operations (JFO), and Major Crime Section. He retired in 2001 from the department's Human Resources Section, which provided services to over 1,400 police and nonpolice personnel. Awards received include the Police Exemplary Service Medal, Chief Constable's Commendations, and the Commanding Officer's Commendation from the Royal Canadian Mounted Police.

Pat has a management certificate in Human Resources Management and a bachelor of technology in management degree from Canada's premier polytechnic institution, the British Columbia Institute of Technology (BCIT), Burnaby. He earned his MA in leadership and training with the specialization in justice and public safety leadership from Royal Roads University, Victoria, British Columbia. His graduate thesis research focused on learning in the workplace.

Pat is associate faculty in the School of Leadership Studies at Royal Roads University where he teaches in the MA in Leadership and Training degree program. He is part-time studies faculty in the British Columbia Institute of Technology, School of Business, where his areas of expertise include organizational behavior and management. He also teaches in the BCIT International Program and serves on the advisory committee for the bachelor of technology in management degree program. Pat is a coauthor of *Every Officer Is a Leader: Transforming Leadership in Police, Justice, and Public Safety* (2000, 1st ed., CRC Press).

Guidelines for Conducting Law Enforcement Backgrounds

John L. Bellah, Corporal, California State University, Long Beach Police Department

Ethics in law enforcement is one of the hottest topics today—as in the past. Law enforcement agencies need to keep ethics in mind in order to continue to generate trust from the communities that they serve. To maintain an ethical department, they need to hire ethical people.

Even if not mandated, a thorough pre-employment background investigation should be conducted on each law enforcement candidate considered for hire, be it sworn or sensitive civilian positions, especially those involving accessing law enforcement records and databases. The pre-employment background investigation should cover previous employment; verification of the candidate's education; any past criminal activity; and civil court records, such as lawsuits, and divorces, motor vehicle operating histories, drug usage, finances, and military history. The background investigation should also include interviews of relatives and past and current spouses, neighbors, friends, and coworkers.

Part of the investigation should include a form signed by the candidate and witnessed that states that the candidate will be disqualified if deliberate falsehoods, errors, and omissions are uncovered during the background investigation.

In addition to a psychological evaluation, a polygraph test should also be administered. While the polygraph is controversial, it is a useful investigative tool with a competent operator, which should establish the applicant's level of truthfulness.

Tempted by today's media glamorization of law enforcement and the allure of wearing a badge and carrying a gun, many will attempt to get into law enforcement—for the wrong reasons. Often applicants will “shop” for agencies that have loose background standards and do not administer polygraph testing so that past issues won't be discovered.

Finding qualified law enforcement applicants is always a huge problem these days. Unfortunately, with court rulings, affirmative action, and consent decrees, many agencies are tempted to lower their standards to fill the ranks. While moral standards and rules of today's society are constantly changing, the law enforcement professional is supposed to be beyond reproach. Lowering hiring standards and allowing those with questionable ethics to become employed will eventually result in embarrassment for the agency, not to mention the enormous expense incurred through lawsuits.

Some years back, a fellow officer detained a college-age girl to investigate a possible alcohol violation. The detainee suddenly spoke with an Irish brogue, explaining that she recently came to the United States from Ireland, and produced both a green card and social security card for identification. The officer immediately recognized both documents to be counterfeit and placed her under arrest. Investigation revealed that

she purchased both documents, which not only concealed her true identity but also “accelerated” her age so she could enter night clubs and purchase age-restricted items, such as alcohol.

Later, the arresting officer was contacted unofficially by members of a large and highly respected law enforcement agency. It seemed that the “lass” was a nonsworn member of that agency and was in the process of becoming a sworn officer; “. . . and would the arresting officer drop the charges as this girl will make an outstanding police officer?”!

Boys will be boys, and girls will be girls, right? Do we have some ethics issues here? You bet! In my state, it is a felony to possess a forged or counterfeit state, corporate, or government seal.¹ Social Security, INS cards, and driver’s licenses all contain a seal from the issuing agency. There are other misdemeanor violations concerning the possession and use of counterfeit identifying documents. Additionally, this “outstanding” candidate was in possession of alcohol when she wasn’t of legal age. She also falsely identified herself to the officer to avoid prosecution.

Maybe individually these aren’t major issues; however, collectively they show a pattern to deceive. How will this individual react to stress further into her career? Will she lie on a report, to her supervisor, to establish probable cause, while testifying in court, or during an internal investigation?

I feel that in this situation, the agency members were wrong in attempting to quash the incident, for what would happen if the officer were to become involved in a high-profile case and the involved parties have the resources to hire highly skilled attorneys? In cases such as this, these attorneys will utilize top-flight investigators—probably former municipal, state, or federal investigators that will conduct deep background investigations and dig up every bit of minutia on everybody—cops included. What kind of damage could this type of information do to the prosecutor’s case, to the officer’s career, to his or her employing agency, or to the head of the agency? Negative retention—when individuals are hired or retained when they shouldn’t be—is another hot topic for some attorneys.

Think something like this can be covered up? Think again. Incidents, considered long buried in the past, can become uncovered if enough resources are utilized. The O.J. Simpson case is a prime example. Simpson’s “Dream Team” of top-flight attorneys and investigators knew that the prosecution’s case against Simpson was strong—so they went after the investigators. In legal parlance, if you can’t attack the report, go after the writer of the report. In this case, the defense went after LAPD Detective Mark Fuhrman, who quickly ended his career by retiring and was eventually prosecuted for perjury² for statements he made to an author, which he denied making during his sworn testimony.

Many agencies choose to “farm out” their pre-employment background investigations to private agencies—citing that backgrounds drain resources. It is suggested that agencies conduct their own investigations, as once a substandard employee is hired and passes probation, that agency is “stuck” with him or her for the next 20 years. Farming background investigations out to a private agency could become a mistake, depending on the caliber of the private agency. The private investigator may not have the skills necessary to conduct the investigation properly.

The department investigator has a vested interest in the department and should realize that someday, he or she may have to work with the candidate and should have some type of feel as to what kind of officer the candidate would make and whether he or she would fit in with the department.

Choosing the right investigator to do pre-employment backgrounds is important, and finding the person with the right attitude, motivation, and demeanor is also important. There are many officers that are quite successful in uniformed patrol, who lack the motivation to be an investigator—and in some cases, the opposite is true. On the other hand, there are some investigators who are great criminal investigators but lack the skills and motivation for other investigation categories.

A successful background investigator must have people skills; the hard-nosed “cop” image can be counterproductive in this case as the successful investigator must seem approachable as he or she is trying to draw out information from civilians, whose only contact with law enforcement may be when stopped for a traffic offense or reporting a crime. In other words, the background investigator should project a positive image of the department.

The proper clothing is essential. Uniforms should be avoided. The same goes for dark suits and sports jackets; leave those for the internal affairs and homicide investigators and the TV cops. Light-colored business attire or, if agency policy permits, “dressy casual” attire will help make the officer appear to be more approachable. Some background investigators will not wear a coat and secure their weapon in an ankle holster or in their briefcase when conducting interviews. That decision, however, is best left to the individual and/or agency policy.

There is far more to doing background investigations than sending questionnaires and awaiting their replies. To ensure maximum return of the questionnaire, a stamped-self-addressed-envelope should be included.

In addition, fingerprinting, standard checks of the subject’s credit, and driving record should be obtained. The applicant should bring in the pertinent personal documents, such as birth, marriage, divorce, and naturalization certificates; school diplomas; and military papers. These documents must be the *original* documents so the investigator can examine them to establish that they are genuine, as there are a lot of counterfeit, altered, and forged documents out there. After examining the *original* documents, the investigator can photocopy them for the file and return the original documents to the applicant. The investigator should attest that he or she has personally seen and examined the original documents.

Let’s face it. There a lot of people who want to enter law enforcement but can’t due to lack of qualifications or acts they committed in the past. With the Internet and today’s computer technology, identification, diplomas, birth certificates, and other documents are easily counterfeited.

These certificates should also be verified with the issuing agency. One candidate submitted a photocopy of his DD-214 to me showing an “Honorable” discharge from the Army. Casual questioning indicated that he had a less than honorable tour of duty, and a close look of his DD-214 showed that a judicious amount of correction

fluid had modified this document to read “Honorable” and then “creative Xeroxing” attempted to cover the alteration.

While faxes, e-mail, and telephone conversations can save the investigator time, it is best to conduct as many interviews in-person as possible because body language is an important means of communication. Personal interviews should be conducted of friends, employers, coworkers, spouses, former spouses, and neighbors.

What kind of individual is the candidate? Is he or she eligible for rehire? What is his or her work ethic? Unexplained absences or patterns of tardiness? What is the caliber of individual he or she associates with? Any indications of substance abuse? Living beyond their financial means? Spousal and/or child abuse?

Occasionally, the investigator is going to encounter reluctance to some of these questions—and if so, why? Is the friend/relative/neighbor’s reluctance based on fear that the candidate may be psycho and may harm them if he or she doesn’t get the job? On the other hand, I remember receiving an unsolicited telephone call from a friend of a candidate who claimed to be a cop, extolling all of the positive things about my applicant, which contradicted the information that investigation revealed.

The investigator should have at least one original signed waiver and several photocopies that can be given to the appropriate individuals. Many employers have strict policies on giving out employee information, limiting that information to employment confirmation and salary rate. For obvious reasons, that is not enough information to properly evaluate a law enforcement candidate, which is why I want to conduct personal interviews on coworkers, supervisors, friends, and “significant others.” Assigning investigators that have “people skills” is useful in drawing out this information. One method I have used to overcome reluctance is to state the following: “We want to hire this individual as a police officer. This means that we will be supplying him or her with a gun, a high-powered vehicle, and the authority to enforce the laws. *Do you feel comfortable with this individual protecting you, your family, and your community?*”

At least two different residence checks should be made. One is scheduled in advance, and the other is unannounced. Is the candidate living above or below his or her financial means? What do neighbors say? What kind of friends hang out there? The landlord should also be interviewed, as well as local nearby businesses such as drycleaners, markets, and liquor stores.

Law enforcement agencies in the areas where the candidate lives and works should be checked for any adverse contacts. Additionally, both the civil and criminal indexes of the local courts that serve these areas should also be checked and copies made of pertinent documentation.

“Laterals,” or those who have served with another law enforcement agency, can be very good candidates—or very bad. Often an agency will try to get rid of a “problem child” by giving glowing recommendations. I have had police administrators “purge” an applicant’s package of detrimental information and then lie to my face about what an outstanding person he or she is. That is one reason I will try to track down that

agency's street cops to get their feel on the candidate. Reluctance to talk should raise red flags.

Many years back, I was doing a seemingly simple background investigation for my department on a person who on the surface appeared to be an outstanding candidate. In addition to working security for a college, he was also a reserve police officer that was highly regarded by both his peers and supervisors from both agencies. Everyone told me that they would hate to lose him and he would be eligible for rehire if he were to leave. His chief at the college, however, made an off-the-cuff remark that the candidate "... needed a different wife." This raised a red flag, as this was not his first marriage. Upon further questioning, however, his chief refused to elaborate.

A review of the paperwork submitted showed the candidate and his wife used to live in staff/faculty housing on campus; however, they currently were living off-campus, and at that point, the college had selective amnesia as to the reason for his sudden departure from on-campus housing. When I conducted my residence checks, there were indications that his standard of living was below what would be the norm for his and his wife's combined incomes.

I went to the courthouse and made my standard checks of both the civil and criminal indexes on my candidate. While many states don't allow criminal databases to be used for employment purposes (fingerprint checks accomplish that), criminal and civil records are usually considered "public records." Often these files contain a lot of information, and it is often worth the time and effort to obtain them. Also keep in mind that I was conducting a background investigation on the candidate, however, acting on a hunch, I also ran his wife's name when at the courthouse.

While the candidate was "clean" (he had to be to maintain his status as a police officer), his wife had been convicted for embezzlement from the place she was previously employed. A substantial sum of money was involved. While she was sentenced to probation, the court wasn't amused, and she was convicted of a felony—embezzlement.

Piecing everything together from the investigation and interviews, my conjecture is that our candidate helped his wife obtain a job at the college where he was working and she got caught. Private universities often try to avoid unfavorable publicity and either quietly terminated her or she resigned in lieu of termination. This made the couple ineligible to reside in on-campus housing, forcing them to move off-campus.

During my checks of the candidate's residence, I also observed indications of possible substance abuse. I believe that our candidate applied for a position at my department, as it was a better-paying job, and once past probation, he would try to find a job for his wife—preferably in a department that handled cash—thus supplementing their incomes to support their "habits."

Obviously, this thorough and comprehensive background investigation prevented my employers from being defrauded by this applicant and his wife.

Endnotes

- ¹ California Penal Code #472
- ² Ostrow, R., & Serrano, R. A. (1998, April 3). Justice Department won't prosecute Mark Fuhrman. *Los Angeles Times*.

John L. Bellah has conducted numerous pre-employment background investigations during his 28+ years in law enforcement and has extensive training and practical experience in conducting backgrounds. Additionally, he formed the Background Investigation Unit for his previous department. Bellah has written numerous articles on law enforcement and automotive issues for various publications. Currently, Bellah holds the rank of corporal with the California State University, Long Beach Police Department.

Winning Mind, Warrior Spirit, Cop Body

Brian Willis, President, Winning Mind Training, Inc.; Advisory Board Member for ILEETA; National Advisory Board Member for *Police Marksman*

There are many definitions and interpretations of the terms *winning* and *warrior*. For some, these words have negative connotations, while for others they are more than words; they represent a way of life and are inspirational and motivational. The purpose of this article is to explore these philosophies and how they apply to the thousands of men and women who have chosen to serve as law enforcement professionals. These dedicated men and women are part of today's warrior culture. While the focus here will be on law enforcement professionals, this culture is expansive. It encompasses law enforcement officers, dispatchers and 911 operators, corrections officers, and military personnel. The warrior culture embodies such values as loyalty, self-discipline, respect, honor, integrity and ethical behavior. Psychologist and renowned law enforcement trainer Alexis Artwohl, PhD, refers to law enforcement officers as "democratic ethical warriors." According to Artwohl (2004), "Democratic ethical warriors are a major part of the foundation on which democracy is built. Without them, we would descend into terrifying chaos and brutalization by tyrants" (34). Accepting that law enforcement professionals are warriors, the terms *officers* and *warriors* will be used interchangeably throughout this writing.

The Pyramid of Preparation

Complete preparation of the mind, body, and spirit for any eventuality is critical for all warriors. The Pyramid of Preparation is a concept created to assist those who have chosen the path of a law enforcement officer, the path of a warrior, to gain an understanding of what is required for total preparation for this honorable calling. The pyramid analogy was chosen for very specific reasons. Pyramids bring to mind images of powerful structures that have been around for thousands of years and have withstood the test of time due to their structural integrity. That structural integrity relies on a number of factors:

- The sides of the pyramid are complete and equally developed.
- The blocks of the pyramid must be strong to ensure the structure's overall strength and integrity.
- The mortar that binds the blocks together must be strong.

The Four Sides

The Pyramid of Preparation has four sides:

1. *Skills*. Warriors must develop a level of competency in the wide range of skills necessary for their profession. *Communication skills* are critical for all warriors. Communication is an extremely broad topic and involves both verbal and nonverbal elements, understanding threat cues, and the skill of articulation. Articulation is the ability to explain both verbally and in writing why the

warrior's actions are reasonable and necessary in that moment of time based on the totality of circumstances. *Empty-hand skills* are another important aspect for officers. The officer must have the ability to establish and maintain control of subjects using varying degrees of resistance and aggression. These skills include the fundamental principles of balance, power, and mobility as well as the technique elements of control, handcuffing, searching, pain compliance, stuns, and strikes. Officers must also master basic weapon skills with all the less-lethal and lethal weapons systems they utilize. This includes an understanding of not only how to use the weapon but when to use it. *Vehicle operation skills* are another element of this component of the pyramid. This skill set includes understanding vehicle dynamics and how to manipulate the three basic inputs in any vehicle (i.e., braking, steering, and acceleration) in order to maintain a stable platform.

2. *Tactics*. Once officers develop a degree of proficiency in all skill areas, they must develop an understanding of the tactical and operational application of those skills. Officers must develop the ability to apply basic principles and concepts to utilize empty-hand skills and be successful in multiple assailant confrontations, defeating edged weapon attacks, defeating disarming attempts, and defeating a variety of ground fighting confrontations. This also includes the ability to use empty-hand skills in close confines of hallways, bathrooms, or other rooms cluttered with furniture. The list of tactics necessary can be expansive and will depend on the types of missions the officer will be tasked with throughout his or her career. Tactics also include the aspects of downed officer rescues, rapid intervention and deployment in response to active assailants, cover and movement, building clearing operations, cell extractions, vehicle stops, and vehicle assaults.
3. *Fitness*. Warriors must develop a strong foundation of aerobic and anaerobic fitness. They must then develop an understanding of the difference between lifestyle fitness and combat fitness. Combat fitness refers to training the body and its energy systems in preparation for high-intensity, short-duration confrontations in which warriors often find themselves. In addition to strength and endurance, warriors must develop explosive speed and power in preparation for combative events. To accomplish this, warriors and warrior trainers must begin to move away from some of the traditional fitness activities often conducted in training academies and move towards more functional strength and fitness activities that will better prepare them. Examples include limiting the amount of long, steady-state cardio training (e.g., long, slow company runs) and including more high-intensity interval training. Traditional strength training programs often include a number of bodybuilding types of exercises. These exercises will help officers get stronger and look better but must be assessed on their degree of functionality. In the field, the officer will very rarely be on a flat, stable surface with a weight belt, lifting straps, and a spotter. Instead, the officer will be on uneven surfaces, in positions of compromised stability with a duty belt and body armor. Therefore, the incorporation of compound exercises, odd shaped object lifting, and ballistic and plyometric training that develop explosive speed and power and functional strength will better serve the needs of officers in preparation for success.

4. *Mental Preparation and Conditioning.* It has been said that the mind of a true warrior is what sets him or her apart from others in the midst of battle. What is it, then, about the mental preparation and conditioning of a warrior that allows for performance at higher levels in the midst of chaos and confrontation? In the military as well as in law enforcement, all warrior trainees go through the same basic training, yet in the field, they perform at varying levels. Some excel under pressure and consistently perform at the highest levels, while others are frozen with fear or overcome with anxiety and perform poorly or fail to perform at all. Even among the top performers, there are a select few who rise above and stand out as true leaders. This has been the reality as long as men have engaged in battle. In 500 BC, Heraclites (as cited by Grossman, 1999) identified this issue when he wrote to his commander from the battlefield:

Of every 100 men, 10 should not even be here, 80 are nothing more than targets. Nine of them are the real fighters. We are lucky to have them, they the battle make. Ah, but the one. One of them is a warrior, and he will bring the others back.

What is it that determines how officers will perform when confronted with the realities of interpersonal human aggression? Of all those who serve in warrior professions, what is it that separates the nine that are the real fighters from those that are nothing more than targets? And what is it about “The one – the warrior?” If it is the mind of a true warrior that sets him or her apart from others in the midst of battle and in all aspects of life, then what is different about the way that true warriors train and prepare their minds?

Some would argue that since everyone in basic training receives the same exposure to mental preparation and conditioning, this may not be the deciding factor. The difference, however, lies with commitment, responsibility, and control. The training staff at basic academies has control over training as they determine what drills will be conducted, how many repetitions of any given skill will be performed, what information will be presented during the academic sessions, and what exercises the students will participate in. What they do not control is what goes on inside the mind of the individual officer. The mind is the most powerful weapon an officer has, yet it is not issued by the agency and cannot be inspected by the range master or armorer. There is no owner’s manual or manufacturer’s guarantee; however, inside the mind of trainees lies the key to unlocking the warrior spirit that is within them.

The Building Blocks

The blocks used to construct the pyramid represent the learning that occurs throughout a warrior’s lifetime. While training is something that is controlled by someone else, the warrior controls learning. People can be made to attend training, but they cannot be forced to learn. Warriors seek opportunities to train and choose to learn. Some of the blocks are created in formal training sessions; others represent informal or self-directed learning activities; and the remainder represents lessons learned everyday during interactions with victims, witnesses, complainants, suspects, and fellow warriors. A warrior’s learning takes place in the classroom, in the parade room or briefing room, in the patrol car, on the streets, and in the coffee shops during briefings and debriefings. Warriors learn from the experience of others through books, videos, articles, conferences, and seminars. They learn from

the hard fought lessons taught in battle. Warriors understand that they must learn from both victory and defeat, from the battles they and others have walked away from and from the battles in which warriors have lost their lives so that others may live. Warriors choose to learn and as a result continually add new, stronger blocks to their Pyramid of Preparation.

The Mortar

Commitment is the mortar that serves to bind together all of the building blocks that form the Pyramid of Preparation. As with any structure, the mortar is critical to its structural integrity. Bound together, the blocks have tremendous strength and the ability to withstand the test of time and weather the storms. These storms are caused by shift work, continual public scrutiny, exposure to human suffering, traumatic events, and interpersonal human aggression. Without commitment, the blocks stand in isolation and are likely to slip, break down, or collapse at the moment of truth when a warrior is confronted with challenges to his or her integrity, honor, or physical safety.

Commitment is not something that can be given to a warrior by a trainer or manager; rather it is something that must come from within. Not only must commitment come from within, but also it must be continually reaffirmed throughout the officer's career. Commitment is about officers accepting responsibility for their personal development and growth, their careers, and ultimately their destiny. William Jennings Bryan once said, "Destiny is not a matter of chance, it is a matter of choice; it is not a thing to be waited for, it is a thing to be achieved." Accepting responsibility empowers officers to take control of their destiny and develop a powerful "response-ability"; the ability to respond effectively and professionally in any situation or circumstance. This response-ability creates within the warrior a powerful sense of calm, focus, control, and confidence. Personal commitment can be broken down into three main areas:

1. **Commitment to Winning** – Winning encompasses far more than the outcome of a mission or event. Winning is a mindset, a philosophy that incorporates integrity, honor, and commitment. In every confrontation, warriors understand that winning is not only the goal but also the only acceptable option. In these confrontations, winning takes many forms. It encompasses all use-of-force options, ranging from professional presence and the use of effective communication skills to gain the voluntary compliance from a subject to the use of lethal force to win a confrontation by taking life. In *The Acts of King Arthur and His Noble Knights*, Steinbeck (1993) addressed the importance of this mindset:

This is the law. The purpose of fighting is to win. There is no possible victory in defense. The sword is more important than the shield, and skill is more important than either. The next weapon is the brain. All else is supplementary. (78)

This is valuable advice given to a knight on his quest. The analogy of the sword and the shield highlights the critical importance of offence over defense in winning any battle. Warriors possess this winning mind and know that the only purpose for fighting is to win. They are confident in their skills, tactics, and fitness. They are committed to their mission. They are physically and

mentally prepared to do whatever is reasonable and necessary to accomplish their mission. For a warrior, winning is about doing what is right and then being at peace with the decision made and actions taken.

2. **Commitment to Training** – Warriors make a personal commitment to learn and continually train their minds and bodies. They understand that all that is really needed for a training session is themselves and a commitment to train. Training partners, training equipment, training courses, and training facilities are all “nice to have, not “need to have.” Warriors know how to improvise and create all these things. They understand that they can always train in their mind. Others make excuses and abdicate the responsibility for training to their agency or organization; they are not willing to commit their personal time and money to train. The unfortunate reality for those with this type of thinking is that there has never been, and never will be, an agency killed or injured in the line of duty. Officers are the ones who get killed and injured in the line of duty. Yes, there is an onus on agencies to provide adequate training to their personnel; however, warriors accept that they are the ones who will go into harm’s way and so they make a personal commitment to train. Warriors train until they master all the basic elements of a skill or tactic and then continue to train even more. They understand that an advanced skill is simply a basic skill mastered.
3. **Commitment to Family** – Warriors understand the importance of family and make a commitment that family will always be *the* priority. Family includes parents, siblings, children, significant others, and close friends. Family also refers to their brother and sister warriors with whom they train and go into battle. In order to fulfill this commitment, they must also fulfill the previously mentioned commitments to training and to winning. In the powerful book on the Spartan society, a society of warriors, and the battle of Thermopylae called *Gates of Fire*, Pressfield (1999) talks about the fact that Spartans would excuse without penalty the warrior who loses his helmet or breastplate in battle but punish with loss of citizenship rights the man who discards his shield. This was because a warrior carries a breastplate and helmet for his own protection, but his shield was for the protection of the whole line. The analogy of the Spartan shield represents all of a warrior’s physical and mental training and preparation. It represents wearing body armor every shift regardless of the weather. It represents all aspects of the Pyramid of Performance and all levels of personal commitment. It represents all those elements because warriors don them not only for their own safety and well-being, but for every member of their “family.”

The Winning Mind

Being a warrior means developing and aligning the mind, the body, and the spirit. During our examination of the Pyramid of Preparation, we explored physical preparation during the discussions on skills, tactics, and fitness. We began to explore the meaning of winning as an element of commitment. So what then is the winning mind, and how does a warrior acquire it? Developing the winning mind for officers is a journey, not a destination. It is a continual life-long process that embraces the pursuit of personal excellence. The pursuit of personal excellence is not about seeking perfection, being the best, or being as good as or better than anyone else. It is about striving to be better tomorrow than you are today. It is about being the best that you can be physically, emotionally, mentally, and spiritually in

every aspect of your personal and professional life. It is about the commitment to personal growth and development. Warriors develop habits of excellence. Aristotle had this to say about excellence:

Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but rather we have those because we have acted rightly. We are what we repeatedly do. Excellence then is not a single act, but a habit.

For warriors, an important element of developing the winning mind is acceptance, beginning with the realities of their profession. These realities include the acceptance that although many of the people they will deal with are decent hard-working people, they will also face the dark side of our world. In their careers, warriors will come face to face with evil. That evil will come in many forms. It will be in the form of child abusers, rapists, spousal abusers, gang members, drug dealers, and people who use violence and intimidation as the tools of their trade. Evil comes in the form of people who are willing, able, and intent on hurting or killing the officer to facilitate escape, save face. They do this as a badge of honor or just for the fun of it. They will deal with victims of all shapes, sizes, ages, races, religions, and educational and economic backgrounds. They will deal with victims of violence, abuse, and man-made and natural disasters. Warriors must develop mechanisms to deal with evil so they do not allow it to follow them into their homes and affect their families and personal lives. Warriors understand that reality is far different than the perceptions created by television and movies. They acknowledge and embrace these realities and know that they do make a difference in the lives of the people they are sworn to serve and protect.

Warriors acknowledge and move past the childhood philosophies that it is not whether you win or lose that is important but rather how you play the game. They accept that it is okay to win. Warriors understand that neither training nor combat are games, and winning is vitally important. Winning isn't always pretty, but it always beats the alternative. In the process of winning, officers may get punched, kicked, stabbed, sprayed, or shot. Accepting this reality, they train and prepare to work through these events and remain calm and focused while eliminating the threat and winning the confrontation. Warriors accept they will have to use force and at times may use extreme violence to win. They may have to kill someone to win. They accept this reality and train for it preparing their mind and their body by harnessing the power of their imagination.

Imagination is a powerful component of the subconscious mind that works continuously to shape our beliefs and expectations, yet for most people, it lingers untapped below the level of consciousness. An officer's imagination is focused on success. Officers accept the importance of training and not only train the way they want to fight; they also train with imagination and emotion knowing that only then will they fight the way they train.

What does it mean to train with imagination and emotion, and why is it so important? When warriors train, they always imagine using their skills in combat to ensure that they win the confrontation. Those who are non-warriors simply go through the motions. At the firing range, for example, others simply see a paper target in which they need to get a certain number of holes to qualify. Warriors, however, imagine

that the target represents someone who is attempting to kill them, attempting to take them away from their family, their friends, from the people that are important to them in their lives. Warriors prepare to win lethal force confrontations; others simply prepare to qualify.

In the combatives room, warriors imagine that their training partner is an actual attacker who is attempting to hurt or kill them and take them away from the people that are important to them. Others simply go through the motions seeing only a striking bag or a training partner. The nonwarriors go easy on each other so no one looks bad or gets injured. Even in training, warriors keep fighting until they have won. If they do something that is less desirable, they fix it and make it more desirable. If they get slashed, stabbed, or shot in training, they fight through it, becoming even more aggressive in defeating the threat, knowing that they may get injured in combat and yet they still have to win. Others simply go through the motions. They stop when they do something less desirable and harangue themselves for screwing up. When they get shot or stabbed, they stop, and say, "I'm dead. I would have been killed by that." Warriors, on the other hand, understand that if you are dead, you don't know it. If you are alive, you keep fighting. Warriors imagine themselves winning confrontations using all their skills, tactics, fitness, and mental preparation. Outside of the training arena, warriors harness the power of imagery, which allows them to focus and direct the imagination in every aspect of their pursuit of personal excellence.

Training in this manner allows officers to accept that if they do find themselves in a lethal force encounter and take a life in a righteous manner that it is okay to feel good about it. It is okay to acknowledge that they acted as a warrior and did what was necessary in that moment of time, and it is acceptable to feel good about themselves and their training and preparation. They also accept that if it does bother them, there are peer support groups and police psychologists who can assist them. Warriors understand the signs and symptoms of Post Traumatic Stress Disorder (PTSD) but do not automatically expect to experience and struggle with them.

Through training with imagination and emotion, warriors learn to accept that every situation is winnable. This is not arrogance or the "superman syndrome" in which they believe they are bulletproof or impervious to harm. Rather, it speaks to the acceptance that conflict is fluid and often unpredictable, and there will always be unexpected elements. Warriors live by the credo, "Train hard for the unexpected, then when it happens, it will be neither hard, nor unexpected." Warriors think in terms of offense not defense. When dealing with interpersonal human aggression, there are only two roles one can occupy: (1) the predator or (2) the prey. As Phil Messina (2004), a retired NYPD officer and law enforcement trainer, says "Being a predator isn't always comfortable, but the only other option is to be the prey, and that is not acceptable" (personal communication). Not only is being the predator uncomfortable for some people, the use of the word and its philosophy is uncomfortable for some. Generally, this is because people tend to associate the word *predator* with evil. They conjure up images of sexual predators or people who prey on the elderly or the weak. We need to step back for a moment and consider predatory animals in the wild. What is it that makes predators in nature successful? They are successful for without success, they and their offspring would die. The traits and characteristics that most commonly come up in this discussion are cunning; skill; ferocity; understanding of opponents' knowledge; and utilization of the environment, speed, strength,

power, controlled aggression, cover, concealment, movement, and team tactics. These same tactics and characteristics are taught in law enforcement officer safety courses, incident command courses, and leadership courses around the world. Warriors develop these traits and characteristics, and on every mission, they are the predators. A simple example to highlight this point is a building search or building clearing operation. Patrol officers, detectives, and tactical officers conduct these operations thousands of times every day in North America. A warrior with the predator mindset approaches that clearing operation expecting and wanting to find a subject behind every door and in every room. Instead of being startled when a subject is encountered, the warrior is calm and in control and in this way is more effective in controlling the subject, utilizing a level of force that is reasonable and necessary. If a room is entered and no one is located, warriors are disappointed. Former West Point psychology professor and Army Ranger Lieutenant Colonel Dave Grossman (2005) addresses the fact that only a predator can hunt a predator and that law enforcement professionals are predators under the authority of law. Warriors with this predator mentality are calm, confident, and professional in every situation. They are unlikely to use unreasonable or unnecessary levels of force. As the warrior, the predator understands that survival is a by-product of winning. The reverse is not true.

A warrior's journey to develop the winning mind also includes personal growth and development outside of his or her chosen profession. This growth takes place by being actively involved in the lives of family through many roles as a father or mother, son or daughter, brother or sister, husband or wife, friend, coach, and mentor. It also takes place through community involvement—be that through youth sports, parent groups, community associations, volunteer work, or church groups. Warriors are action-oriented and therefore take action roles in all these areas, while others remain passive and stay on the sidelines often critical of those who are involved. Through that action and the way they live their lives, warriors leave a powerful legacy. To a warrior, a legacy is not something you leave behind when you die; it is something you create every day of your life.

The winning mind can really be broken down into one simple acronym: WIN. The WIN acronym is something used by Lou Holtz, the famous college football coach, to help keep his players focused. It stands for "What's Important Now?". Lou Holtz used to tell his players to ask themselves that question 35 times a day to keep themselves focused during class, during study hall, in the weight room, on the practice field, on the sidelines during a game, and on the field during a game. Warriors live their lives by this simple creed. They ask themselves this question on every call and on every mission as well as when they are with their family and their friends. It allows them to prioritize the things in that moment. This ability to prioritize allows warriors to focus on what is important and do what is right based on that assessment.

The Warrior Spirit

There is an endless philosophical debate about warriors and whether they are born or made. This article is not written to enter into that debate. Instead, it is meant to focus on "the warrior spirit." It is the author's contention that everyone has within them the warrior spirit. The job of law enforcement trainers and leaders is to help those entering into the profession to find that warrior spirit within themselves. Once

they have discovered it, the mission then becomes to embrace it, harness it, foster it, nurture it, and allow it to grow and flourish.

The term *warrior* is gaining greater acceptance within the law enforcement profession as people begin to acknowledge and accept that law enforcement professionals are warriors. The reasons it has not been a part of the mainstream law enforcement vocabulary are many. One of the most common reasons given is that the term is not politically correct, and it often brings with it negative connotations. Yet when you take a group of people and have them close their eyes and allow the image of a warrior to come to mind, whatever that image is for them, the traits and characteristics of the images produced are exceedingly positive. This list of traits and attributes include courage, integrity, honor, selflessness, controlled aggression, skill, confidence, competence, the ability to manage fear, intelligence, common sense, and empathy. These are not only the traits of warriors; these are the traits of leaders in every element of society. In his book *Unleashing the Warrior Within*, former navy seal Richard J. Machowicz (2000) addresses the issue of warriors as leaders as well as the issue of commitment to personal growth and development when he says "The warrior fights because he believes that he is fighting for something good, something positive, something that will improve the quality of the world around him. The warrior never forgets that he is an example and so will always act accordingly. He is a leader, and when there is no one else to lead, the warrior must lead himself forward to a different, higher standard" (p. 180).

Grossman adds to this list of warrior traits and attributes when he says, "Warriors must have a capacity for violence and a love for their fellow man." Warriors are not something to be feared by society; they are something to be cherished and honored for their sacrifice and dedication.

There is much confusion about the true warrior spirit within the warrior professions. There are some who think that being a warrior is about machismo, about bravado. They think that being a warrior is about racing to all the hot calls, or starting fights to show others how tough they are. They think it is about taking unnecessary risks for the glory or the accolades. Those who truly possess the warrior spirit understand that one of the many virtues of a warrior is humility. Carlos Castaneda (1991) addressed the issue of humility as follows:

A warrior is on permanent guard against the roughness of human behavior. A warrior is magical and ruthless, a maverick with the most refined taste and manners, whose worldly task is to sharpen, yet disguise, his cutting edge so that no one would be able to suspect his ruthlessness.

Warriors do not need to start fights to show others how tough they are. They are confident in their skills and tactics. They understand that there is a time to fight and a time to walk away. When they fight, they fight to win. They fight with tenacity and ferocity. When they walk away, they walk away with their heads held high. They walk away with pride and honor because it is a choice. Because of that humility, warriors have an aura of professionalism that they bring to every conflict.

Being a warrior is not an 8:00 to 4:00 job. It is a way of life. It is about who you are and how you live your life every hour of every day. The warrior spirit is like an eternal flame that burns within each and every warrior. It is not something that is

turned on in the locker room at the start of shift and turned off again at the end of the day's assignments. It is the spirit in the mind, body, spirit connection. Albert Einstein perhaps said it best when he said "To be a warrior is to learn to be genuine in every moment of your life."

Regardless of whether you believe warriors are born or made, the Pyramid of Preparation provides a framework for the development and preparation of all warriors regardless of rank, experience, or assignment. As you continue on your journey through life working towards being "The one – The warrior who will bring the others home," let this serve as a guide for you. Continue to ask yourself, "What condition is my pyramid in?"

References

- Artwohl, A. (2004). *Warriors: On living with courage, discipline, and honor*. Boulder, CO: Paladin Press.
- Castaneda, C. (1991). *Power of silence*. Washington, DC: Square Press.
- Grossman, D. (1999, September). *Keynote address*. Western Canada Use of Force Conference, Calgary, Alberta, Canada.
- Grossman, D. (2005, September). *Keynote address*. Canadian Officer Safety Conference. Victoria, British Columbia, Canada.
- Machowicz, R. (2000). *Unleashing the warrior within*. New York: Hyperion.
- Pressfield, S. (1999). *Gates of fire*. New York: Bantam.
- Steinbeck, J. (1993). *The acts of King Arthur and his noble knights*. Noonday Press.

Brian Willis began his law enforcement career in 1979, and over the next 25 years, he worked as a patrol officer, tactical officer, patrol supervisor, and trainer. He is currently the president of Winning Mind Training, Inc., an innovative company specializing in performance enhancement. In September of 2005, Brian was awarded the first Lifetime Achievement Award at the Canadian Officer Safety Conference in recognition of his contribution and commitment to officer safety in Canada. In addition to numerous law enforcement certifications, Brian holds a certificate in adult learning from the University of Calgary, and is certified in hypnosis and neuro-linguistic programming. Brian is a sought after speaker on mental preparation and conditioning; is a contributing writer for the book, *Warriors: On Living with Courage, Discipline, and Honor*; and has had numerous articles published in law enforcement periodicals. Brian serves as an Advisory Board member for the International Law Enforcement Educators and Trainers Association (ILEETA) and is a member of the National Advisory Board for *Police Marksman Magazine*.

Court of Appeal Affirms Reinstatement of Deputy Fired for Dishonesty: Justices Chide Department Officials for Being “Hell-Bent to Fire Smith, No Matter What”

Michael P. Stone, Esq., Michael P. Stone, P.C., Lawyers
Stephen J. Horvath, Esq., Associate, Michael P. Stone, P.C., Lawyers

Riverside County Deputy Sheriff Anthony Smith was fired from the Sheriff’s Department over an April 8, 2002, event when he, along with Deputies Raymond Verdugo and Byron Farley engaged in a foot chase of a wanted suspect named David Olivas.

Olivas ran through an apartment parking area toward a six-foot high cinder-block wall, with Verdugo in pursuit on foot. Smith and Farley were close behind and to the right and left of Verdugo. Olivas attempted to go over the wall, when Verdugo reached out with his left hand to grab at Olivas, Verdugo’s gun, in his right hand, discharged unintentionally, probably as the result of a sympathetic contraction of his right hand, as he reached to grab Olivas with his left hand.¹ Verdugo lied about this event and claimed he shot in self-defense because Olivas pulled a knife on him at the base of the block wall. Apparently, Verdugo was conflicted over his duty to tell the truth and decided to try to convince department investigators that he shot voluntarily in self-defense in order to avoid possible criticism for unsafe handling of his firearm. Neither Farley nor Smith supported Verdugo’s statement or version of the events. In fact, Smith believed the shot was accidental because he saw no basis for Verdugo to shoot in self-defense. In addition, an administrative investigator, Lieutenant Tucker, who arrived on-scene shortly after, told Smith, “this is a no-brainer; no big deal—appears to be an accidental discharge,” when Smith asked for a Sheriffs’ Association representative before being interviewed (Slip. Op. at 27). In short, both Farley and Smith were unaware that Verdugo intended claim to, or claimed, that this discharge was intentional and in self-defense.

All of the deputies submitted to interviews or wrote reports about the incident. Smith described how he and Farley pursued Olivas over the wall and apprehended him in a field. Smith described locating a knife in Olivas’ right pants pocket and a car stereo detachable faceplate in his left pants pocket. When Verdugo saw Smith retrieve the knife, Verdugo said something to the effect of “that is what he pulled on me,” or “that is what he was going for.”

About one week later, however, Smith was reinterviewed by another investigator about the incident. Smith did not review anything before this second interview. He incorrectly recalled in the second interview that he recovered the stereo faceplate from Olivas’ left hand (as opposed to his left pants pocket). By this time, Verdugo’s story about shooting in self-defense began to unravel.

Investigator Chad Bianco reviewed Smith's April 8 and April 16, 2002, interviews and noted some possible discrepancies, including the location of the faceplate when it was found by Smith. He ordered Smith to a third interview on April 25, 2002, which lasted over five hours. Bianco concluded that Smith lied in his interviews in order to "protect" Verdugo and recommended to sheriff's administration that Smith be found guilty of willfully trying to cover up Verdugo's unintended discharge. Bianco reasoned that Smith's innocent misrecollection about the faceplate (pocket vs. hand) was in fact, calculated deceit designed to support Verdugo's claim that Olivas "pulled the knife" at the wall.²

Verdugo was fired (as he should have been) for his willful dishonesty. Smith was also fired, although there was *no evidence* whatsoever of *any* collusion between Smith and Verdugo.

The department also alleged that Smith lied about three other issues: (1) the position of Olivas (sitting up or supine) during the search that produced the faceplate and knife, (2) whether Olivas "hesitated" at the wall for "milliseconds" or "several seconds," and (3) whether Olivas and Verdugo had any confrontation or "struggle" at the wall. Suffice to say, the trial court and the Court of Appeal disposed of these three items as "non-issues" in the analyses of the two courts. Rather, both courts focused on the faceplate issue. The 33-page slip opinion deals primarily with the facts attending recovery of the stereo faceplate and quotes extensively from the record to support its conclusion, like that of the trial court, that Smith's misstatement was the product of "innocent misrecollection" and *not* knowing and willful deceit.

Hence, the Court of Appeal and trial court found Smith substantially innocent of any misconduct, and ordered him reinstated, without prejudice or loss. Reinstated employees are entitled to back pay from the date of discharge, less earnings from substitute employment, plus interest at 7%.

The Court of Appeal, however, rather bluntly criticized department officials for being "hell-bent to fire Smith, no matter what" (Slip. Op. At 3).

The County's Contentions in the Court of Appeal

As it did in the trial court, the County of Riverside and the Sheriff's Department argued that the trial court applied an incorrect standard of review of the administrative decision.³

Since it is true that the trial court must afford such administrative decisions a "strong presumption of correctness," a party (like Smith) who challenges the decision must demonstrate that the decision is "contrary to the weight of the evidence" (Slip. Op. at 21). Both the trial court and the Court of Appeal found that Smith successfully carried this burden. In so doing, the Court of Appeal noted that the presumption of correctness *can be overcome* in a proper case because the trial court must review the evidence based upon its independent judgment.

The County also contended that the hearing officer's findings on the credibility of Smith's testimony were entitled to great deference in the trial court and should not have been disregarded (Slip. Op. at 22). Again, the Court of Appeal disagreed,

noting that the independent judgment test “requires” the trial court to reweigh the evidence by examining the credibility of witnesses.

Is an Intent to Deceive a Necessary Element of Dishonesty?

The County contended at the administrative hearing, and in the two reviewing courts, that Smith “intended to deceive” investigators. While the hearing officer was apparently persuaded, the judge and justices were not, but the County floated an even more stunning argument as a fall-back position, based on Riverside County Sheriff’s General Order § 202.02: “Department members shall speak the truth at all times” The County and department argued “that they are entitled to fire Smith simply for saying something untrue, regardless of his intent in doing so” (Slip Op. at 2).

Of course, Smith could not lawfully be fired for an innocent misrecollection (Slip Op. at 23-24). The Court of Appeal also noted that “Investigator Bianco badgered Smith about the supposed discrepancy. . . .” “This,” said the Court, “is typical of the way Investigator Bianco appeared, throughout the interview, to have prejudged Smith’s guilt” (Slip Op. at 29-30, fn.2).

Moreover, the Court was critical of the County’s position in the case as is, evident in the following passage from page 31 and 32 of the Slip Opinion:

*On April 25, Smith promptly and frankly volunteered that there were “discrepancies” between the two earlier interviews⁴ {AR 691}. He also admitted that, in fact, he found the faceplate in the suspect’s pants pocket {AR 698, 782, 804}. He explained, “I think the whole searching [- -] my left hand, [his] left side. I was just securing his left, and . . . my memory got a little distorted, . . . and I just got left side . . . on the brain” {AR 783}. He added that he was “tired” {AR 796}; he had not taken any notes he could review⁵ {AR 796, 804}; and he “didn’t take the time necessary to really recount exactly in my memory all my steps” {AR 783}. He concluded that he just “forgot” {AR 796, 799}. This constituted substantial evidence that his misstatement concerning the location of the faceplate was, at worst, negligent rather than intentional [See *Kolender v. San Diego Co. Civil Service Com. (Salenko)* (2005) ___ Cal.App. 4th ___, ___ (2005 Daily Journal D.A.R. 11,605) (trier of fact could believe officer’s claim that his notes were disorganized, and he “lost track” of which witness said what)].*

Conclusion

There are some obvious and important points in the Smith case that require reiteration. The first three of these are legal in nature. The remaining learning points are practical: *how to avoid being victimized by your department for an “innocent misrecollection.”* On the legal side, *Smith* establishes the following:

- Dishonesty or false statement charges require proof of an intent to deceive and knowledge of the falsity of the statements; that is, being mistaken, even as a result of negligence, is not to be confused with untruthfulness—culpable untruthfulness requires a knowing intent to mislead.
- Although administrative adjudications come into court bearing a “strong presumption of correctness,” that presumption can be overcome, thus entitled to

no weight if the petitioner (as Smith did, for example) persuades the court that the decision is contrary to the weight of the evidence.

- Although credibility findings rest initially with the hearing officer who watched and listened to the parties and witnesses while testifying, a reviewing court is still required to reweigh the evidence and may disregard the hearing officer's assessment of credibility (as Judge Spitzer did in *Smith*).

Learning Points

As for the learning points, what could or should Smith have done to protect himself against such a disastrous consequence of “innocent misrecollection”—discharge and three years of unemployment or underemployment?

First, Smith initially asked Lieutenant Tucker for a representative before being interviewed, but, he allowed Tucker to talk him out of this protection, by Tucker's characterization that the discharge was “an accidental—a no-brainer, no big deal.” A competent representative would have ensured that Smith retained a recording of his first interview on April 8, 2002, and reviewed it before his second interview on April 16, 2002, which would also have been self-recorded. It is highly unlikely had these minimal precautions been taken, Smith would have suffered failed recollection. Also, a competent representative would have not permitted Smith to be whip-sawed and bullied in the five-hour interview of April 25, 2002, which the court found so offensive to the search for truth.

Aside from the presence of a representative, however, there was a lot more that Anthony Smith could have done to protect himself from this kind of administrative overreaching. In fact, we were so disturbed by this case after the hearing officer sustained Smith's termination, that we wrote a special bulletin based on the Smith case (although it did not identify it by name), which emphasized the importance of always ensuring that any official statement you make—whether in a report, interview, or testimony—is always as accurate as possible. As we see in the Smith case, innocent misrecollection and failed recollection are common human memory flaws. The problem is, someone with the authority and power to decide may determine that it is more than an innocent mistake. What should be obvious to us sometimes escapes us; here, that was the recognition that any statement you make can form the basis for a charge of dishonesty.⁶ In a profession that places such a high premium on accuracy in reports and statements, members should do whatever they can to make sure their statements are accurate and consistent. Above all else, remember to look out for yourself because nobody else owns that job.

Endnotes

¹ The sympathetic contraction phenomenon is discussed in detail in the author's *Training Bulletin*, 7(5), “Understanding the Dynamics of Involuntary Firearm Discharges in Tactical Situations, May 2004 (available upon request).

² Indeed, Olivas had a knife in his right pants pocket but he did not draw it out at any time before Smith took it from him.

³ Arbitrator William Daugherty as a hearing officer under the MOU, sustained Smith's discharge and sided with the Department finding that Smith had been dishonest in the four particulars cited. Smith's counsel sought mandamus review of that decision in the Superior Court before the Honorable Judge Robert G. Spitzer under Code of Civil Procedure §1094.5. Judge Spitzer reversed the hearing officer, finding Smith substantially innocent of misconduct utilizing the court's independent judgment on the evidence. He ordered Smith reinstated in the writ. The County then appealed.

⁴ The County seems to think it was not enough for Smith to admit that there were discrepancies; it faults him for not adding immediately that there was a discrepancy specifically concerning the faceplate, and even for not describing how he felt when he discovered the discrepancy (AOB 32-33; ARB 4).

At the administrative hearing, Smith explained that he "wasn't asked" about these matters {AR 559-560}. And, as the transcript of the April 25 interview confirms, he was not. Yet the County concludes, "That comment alone would be sufficient for [the arbitrator] to thereafter completely distrust any testimony provided by Smith" {ARB 4}. We disagree. In fact, we consider the County's comment sufficient to show that the County is determined to find fault with everything Smith did.

⁵ Investigator Bianco's reaction to this gives some of the flavor of the interview:

INVESTIGATOR BIANCO: "Does it take notes and a notepad to help you remember a factual object or a factual situation that is the truth?"

ANTHONY SMITH: "It could."

INVESTIGATOR BIANCO: "You need something to remind you of what's the truth and what's not the truth?"

ANTHONY SMITH: "Well, it's two different interviews, and I'm trying to remember how it happened - - [¶] . . . [¶]"

INVESTIGATOR BIANCO: "Okay. Do you need a notepad to tell the truth?"

ANTHONY SMITH: No.

⁶ On this point, see our *Training Bulletin*, 6(2), February 2003, "Some Notes About Police Testimony—In Any Investigation or Testimony, Always Take Time to Review Your Prior Statements."

Michael P. Stone, Esq., has been a police defense (civil, criminal, administrative, appellate) specialist, based in southern California for 25 years. He is a former police officer, agent, supervisor, and police attorney; he served in three municipal police departments in California and Colorado from 1967 to 1979. He has been an active police trainer throughout his entire career and has trained thousands of police executives, managers, investigators, and association representatives in all aspects of police law and litigation. Formerly the General Counsel for the Los Angeles Police Protective League (Lieutenants and Below

Unit), he is presently General Counsel for the Los Angeles Police Command Officers Association (Captains, Commanders, and Deputy Chiefs Unit), as well as for the Riverside Sheriff's Association Legal Defense Trust and the Los Angeles Port Police Association. He regularly represents individual local, state, and federal officers and officials as conflict counsel for the City of Los Angeles (tort and civil rights); the U.S. Department of Justice, Civil Division, Torts Branch (*Bivens* actions, BOP prison litigation, VA physicians and surgeons; *Qui Tam* litigation); and as PORAC-LDF and FOP panel attorneys. His firm, Michael P. Stone, P.C., Lawyers, generally limits its practice to police and corrections law and litigation cases.

Stephen J. Horvath is an associate who is part of the firm's police litigation unit and collaborates with Michael P. Stone on many cases like that described herein.

Can Police Departments Be Sued as “Rackateer-Influenced and Corrupt Organizations” Under the “Rico Act”? En Banc Ninth Circuit Panel Rules Ten to One, “Yes”

Michael P. Stone, Esq., Michael P. Stone, P.C., Lawyers
Marc Berger, Esq., Senior Motion and Writs and Appeals Specialist,
Michael P. Stone, P.C., Lawyers

The so-called “Rampart Scandal” in LAPD has spawned the lion’s share of civil rights litigation (42 U.S.C §1983) brought against the City of Los Angeles, its officials, and employees since Raphael Perez’ stunning revelations about corruption in the Rampart CRASH gang unit in November 1999. Indeed, the ensuing criminal, civil, and administrative proceedings have cost taxpayers millions in salaries, attorney’s fees, costs, settlements, and related wastes, as well as seen hundreds of gangster convictions overturned, most accompanied by a fat sum of the public’s money to settle the related civil rights suits. To this day, many of us remain skeptical about the true nature and extent of the so-called police corruption in Rampart. Some of it is undeniable, but I’ve also personally witnessed many good and honest cops and supervisors tarnished, many beyond repair, in the hysteria churned by Perez’s revelations—which, after all, were “given up” only in his cowardly effort to cut a deal on his own perfidious theft of a huge amount of cocaine out of LAPD evidence.

The taxpayers’ bleeding is not over, however, according to a recently released (August 16, 2005) Ninth Circuit Court of Appeals ruling in a Rampart civil rights case, every officers’ favorite civil rights attorney Stephen Yagman scored another victory in what some observers believe will change the dynamics of police misconduct litigation.

The Ninth Circuit ruled that a plaintiff in a civil rights case can use the federal “RICO” statute (the “Racketeer Influenced and Corrupt Organizations Act,” 18 U.S.C. §§ 1961-1968), to enhance recovery of damages beyond the remedies available under the federal civil rights statute (42 U.S.C. §1983), which is the primary remedial statute for police misconduct claims and imposes civil liability for violation of federal rights under color of law. The RICO statute, however, gives the plaintiff an effective additional weapon to increase the plaintiff’s chances of prevailing on liability and enhance recovery of damages. The “RICO” statute imposes civil liability upon enterprises engaged in a “pattern of racketeering activity” (18 U.S.C. § 1962). Among other remedies, the RICO statute provides for recovery for injury to “business or property.” That remedy is the focus of the newly announced opinion. The RICO statute, however, also provides certain remedies beyond those available under §1983, notably a civil penalty of tripling of the compensatory damages proven by the evidence or “treble damages.”

The RICO statute also furnishes plaintiffs with an important evidentiary advantage. As a conspiracy statute, it enables statements of each coconspirator made within

the course of the conspiracy to be admitted into evidence against each other coconspirator. Also, since the claim entails proof of a “pattern” of activity, a plaintiff is permitted to bring in evidence of prior similar acts toward others, for the purpose of showing a pattern, as well as “predicate acts” argued to be part of the corrupt plan or scheme. In establishing the existence of a pattern of similar conduct, the plaintiff is able to bring to the jury’s attention a wider spectrum of evidence of misconduct and official toleration of misconduct, all of which can only reflect unfavorably on the defendant officers, department, and government officials.

This new case, *Diaz v. Gates* (Ninth Circuit case no. 02-56818), was decided by a ten to one vote of an “en banc” panel of 11 judges of the Ninth Circuit. Typical of a body of Rampart cases, plaintiff David Diaz alleged fabrication of evidence of an assault with a deadly weapon and tampering with witnesses to achieve a false conviction. Pleading his case under the RICO statute, Diaz alleged damages for loss of income and employment opportunities because he could not work or seek employment while incarcerated.

Observing that the RICO statute required proof of “injury to business or property,” the District Court below had ruled that the RICO statute could not be used by a civil plaintiff alleging that his wrongful incarceration caused loss of opportunity to work and earn income. The Ninth Circuit has now reversed that ruling and held that the interference with the plaintiff’s ability to earn money because of incarceration can constitute an actionable injury to business or property under the RICO statute. This means that most “Rampart” plaintiffs and other purported victims of “corruptly obtained” wrongful incarceration, may have a cause of action under the RICO statute for loss of employment opportunities. The typical police misconduct lawsuit does not furnish a basis for even a wild stab at a RICO claim, however.

The trial court in *Diaz* had dismissed the case on the basis that loss of wages because of imprisonment did not constitute a loss of “business or property” as provided in the RICO statute. The District Court granted leave to amend to enable the plaintiff to plead a different theory. Yagman declined to amend the complaint, thereby paving the way to an appeal of the District Court’s interpretation of standing under the RICO statute.

The Ninth Circuit was thus squarely confronted with the issue of whether a loss of wages or a loss of the opportunity to seek gainful employment constituted “business or property” within the meaning of the RICO statute. The Court had previously limited RICO recovery to “concrete financial loss.” *Oscar v. University Students Cooperative Association* [965 F.2d 783, 785 (9th Cir. 1992)]. During the appellate process for the *Diaz* case, another Ninth Circuit opinion had expanded the reach of RICO to cover “legal entitlement to business relations,” in which agricultural laborers alleged a conspiracy by employers to depress their wages by hiring undocumented immigrants. *Mendoza v. Zirkle Fruit Company* [301 F.3d 1163, 1168 (9th Cir. 2002)]. Although the laborers in *Mendoza* could not allege that they had a contract or promise to receive higher wages, the court held that their “legal entitlement to business relations” was a sufficient property interest to fall within the scope of RICO recovery.

In reversing the dismissal of the *Diaz* action, the Ninth Circuit equated the alleged interference with the plaintiff’s career in the case before it to the property interest

of the agricultural laborers in *Mendoza*. The Ninth Circuit interpreted the phrase “business or property” in the RICO statute to include property interests that are protected by the law of the state where the damage occurs. The court found that the allegations by Diaz would constitute a property interest under California state law, because California recognizes tort liability for both interference with contract and interference with prospective business relations [See *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376 (1995)]. Since Diaz was unable to fulfill his existing employment contract and could not pursue employment opportunities while incarcerated, he had stated a claim for loss of “business or property” within the meaning of the RICO statute.

Though the ruling remands the *Diaz* case to the District Court, the Ninth Circuit, its jurisdiction at this stage, confined to whether Diaz had standing to sue for lost wages under RICO, declined to speculate on the merits of the case. A concurring opinion by Judge Kleinfeld observes that the federal civil rights statute, 42 U.S.C. §1983, will still provide the primary remedy for most police misconduct cases. The advantage of a RICO claim is to achieve triple damages for some losses. Nevertheless, a police misconduct plaintiff still faces many of the same obstacles under RICO as under §1983, including the prerequisite in many cases of overturning the criminal conviction. The opinions in *Diaz* recognize that the District Court had found other deficiencies in the complaint, including the plaintiff’s conviction for attempted murder and assault, which the plaintiff would be hard-pressed to overcome on remand through an amended pleading.

Though the Ninth Circuit recognized that the *Diaz* holding will allow more claims to go forward than under the more restrictive former interpretation, the court reasoned that “these policy consequences, assuming they are undesirable, cannot blind us to the statutory language.” This observation may perhaps be intended to alert Congress to a need to consider an amendment that would restore the former interpretation.

Indeed, a concurring opinion by Judge Reinhardt asks Congress to look into “amending the statute so as to limit it to its original purpose.” The concurrence by Judge Kleinfeld observes, “When it was passed, many ascribed to RICO the purpose of facilitating remedies against ‘mobsters and organized criminals.’ As the Supreme Court has construed the words of the statute since then, though, there is no way to corral RICO so that it would apply only to ‘racketeering’ as that word may initially have been understood and as it is defined in the dictionary.”

Only Congress can return RICO to its original purpose. Meanwhile, the *Diaz* opinion may give a fresh breath of life to the cases of many police misconduct plaintiffs. Yagman has at least three other dismissed RICO cases on appeal that he believes will now be reversed and remanded for trial because of the new *Diaz* opinion. One of these was handled by our firm as co-counsel with the City Attorney until Judge Feess dismissed it on account of the RICO claims.

Michael P. Stone, Esq., has been a police defense (civil, criminal, administrative, appellate) specialist, based in southern California for 25 years. He is a former police officer, agent, supervisor, and police attorney; he served in three municipal police departments in California and Colorado from 1967 to 1979. He has been an active police trainer throughout his entire career and has trained thousands of police executives, managers, investigators, and association representatives in all aspects of police law and litigation. Formerly the General Counsel for the Los Angeles Police Protective League (Lieutenants and Below Unit), he is presently General Counsel for the Los Angeles Police Command Officers Association (Captains, Commanders, and Deputy Chiefs Unit), as well as for the Riverside Sheriff's Association Legal Defense Trust and the Los Angeles Port Police Association. He regularly represents individual local, state, and federal officers and officials as conflict counsel for the City of Los Angeles (tort and civil rights); the U.S. Department of Justice, Civil Division, Torts Branch (*Bivens* actions, BOP prison litigation, VA physicians and surgeons; *Qui Tam* litigation); and as PORAC-LDF and FOP panel attorneys. His firm, Michael P. Stone, P.C., Lawyers, generally limits its practice to police and corrections law and litigation cases.

Marc J. Berger has been associated with Michael P. Stone since 1986, and is the firm's senior motion and writs and appeals specialist.

Are Take-Home Cars a Benefit or a Liability for St. Clair County Employees and Residents?

Dominic Lauko

Abstract

The St. Clair County Sheriff's Department currently does not have a take-home vehicle policy in force. A survey was given to approximately 75 members of the Patrol Division. These officers are currently assigned the usage of vehicles from the department's fleet. The majority of these officers do not have a particularly assigned vehicle. The survey consisted of 12 questions. The first four questions were yes or no answers and indicated the officers' support and viewpoints on take-home vehicles. The next four questions dealt with statistics of how long a take-home vehicle would last, the officers' age, years of service, and amount of personal usage of take-home vehicles. The last four questions dealt with the officers' opinions on the presence of take-home vehicles, whether personal usage should be allowed, whether the officer should be responsible for the vehicle, and whether there would be more pride taken in that take-home car. The surveys were returned to the researcher for data analysis. The findings of these surveys indicated that the majority of the officers were in support of a take-home vehicle policy. The research also supported that the officers had very similar ideas pertaining to the care of the vehicles. The conclusion of this research shows that a take-home vehicle policy would be a direct benefit to the officers and the residents of St. Clair County. The final decision on implementation would rest with the sheriff of St. Clair County.

Description of the Problem

Many crimes are those of opportunity. The person who is intent on committing a crime will generally look for the easiest targets. If one location is in a high-traffic area and the other in an area that is not as well-traveled, the criminal is going to go for the location of least attraction. The criminal has picked his target and enters the building with gun in hand. Just as he is about to display the gun and announce his intentions, a marked police car pulls into the parking lot. The would-be criminal notices the arrival and quickly exits the rear of the building.

What the criminal didn't notice was that the marked squad car is being driven by an off-duty officer. He is not in uniform and is not on official business. The officer works for a department that allows its officers to use marked units for personal reasons.

The purpose of this article is to study the feasibility of the St. Clair County Sheriff's Department assigning take-home patrol cars. This research will discuss the issues, both for and against such a program, and examine the data to help determine the feasibility.

Setting of the Problem

The mission of the St. Clair County Sheriff's Department is to enhance the quality of life in the County of St. Clair by working cooperatively with the public and within

the framework of the United States Constitution to enforce laws, preserve peace, reduce fear, and provide for a safe environment.

The Sheriff's Department is run as a paramilitary structure. The deputies report to the sergeants, the sergeants report to the lieutenants, the lieutenants report to the captain, and everyone reports to the sheriff. The sheriff is the ultimate authority figure.

The relationships between each department vary as to the department. The Corrections Division works better with other sections within corrections. The Patrol Division works better with other units within patrol. The Corrections and Patrol Divisions work together; however, they seem to relate better to members of their own sections.

The main motivator at our department is numbers. Who has the most traffic stops? Who has written the most tickets? Which officer has the most felony arrests? We do not get any extra pay or recognition, but we do it for ourselves. To us, the numbers speak for how good of a job we are doing. The officers who have high numbers are generally the ones who are assigned to special details.

The leadership at our department is probably one of the best in the area. If we are involved in a serious incident, our supervisors are there immediately. The supervisors understand what dangerous jobs we have, and they are there for us. Most of the supervisors are the first ones in and the last ones out on any major call. I am a proud member of the leadership team.

Over the past several years, the sheriff has made great steps in ensuring that we are at the top of the technology field. We now have computers in our squad cars. They are working on a state-of-the-art radio system. The sheriff holds monthly supervisory meetings so all those in charge can meet with each other and discuss the issues in the county.

History and Background of the Problem

The issuance to police officers of a patrol car to take home has been a controversial subject. There are some departments that feel that it is by far the best practice. On the other hand, there are departments in which this would never be considered.

The availability of take-home cars can provide both benefits and liabilities. First, let's look at some of the benefits. One of the benefits to the public would be the extra time that a patrol car would be on the streets. The potential for a police car to arrive at a location at any time is certainly not known; however, if an officer is allowed to use a vehicle for personal reasons, the probability of an unexpected arrival is even greater.

Another benefit would be a pride of ownership to the officer. Once an officer is assigned a vehicle, that vehicle would be his or her responsibility. Currently, at most departments, you have the rental-car syndrome. It's not my car, so who cares how I treat it. If one officer is permanently assigned to a car, the accountability level is there.

Now, let's discuss some of the drawbacks to take-home vehicles. One of the major issues for officers would be that people would know where they live. This by far would be the biggest concern. The officers' families and homes could now become targets. Also, if you

broke down and needed help, where would you go? Would you knock on the door of a stranger, or would you knock on the door where a marked unit sat in the driveway?

A big issue for a department against take-home units would be less control over their vehicles. A department would not be able to know, at any given time, where an officer may be. This certainly could be addressed with the usage of a global positioning system; however, this would add additional costs. If an officer is allowed to use this vehicle for everyday errands, this could increase the amount of maintenance costs. The more a vehicle is utilized, the more expenses for fuel, fluids, and tires may increase; however, since a pool vehicle is generally running 24 hours a day, seven days a week, the maintenance costs may actually decrease.

The idea of take-home vehicles is not a new one. In fact, most departments do have at least one division that routinely houses assigned vehicles at their residences; however, in most cases, these are unmarked cars. The proposals of marked, take-home units meet with a variety of responses from officers, public, and officials. Many officers favor a take-home car. The general public typically will respond with mixed emotions. Some people view the take-home car as a service, while others feel that they are paying for an officer to have an extra car. Our elected officials tend to shy away from the topic. If the public wants it, then the official generally will also support the policy. The same could be said if the citizens are not in favor; the official will also decline the option.

A department would have to conduct a very thorough investigation to determine whether allowing officers take-home cars would be viable. The return to the department, the officer, and the public would have to be weighed against the accountabilities to the same groups.

Scope of the Project

The scope of this project is the St. Clair County Sheriff's Department Patrol Division. The data will be used to determine whether a take-home car policy will benefit the department and the citizens of St. Clair County. Direct information will be compiled from the patrol officers' survey responses.

Significance of the Project

The goal of this research project is to collect data from the Sheriff's Department and analyze the results. This information will determine the feasibility of a take-home car program for the department. From this data, hopefully, the sheriff and the St. Clair County Board can review the information and decide on the possibility of a take-home car program.

Definition of Terms

Take-home car – squad car that is assigned to an individual officer to take home

Squad car – a vehicle that is clearly identified as a police vehicle

Paramilitary – a type of reporting structure that is based on the military rank system

Corrections Division – officers who are assigned to the jail

Patrol Division – officers who are assigned to patrol the cities

Traffic stops – the act of stopping a driver who may have broken the law

Felony arrests – the act of arresting a person who is wanted for a serious criminal offense

Pool vehicle – squad car that is available for any officer to use

Research

Research concerning the usage of marked take-home police vehicles by local, county, and state law enforcement agencies was reviewed for this topic. An extensive search of department policies, Internet sites, magazine publications, and published works was conducted to determine the similarities, or differences, that exist on take-home vehicle usage.

Internet research concerning take-home patrol vehicles as a recruiting incentive was located for the Montgomery County Police Department (Maryland), the Howard County Police Department (Maryland), and the Louisville (Kentucky) Police Department. Additional research was obtained from such sources as *Law and Order* magazine and abstracts from the National Criminal Justice Reference Service.

Information from the Tampa Florida Police Department included an overview of their take-home car program. This material cited a survey questionnaire that was distributed to their patrol officers. The survey was an attempt to evaluate whether there was an increase or decrease in the morale of police officers assigned to take-home vehicles. The survey also addressed the issues of the advantages and disadvantages of take-home vehicles.

The research concerning take-home police vehicles has been debated over the last several years by many. A major concern that has been addressed is whether a take-home vehicle policy would cost a department more money. "Take-home cars have a moderately high initial cost, but they make law enforcement agencies more efficient and eventually save money" (Yates, 1992).

Several forms of comparison for fleet vehicles versus take-home vehicles included comparing the cost per mile (i.e., fuel and maintenance), annual mileage, length of service for the vehicles, and the trade-in value of the unit (NCJRS-Albuquerque Police Department). Some agencies consider the community perception of officers driving take-home vehicles, along with the effect of morale on the police officers operating the vehicles.

Articles published in both the November 1982 *Law and Order* magazine and the December 1979 *The Police Chief* magazine cite numerous similar issues to be addressed regarding take-home vehicle policies (Auten, 1982; Yates, 1997). Even though the dates of original publication for these articles are over 20 years old, a more recently published article from August 2003 *American Police Beat* magazine describes the same issues. Some of these issues are as follows:

- Although initial costs would be higher due to each officer requiring a personal vehicle, the total costs would be less due to less maintenance costs.
- Cars would be better cared for and would last longer.
- The visibility of additional marked units would lower crime.

- There would be less “down time” due to shift changes.
- Citizens would feel safer with a marked unit parked in their neighborhoods.
- Officer morale would improve.
- Officer productivity would improve.
- In cases of extreme emergencies, off-duty officers could report to scenes more quickly.

The costs associated with implementing the take-home policy by the various agencies cited displayed various differences due to the information tracked by each department. Some departments allow a variety of vehicles as take-home units. As discussed in the book, *Police Cars in Action*, the Escondido (California) Police Department allows their officers the personal usage of several high-end Camaros (Genat, 1999a). These Camaros are primarily assigned to traffic details. These are marked units; however, the markings are not the same as the traditional units. The officers have the ability to blend in with the general flow of traffic and have seen an increase in the number of traffic violation citations. Another vehicle that is not widely used is the motorcycle. The officers assigned to the motorcycles are usually allowed to use them for take-home vehicles. The police officer who houses his or her motorcycle at home is allowed to begin his or her shift from home. Several departments’ policies on this option are discussed in the book, *Modern Police Motorcycles in Action* (Genat, 1999b).

The first step in deciding whether a take-home policy is feasible is to look at the costs. Each year, law enforcement agencies replace outdated or worn-out equipment. There is no set rule on how long a police vehicle will last. The industry standard for vehicle replacements is when the mileage is between 60,000 and 100,000. “Even two of Michigan’s major universities, Wayne State and the University of Michigan, have no idea of how long an automobile will last, despite the fact that they have large engineering schools that supply engineers to all the major automobile companies” (Yates, 1992). Another factor to consider would be the overall age of the fleet. “Because a younger fleet is less prone to breakdowns, these increased capital costs are reduced somewhat by a decreased need for backup or spare vehicles” (Griffith and Associates, 1993).

Once an agency begins the procurement process, it must examine a wide range of considerations, then prioritize and evaluate what is most important. Agencies must determine specifics on equipment, size, dynamics, acceleration, top speed, braking, ergonomics, communications, and fuel economy (Law Enforcement Technology). The following would be considered advantages of a take-home policy:

- Lower annual per-vehicle costs
- Heightened feeling of safety by citizens
- Increased officer productivity
- Increased officer morale
- Better care of the vehicles
- Less wear and tear on vehicle

There are many factors to consider before permitting a take-home vehicle program. To ensure the success of the program, a comprehensive take-home vehicle policy must be initiated. This policy should cover items such as the following:

- Personal usage
- Responsibility for damage and fuel

- Passenger permission
- Areas of travel
- Which officers are allowed take-home vehicles
- Whether there is a residency requirement in place

As with any new policy, the downside of these issues must also be examined. Some negative things that may need to be considered include the following:

- Will there be more accidents?
- Who is responsible for additional fuel costs?
- What schedule would be followed for turning in paperwork?
- Do the officers' shifts begin and end at home?
- How many spare vehicles are needed?
- Will payroll costs increase due to unforeseen overtime?

Many sources on fleet management do not deal with police department take-home policies. These sources generally deal with fleets such as company vehicles, buses, or taxis. "The posture of the company operationally and financially needs to be explored, and the fleet's strategies should complement the company's strategies, short and long term" (Dolce, 1994). This one statement should be the basis for any department to analyze if a take-home vehicle policy is right for them.

The research being conducted will indicate the best practices to be implemented, whether the officers support a take-home policy, and what the actual benefits/costs would be to the department and the public. This comprehensive study will be able to show a definitive answer for the direct, and indirect, benefits of a take-home policy for the St. Clair County Sheriff's Department.

Methods

Summary

The decision by a department to initiate the policy of take-home patrol cars can be a difficult process. There are many factors to consider. The benefits of such a policy must be considered against the negative factors.

The St. Clair County Sheriff's Department is one of the police agencies in the area that does not have a take-home vehicle program. There are several specialized units that are permitted to keep an unmarked vehicle at their residence, but there are no marked units housed away from the department.

The research section of this article showed that the idea of a take-home vehicle policy has been discussed in numerous publications. This is an issue that has been researched across the country at various departments. This research will provide valuable information to present to the sheriff and residents of St. Clair County.

Research Strategy

The research strategy includes specific objectives, the type of research selected to reach these objectives, and a description of the research model.

Statement of Research Objectives

The St. Clair County Sheriff's Department prides itself on being a leader in police department procedures. The objectives below will show the St. Clair County Sheriff's Department the benefits or liabilities of a take-home vehicle policy.

- Objective 1 – Identify whether there is support among patrol officers for a take-home vehicle policy.
- Objective 2 – Determine what benefits or liabilities the department would incur with a take-home vehicle policy.
- Objective 3 – Provide St. Clair County Sheriff's Department with specific data to support or decline a take-home vehicle policy.

Type of Research

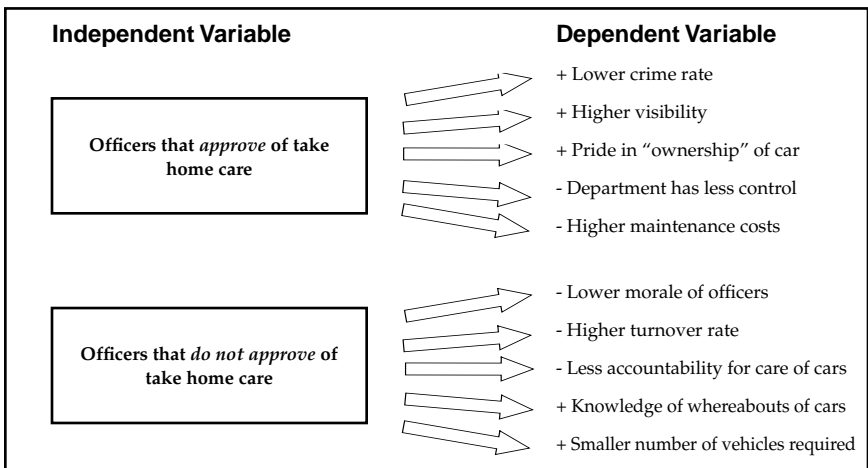
Detailed surveys were used to collect data on the various issues involving take-home police vehicles. The survey method was chosen for this research project due to the fact that the officer completing the survey would remain anonymous. The officers were asked to complete the survey within one week and place in my mailbox at the St. Clair County Sheriff's Department.

The main disadvantage to this type of research method is that the officers' responses are limited to the questions that have been asked.

Research Model and Hypotheses

Independent demographic variables will be used to differentiate between officers who support, or do not support, the take-home vehicle policy. A diagram of the research model is shown below.

Figure 1
Research Model



My research hypotheses are as follows:

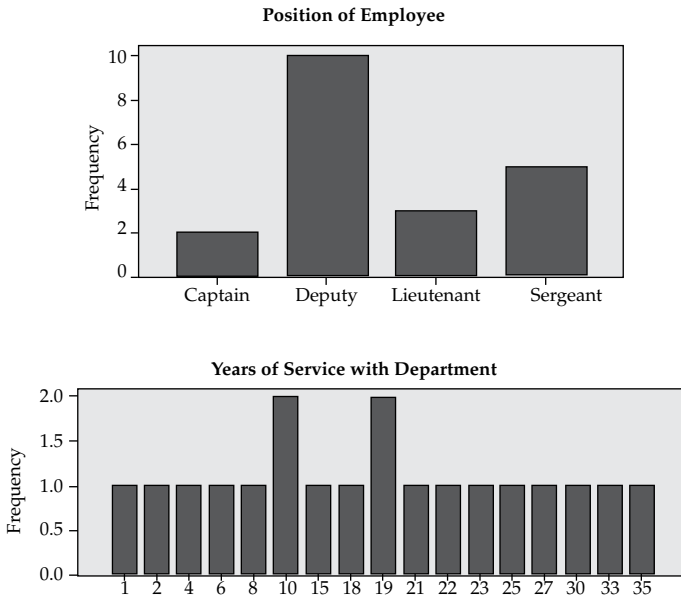
- The majority of the officers approve a take-home vehicle.
- The findings indicated that an officer would take better care of a vehicle that was assigned to them only.
- There is a direct correlation between the years of service of officers and their individual ages.
- There is a direct correlation between the officers' age and the allowance of personal usage of a take-home vehicle.
- There is no significance to be supported between the better care of a take-home vehicle and the longevity of that unit.
- The data showed that the majority of the officers show no support that their years of service correspond to the personal use of a take-home vehicle.

Description of Procedures

Sample and Target Population

The survey was conducted of the employees at the St. Clair County Sheriff's Department. The survey was offered to the Patrol Division of the Sheriff's Department. This division is made up of over 75 full-time officers. These findings are based on the results of 20 surveys. These officers have been with the department from 1 year to 35 years. Their ranks include deputies, sergeants, lieutenants, and captains.

Figure 2
Positions and Years of Service



Research Instrument(s) and Variable Measurements

The following ordinal variables provide information regarding officers' specific viewpoints:

- "Do you support take-home cars?"
- "Take-home cars are cared for better."
- "Morale would increase with take-home cars."
- "Officer is responsible for fuel used for personal errands." The following ordinal variables that proved information regarding an officers' specific viewpoints are as follows (see Appendix, questions 1-4):

This information can be used to determine whether the officers are for or against a take-home vehicle policy. The data may be utilized to address what issues may need to be incorporated in a written take-home vehicle policy.

The following variables give us a wider range of information and allow the officers to input their own personal beliefs (See Appendix, questions 5-8):

- "How many years would a take-home vehicle last?"
- "How many years have you served with the Sheriff's Department?"
- "What is your age?"
- "How many hours of personal usage of take-home vehicle do you favor?"

The following questions were responded to on a sliding scale and allowed the officers to voice their own personal attitudes on the proposal of take-home vehicles:

- "Neighborhoods would be safer."
- "Allow personal usage of take-home cars."
- "Responsible for damage during personal usage."
- "Feel more pride in take-home car."

Data Collection and Analysis

Surveys were placed in the department mailboxes of the officers who are assigned to the Patrol Division. Return rates will be determined by the number of surveys that are completed.

The first test will be used to meet the first objective, identify whether there is support among patrol officers for a take-home vehicle policy. Ordinal variables of the first four questions on the survey (see Appendix) will be combined, and a univariate study of officers' opinions on take-home vehicles will be performed. A cross-tabulation with Chi-square test will then be performed using the recorded variable above and the nominal variable indicating support. Frequency tests for the nominal variable indicating the respondent's approval will be displayed in the form of a table.

The second objective will be met through the use of Pearson's "r" correlation of the interval variables (see Appendix) pertaining to the officers' opinions on how a take-home vehicle policy would impact the Sheriff's Department. This test will reveal the correlation between the officer's age and his or her beliefs regarding a take-home

vehicle. A cross-tabulation with chi-square test will be used to test the correlation of the nominal variables pertaining to the last four questions (see Appendix).

The third objective will be met through the compilation of the surveys, the research paper, and a presentation to the sheriff. This data will provide the basis for the possible development of a take-home vehicle policy. More data may be provided at the request of the sheriff.

Debriefing, Follow-Up, and Reporting Procedures

The survey findings will be shared with the St. Clair County Sheriff. Prior to presenting this data to the sheriff, the researcher will meet with key members of the management team and the captain.

Results, Conclusions, and Recommendations

Summary

St. Clair County Sheriff's Department is one of the largest sheriff's departments in the State of Illinois. The department employs approximately 75 Patrol Division officers. These officers are divided into several different shifts. There are always two shifts on days and two shifts on nights. The remaining officers are assigned to shifts that work a combination of days and nights.

The sheriff's department currently utilizes a pool of marked and unmarked patrol vehicles. These vehicles are housed at the sheriff's department and are used by most of the officers. There are several officers that have personally assigned unmarked vehicles; however, the majority of the officers patrol with the same vehicles. Many officers have shown support for a take-home vehicle policy. Such a policy would enable each officer to have a patrol unit at his or her residence.

The St. Clair County Sheriff's Department currently does not have a take-home vehicle policy. The data provided from this research project will enable the department to take an in-depth look at creating such a policy. Objectives to determine the feasibility of this policy were developed. First, the basis of support needed to be established. In addition, the benefits or liabilities to the department must be examined. The final objective is to interpret the research information as to be able to present a comprehensive study to the department on a take-home vehicle policy.

Summary of Results

The survey was conducted of the employees at the St. Clair County Sheriff's Department. The survey was offered to the Patrol Division of the sheriff's department. This division is made up of over 75 full-time officers. These findings are based on the results of 20 surveys. These officers have been with the department from 1 year to 35 years. Their ranks include deputies, sergeants, lieutenants, and captains.

Highlights of Key Variables

The officers who took part in this survey were asked to participate in answering a series of questions regarding take-home patrol cars. They were asked whether they

supported the policy of take-home cars. They were also asked questions to see whether they would agree to certain policies regarding the usage of take-home cars.

Bivariate Findings

Introduction to the Five Tests

Five separate tests will be used to examine the data using bivariate methods. The tests will proceed in the following sequence: Crosstabs with Chi-square, Pearson's R, Linear Regression, T-Test, and F-Test.

Crosstabs with Chi-Square Test

A Chi-square test was performed to determine whether there were any associations between the support of take-home cars and the better care of the patrol vehicle. The alpha level for this test was .05. The null hypothesis and research hypothesis were as follows:

HO: $\chi^2=0$. There was not an association between the support for take-home cars and better personal care of the patrol vehicles.

H1: $\chi^2>0$. There will be an association between upkeep of take-home vehicles and the support of personal take-home cars.

The test results shown below indicate a Pearson Chi-Square value of 5. The Sig. Value of .025 indicates that the test is significant at the .05 level and the null hypothesis should be rejected. Table 1 indicates that 62.5% of the officers surveyed supported the findings that the take-home vehicles would be cared for better.

Table 1
Case Processing Summary

	Cases					
	Valid		Missing		Total	
	N	Percent	N	Percent	N	Percent
Better Personal Care * Support Take-Home Cars	20	100.0%	0	.0%	20	100.0%

Better Personal Care
Support Take-Home Cars Crosstabulation

		Support Take Home Cars			
Better Personal Care	yes	Count% Within Support Take-Home Cars	10	0	10
	no	Count% Within Support Take-Home Cars	62.5%	.0%	50.0%
Total		Count% Within Support Take-Home Cars	6	4	10
	Count% Within Support Take-Home Cars	37.5%	100.0%	50.0%	
Count% Within Support Take-Home Cars	16	4	20		
Count% Within Support Take-Home Cars	100.0%	100.0%	100.0%		

Table 2
Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	5.000(b)	1	.025		
Continuity Correction (a)	2.813	1	.094		
Likelihood Ratio	6.556	1	.010		
Fisher's Exact Test				.087	.043
Linear-by-Linear Association	4.750	1	.029		
Number of Valid Cases	20				

(a) Computed only for a 2x2 table

(b) 2 cells (50.0%) have expected count less than 5. The minimum expected count is 2.00.

Correlation Test

A correlation (Pearson's r) test was performed to see whether there was any significant measure of correlation between the officers' years of service and their age. The alpha level for this test was .05. The null hypothesis and research hypothesis were as follows: HO: $r=0$ (There will not be any correlation between the variables of years of service of an officer and the officers' age) and HI: $r < 0$ (There will be a positive correlation between the variables of years of service and the age of the deputy).

The tests results below indicate that the r correlation is .966 and the Sig. Value (p value) is .000. These values indicate that the test is significant at the .05 level and that the null hypothesis should be rejected. There is a direct correlation between the years of service of a deputy and the age of the deputy.

Table 3
Correlations

		Age Category	Years of Service with Department
Age Category	Pearson Correlation	1	.966**
	Sig. (1-tailed)		.000
	N	20	19
Years of Service with Department	Pearson Correlation	.966**	1
	Sig. (1-tailed)	.000	
	N	19	19

** Correlation is significant at the 0.01 level (1-tailed).

Linear Regression Test

A linear regression test was performed to determine whether there was any significant linear relationship between the age of an officer and the support of limited hours of personal usage of take-home vehicles. The alpha level for this test was .05. The null hypothesis was as follows: HO: $B=0$ (There will not be an association between the age of an officer and the support of limited usage). The

research hypothesis was as follows: H1: B<O (There will be an association between the age of the officer and the support of limited usage).

The test results below indicate a b coefficient of -.168. The Sig. Value for the slope test is p= .000. The test is significant at the .05 level and the null hypothesis should be rejected. The test showed that there is a significant and positive linear relationship between officers' age and their support of limited personal usage. The scatter plot graph depicts the significant linear relationship between the two variables.

**Table 4
Variables Entered/Removed(b)**

Model	Variables Entered	Variables Removed	Method
1	Age Category (a)		Enter

(a) All requested variables entered.

(b) Dependent Variable: Limit hours for personal use.

**Table 5
Model Summary**

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.818 (a)	.668	.650	1.361

(a) Predictors: (Constant), Age category

**Table 5
ANOVA(b)**

Model 1	Sum of Squares	df	Mean Square	F	Sig.
Regression	67.208	1	27.208	36.208	.000 (a)
Residual	33.342	1	1.852		
Total	100.550	19			

(a) Predictors: (Constant), Age category

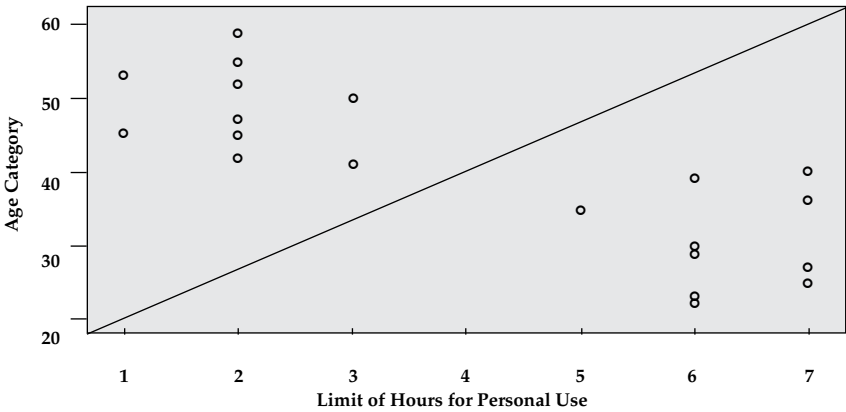
(b) Dependent Variable: Limit of hours for personal use

**Table 6
Coefficients**

Model 1	Unstandardized Coefficients		Standardized Coefficients		Sig.
	B	Std. Error	Beta	t	
(Constant)	10.841	1.152		9.413	.000
Age Category	-.168	.028	-.818	-6.024	.000

(a) Dependent Variable: Limit of hours for personal use

Figure 3
Age/Limit of Hours for Personal Use



T-Test

This test was conducted to determine the support for the personal care and the significance of longer lasting patrol cars. The alpha level for this test was .05. The null hypothesis was as follows: $t=0$ (There will not be an association of support for better personal care and longer lasting patrol cars). The test hypothesis was as follows: $t<0$ (There will be an association between the support for better personal care and longer lasting patrol cars).

The test results below indicate a t coefficient of 791 and a Sig. Value of .439. The test is not significant at the .05 level. The null hypothesis should not be rejected. The table below shows that the support for better care of a patrol car does not show significance with the longevity of the patrol car.

Table 7
Group Statistics

	Better Personal Care	N	Mean	Std. Deviation	Std. Error Mean
Last Longer by Number of Years	Yes	10	4.30	1.252	.396
	No	10	3.90	.994	.314

Table 8
Independent Samples Test

Last Longer by Number of Years	Levene's Test for Equality of Variances		T-Test for Equality of Means						
	F	Sig.	t	df	Sig. (2-tailed)	Mean Diff.	Std. Error Diff.	95% Confidence Interval of the Difference	
								Lower	Upper
Equal Variances Assumed	.524	.478	.791	18	.439	.400	.506	-.662	1.462
Equal Variances Not Assumed			.791	17.125	.440	.400	.506	-.666	1.466

F-Test

An F-test was performed to determine whether there was support to allow the personal use of a patrol vehicle and the relationship of the years of service within a department. The alpha level for this test was .05. The null hypothesis was as follows: $f=0$ (There will not be an association with that of officers' years of service and the usage of a take-home patrol car). The research hypothesis was as follows: $f>0$ (There will be an association with that of officers' years of service and the usage of a take-home patrol car).

The test results below show an F value of .375 and a Sig. Value of .823. The test is not significant at the .05 level; the null hypothesis cannot be rejected. The means of the number of years of service and the support of the take-home cars vary between 10 and 19.5. The majority of the officers show no support that their years of service correspond to the personal use of a take-home vehicle.

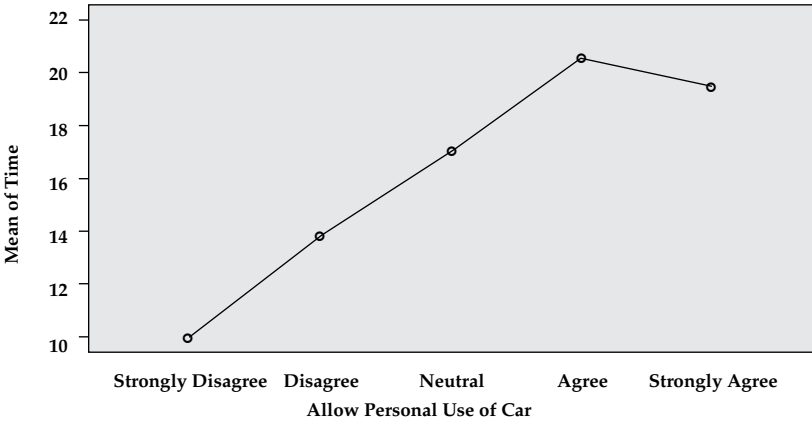
Table 9
Descriptives: Years of Service with Department

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
Strongly Disagree	1	10.00	10	10
Disagree	5	13.80	12.008	5.370	-1.11	28.71	4	33
Neutral	4	17	10.296	5.148	.62	33.38	2	25
Agree	5	20.60	12.602	5.636	4.95	36.25	1	35
Strongly Agree	4	19.50	8.813	4.406	5.48	3.52	10	30
Total	19	17.26	10.413	2.389	12.24	22.28	1	35

Table 10
ANOVA: Years of Service with Department

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	188.684	4	47.171	.375	.823
Within Groups	1763.000	14	125.929		
Total	1951.684	18			

Figure 4
Personal Use of Car



Conclusions and Implications

In summary, the data analysis that was conducted showed the findings that the majority of the officers approve a take-home vehicle. The findings indicated that officers would take better care of a vehicle that was personally assigned to them only. In addition to this information, a direct correlation was found between the years of service and officers’ individual ages. This is also true for the findings of an association between the officers’ age and the allowance of personal usage of a take-home vehicle. It was found that there is no significance to be supported between the better care of a take-home vehicle and the longevity of that unit. Lastly, the data showed that the majority of the officers show no support that their years of service correspond to the personal use of a take-home vehicle.

The results of these tests prove that the majority of the officers at the St. Clair County Sheriff’s Department would be in favor of a take-home vehicle policy. The positive result showing that an officer would take better care of the vehicle would be a direct improvement over the care of the current fleet.

Recommendations

Research Applications and Policy Recommendations

Based on the data compiled, it has shown that the majority of the officers of the St. Clair County Sheriff’s Department are in favor of a take-home vehicle policy. At this time, it has

been determined that a comprehensive take-home vehicle policy would be a benefit to the officers and the residents of St. Clair County. More research would need to be conducted to determine the actual start-up and annual operating costs of such a policy.

The survey provided important insight into the opinions of the patrol officers. The majority of the officers overwhelmingly supported a take-home vehicle policy. The officers had similar opinions on the usage of the vehicles for personal matters. The beliefs expressed were comparable regardless of the officers' age or years of service.

Recommendations for Further Research

An additional survey should be conducted to determine actual take-home vehicle policies. This survey would pertain directly to policy and procedures and any concessions that the officers may be required to accept for the usage of a take-home vehicle.

The survey would be amended to be able to include variables to determine whether an officer would be willing to forgo a wage increase for the benefit of a take-home vehicle, whether nonemployees should be allowed in patrol cars, and whether a take-home vehicle policy would encourage officers to remain with the department.

Enough research information was obtained to assert that a take-home vehicle policy would be an asset to all concerned parties. The department would now be responsible to determine how to implement this policy.

Bibliography

- Auten, J. H. (1982). Police fleet considerations. *Law and Order*, 30(11), 21-23, 66-67.
- Dolce, J. (1994). *Analytical fleet maintenance management*. New York: McGraw-Hill.
- Donnelly, H. A. (1985, September) A management information system for fleet service. *The Police Chief*, 50(9), 29-31.
- Genat, R. (1999a). *Police cars in action*. Osceola, WI: MBI Publishing.
- Genat, R. (1999b). *Modern police motorcycles in action*. Osceola, WI: MBI Publishing.
- Griffith, D. & Associates, Ltd. (1993). Benchmarking for quality in public service fleets. *National Association of Fleet Administrators*, 14-26.
- Levine, M., & Martin, D. (1989, September). The procurement of police cars. *Law Enforcement Technology*, 22-23, 39-43.
- Staff Article. (2003, August). *American Police Beat*, 18-21.
- Yates, T. (1992, August). It ain't the years, it's the miles. *Law and Order*, 69-72.
- Yates, T. (1997, March). Time and money saved: Illinois State Police bring fleet management close to state-of-the-art. *Law and Order*.

Please Return Survey to Sgt. Dominic Lauko by April 15, 2005

The following survey is part of a Research Project required for Graduation from the Law Enforcement Executive Institute sponsored by the Illinois Law Enforcement Executive Training Board.

Position _____

Take-Home Patrol Cars

The following survey will allow for further study of whether take-home Patrol Vehicles would be feasible for the St. Clair County Sheriff's Department. This survey does not reflect any proposal or consideration by the sheriff's department for a take-home program. **Research only.**

Please circle the appropriate number:

I support take-home cars. (1) Yes (2) No

Take-home cars are cared for better. (1) Yes (2) No

Morale would increase with take-home cars. (1) Yes (2) No

Officer is responsible for fuel used for personal errands. (1) Yes (2) No

In the lines provided, please enter an exact number:

How many years would a take-home vehicle last? _____

How many years have you served with the sheriff's department? _____

What is your age? _____

How many hours of personal usage of take-home vehicle do you favor? _____

For each question identified below, please circle the number to the right that best fits your opinion. Use the scale below to select the appropriate number.

1	Strongly Disagree
2	Disagree
3	Neutral
4	Agree
5	Strongly Agree

Description/Identification of Survey Item	Scale				
1. Safer neighborhoods	1	2	3	4	5
2. Allow personal usage of take home cars	1	2	3	4	5
3. Responsible for damage during personal usage	1	2	3	4	5
4. Feel more pride in take home car	1	2	3	4	5

Analyzing and Understanding Federal Civil Rights Law to Yield Better Supervision and Management of Police and Prisons

Robert L. Bastian, Jr., Partner, Law Offices of Bastian & Dini

Part I

As private citizens, you and I typically have to manage our property, drive our cars, and live our lives so as to not harm other persons. Legally, we must live up to a certain standard—the reasonable person standard. If driver A, for example, is injured because driver B absent-mindedly runs a red light, driver A may, under civil law, typically recover for driver B's negligence, that is, driver B's failure to drive to the standard expected of a reasonable person.

Police and prison officials, by contrast, are typically held to lower standards in how they interact with detainees, arrestees, and prisoners. Under both federal and most state law, courts and legislatures have fashioned legal standards, remedies, and doctrines that provide police and prison officials with added protection against civil liability. The reasons for this added protection are varied. In some cases, it has been to protect the public purse; in others, the public weal. In still others, it has been a response to organized efforts of law enforcement unions. Often it is best explained simply by courts' and legislators' greater identification with law enforcement defendants than civil rights plaintiffs.

In any particular lawsuit, this is generally good news for the police or prison official defendant. From a broader, long-run perspective, however, such forgiving legal doctrines can have negative effects on police and prison management, community welfare, citizens' rights, and even, officer safety. Understanding those effects is critical to achieving better police and prison management.

An example of such forgiving doctrines is the standard that prisoners—who allege that prison officials have violated the 8th Amendment¹ rights by providing conditions of confinement that are so deficient in terms of health and safety so as to be cruel and inhuman punishment—must meet. The prisoner must establish that those prison officials have acted with “deliberate indifference” to such rights.² “Deliberate indifference” is legally defined by courts to be something more than “mere negligence” but less than an outright intent to cause harm.³

By definition, then, providing conditions of confinement that are something less than reasonable passes legal muster under federal constitutional law. This leads to some predictable and, indeed, inevitable shortcomings in how modern prisons and jails are managed.

Even though we live in arguably the most affluent nation in history, and even though there has been strong political forces in favor of stricter and less flexible sentencing over the last four decades,⁴ there has been no commensurate will for funding this

movement to incarcerate, which has resulted in the highest incarceration rates of any nation in the world.⁵

This is understandable in that prisoners are politically unpopular.⁶ The amount spent on incarceration is seen as, in economic terms, a deadweight loss.⁷ The only limited leverage aggrieved prisoners have are the lawsuits they are permitted to bring, typically, in federal court.⁸ Consequently, the only budgetary pressures prisoners are able to bring are from successful lawsuits.⁹ Yet, not only do such prisoners have limited remedies and difficult burdens of proof, they also face the same political unpopularity before juries and a substantial portion of the judiciary.¹⁰ Commensurately, prisoner's chances of success at trial are small.¹¹

Where prisons are facing greater countervailing budgetary pressure to hold down expenses or satisfy prison guard union demands, funds will be expended on basic health and safety needs, only and predictably to the level necessary to control liability from lawsuits.¹²

The courts will only intervene in a small number of cases in which prisoners establish "deliberate indifference," but prison officials are sent a powerful "price" signal, as an economist might put it, that prison administrators may reduce health and safety expenses to a level below what is, by legal definition, reasonable. Stated alternatively, the law permits prisons to be run in an unreasonably unsafe and unhealthful manner. When running a jail or prison in an unreasonably unsafe and unhealthful manner is cheaper than its alternative, and jails and prisons are under sustained budgetary pressure, the unreasonable course¹³ becomes both a rational and prevalent choice.

It should be no surprise, then, that prison conditions, under this legal regime, have fallen into crisis.¹⁴ Even with these forgiving standards of federal review, nearly every state has had at least one major penal institution, over the past ten years, come under the supervision of a federal court through an injunction or consent decree.¹⁵

Recently, for example, the California Department of Corrections & Rehabilitation surrendered \$1.2 billion of its approximately \$7 billion budget to a receiver appointed by a federal district court judge to take over the entire department's healthcare system.¹⁶ In the evidentiary hearings leading to the appointment, the court determined that approximately one inmate was needlessly dying per week due to medical neglect.¹⁷ This is only one of the more spectacular law enforcement management failures that is related in part to the wrong signals sent by a relatively forgiving legal environment.

The purpose of this article is, first, to make the reader aware of how the signals the current legal regime sends can lead to errors in policing and prison management. In addition, it demonstrates how, through greater understanding of the relationship between civil liability and police and prison management, such errors may be avoided.

Part II provides a brief history of pertinent federal civil rights law and how the development of this area of law has both contributed to and detracted from the movement towards greater professionalization of police and prison management.

Part III provides four specific examples of how police or prison managers may have drawn the wrong conclusions from signals given by the courts.

In the first example (Part III A), officials in charge of training jail staff moved away from use-of-force continuum strategies ostensibly in response to court interpretations that limited officer liability. This, in turn, resulted in an increased number of alleged beatings, lawsuits, and public controversy.

The second example (Part III B) concerns a “deliberately indifferent” door policy in the Los Angeles County Jail and how a permissive attitude by the local district court contributed to a problem that festered to the point of murder and public scandal.

In the third example (Part III C), forgiving state and federal law regarding police pursuits has resulted both in unnecessary carnage and reduced pressure to innovate regarding methods of terminating such pursuits.

The final example (Part III D) concerns an area in which both police officers and the public are better off with a stricter legal standard (i.e., the rules regarding warning and protecting confidential informants).

Before concluding, Part IV further addresses the fact that prisons, which face even less court oversight, due to the even more forgiving 8th Amendment standards and doctrines, are, not surprisingly, in crisis.

The conclusion (Part V) to which this leads is that police and prison officials will become better managers and decision makers by generally understanding the downside to a relatively forgiving regime of police and prison official liability and adjusting their training and supervisory standards accordingly.

Part II

Understanding a bit of the history of civil liability in federal courts is critical to understanding the strengths and weakness of the signals courts send regarding what is acceptable police and prison patterns and practices.

The most important statute, both practically and historically, that concerns the liability of police and prison officials is 42 U.S.C. § 1983.¹⁸ Section 1983 is an “enabling” statute. That is, it is the legislation that gives persons the right to go into court and vindicate various federally protected rights. The original legislation that gave rise to this statute was the Civil Rights Act of 1871, also called “The Ku Klux Klan Act of 1871.”¹⁹ It is impossible to understand the modern reach and import of the statute without also understanding a bit of its history.

In essence, section 1983 provides that any person can go into either state or federal court and seek a tort remedy, such as compensatory damages, against a government official who, acting “under color of law,” deprived the person of his or her federally protected rights. Further, due to subsequent enactment, such a person can, if he or she is the prevailing party, recover attorney fees expended in the effort.²⁰

As the legislation’s name implies, the statute was originally passed in response to widespread lawlessness in the post-bellum South, in particular, to outrages committed by the Ku Klux Klan in an effort to discredit and undermine Reconstruction. The 42nd Congress held hearings that provided details of how, throughout the post-bellum South, the rights of recently freed slaves and freeman were violated, and

how local sheriffs and courts were either powerless, too intimidated, or otherwise unwilling to step in and protect victims of abuse.²¹ This legislative history, including Congress' findings and the remarks of key representatives and senators, is frequently recounted in modern Supreme Court opinions wherein justices are called upon to interpret the legislative intent underlying section 1983.²²

The 42nd Congress was acting in the wake of the passage of the 13th Amendment [abolishing slavery in 1866]²³ and the 14th Amendment in 1868, which, *inter alia*, provided that all citizens were entitled to all the privileges and immunities of law and that all persons were entitled to the due process of and the equal protection of law.²⁴ Additionally enacted in this era was the Civil Rights Act of 1868, which criminalized the violation by government officials, acting under color of law, of such rights. One of the two resulting criminal statutes, which are still in effect, 18 U.S.C. § 242,²⁵ was used to prosecute under federal law the three LAPD officers and sergeant proximately involved in the notorious Rodney King beating, after they were acquitted of violating state law in a court in Simi Valley, California.²⁶

One of the key features about both the post Civil War Amendments and the related civil rights legislation is which Congress, through its choice of language, elected to cast both the amendments and the statutes in broad, general terms. Although it was outrage in the post-bellum South that proximately motivated much of the legislation,²⁷ the resulting legislative language was not specifically targeted to the South. Instead, Congress, in effect, completed a second revolution, enunciating broad principles of the equality of all citizens before the law and providing remedies to enforce such equality.²⁸

Whereas the emphasis in the original constitution was weighted towards protecting liberty by protecting the rights of states against a feared federal government, after the Civil War, there was an emphasis on protecting individual rights against the state, invoking federal power if necessary to protect such rights. It would be almost nine decades, however, before this promise began to take hold.

This is, substantially, because the federal courts were not ready for such a revolution in government. In *The Slaughter House Cases* (1876),²⁹ the Court sucked meaning out of the privileges and immunities clause in such a way to undermine Reconstruction and restore the balance of state and federal government as before the Civil War. The Court limited the "privileges and immunities" to only those previously enumerated in the Constitution.³⁰

In the *Civil Rights Cases* (1883),³¹ the Court invalidated the Civil Rights Act of 1875, which would have prohibited persons from denying equal access, on the basis of race, to inns, public transportation, theaters, and other places of public accommodation. The Court gave restrictive interpretations of state action, the meaning of which was an enforceable "badge of slavery" under the 13th Amendment, and of Congress' enforcement power under section 5 of the 14th Amendment.

Finally, in *Plessy v. Ferguson* (1896),³² the Court infamously ruled that "separate but equal" answered the call of the equal protection clause.

Meanwhile, lower federal courts, taking their cues from these cases, crafted restrictive rules regarding what constituted "under color of law" for purposes of bringing a criminal action under the Civil Rights Act of 1868 or a civil action under

the Civil Rights Act of 1871.³³ If a state law prohibited the alleged conduct, then, by legal definition, the defendant was not acting “under color of law.”³⁴ If, for example, a sheriff beat an inmate to death, yet the sheriff’s state had a statute prohibiting murder, the victim’s family had no remedy in federal court.

These were the nails in the foundation that supported Jim Crow.³⁵ For the six decades following *Plessy*, the Civil Rights Act of 1871 was a dead letter. Only a handful of such cases made it into the reported decisions on the federal docket.³⁶ Victims of official abuse had no effective federal remedy.

Brown v. Board of Education (1956)³⁷ is the most famous instance of the promise of the post Civil War Amendments finally being translated into legal action, backed by federal power. Less known is that the action was brought under the Civil Rights Act of 1871, a fact not recounted in the opinion.³⁸

The crucial resurrection of the 1871 Act, nonetheless, occurred in 1961. In *Monroe v. Pape* (1961),³⁹ the Court critically relaxed the restrictive definition of “under color of law.” The plaintiffs, a black man wrongfully suspected of murder and his family, brought an action against Chicago police alleging that they were subjected to an unlawful entry into their home and an unlawful detention, search, and seizure. The police officers argued that, if they had, in fact, done these things, then they had violated Illinois state law and, therefore, were not acting “under color of law.”⁴⁰

The Court, however, followed the precedent of two cases from the 1940s in which the Court relaxed the rigid “under color of law” requirement in the context of the criminal statutes originally enacted as the Civil Rights Act of 1868. In *United States v. Classic* (1941),⁴¹ the Court relaxed the standard to criminalize the conduct of officials who willfully altered and miscounted ballots in a Louisiana primary. In *United States v. Screws* (1945),⁴² the requirement was further relaxed to criminalize the conduct of a sheriff who willfully beat a young black male to death while in custody.

Justice William O. Douglas, the strongest libertarian voice in the Warren Court, wrote the majority opinion. Reviewing the 42nd Congress’ intent in passing the 1871 act, he found three overarching purposes to the legislation.⁴³ First, it was passed to counter invidious state legislation. It also was to provide a remedy by which state law was inadequate.⁴⁴ Lastly, it was to provide a federal remedy by the state remedy, though adequate in theory, was not available in practice.⁴⁵

It is the third that is most salient in *Monroe* because, although unstated in the opinion, it was plainly obvious that black victims of police abuse did not stand a chance in 1960s era Cook County courts against Chicago police.⁴⁶

Justice Douglas added that, unlike the criminal cases whose “under color of” formulation it was following, there was no “willful” or “specific intent” requirement in section 1983. Instead, Douglas explained, the statute “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁴⁷

It is with that language that the 42nd Congress’ intent to develop a framework of constitutional tort liability, which would both deter and vindicate violations of federally protected rights, was finally given effect. For the most part, this legal revolution occurred within the same Warren era⁴⁸ as the expansion of individual

rights, including the incorporation of various provisions of the Bill of Rights into the due process clause of the 14th Amendment, making those rights thereby enforceable against the states.⁴⁹ Thus, for example, the 4th Amendment was no longer merely a protection against the misconduct of federal officials.⁵⁰ A local police officer could no longer conduct a search absent a warrant or legal justification—after incorporation—without violating the Constitution.

Not surprisingly, the number of lawsuits brought in federal court under section 1983 rose dramatically.⁵¹ Critics decried the deluge,⁵² but what other than a flood might be expected after nine decades of dammed or, should one say, damned justice?⁵³

Naturally, the new emphasis on original rights and the commensurate exposure to liability gave rise to concern and, in some instances, backlash.

In *Pierson v. Ray* (1967),⁵⁴ for example, freedom riders who were subjected to arrest, prosecution, and conviction in Jacksonville, Mississippi, successfully sued for damages under section 1983, after having their convictions reversed. They alleged and proved false arrest and conspiracy between the arresting officers and the judge. The defendant police officers and judges challenged the verdicts on appeal and before the Supreme Court, where they obtained a sympathetic ruling.

Although the Civil Rights Act of 1871 is entirely silent on the subject of immunities, the Court assumed, nearly 100 years after its passage, that Congress had not intended to abrogate common law immunities. Thus, the Court ruled that the judge had “absolute immunity” from lawsuit because such immunity existed at common law. Furthermore, the Court explained that as a matter of policy, “absolute immunity” promoted judges’ ability to decide cases in a principled and fearless fashion, free from intimidation.⁵⁵

The police officer defendants did not claim that they were entitled to either absolute or qualified immunity. They asserted, instead, that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.⁵⁶

The Court noted that, under 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.⁵⁷ “A policeman’s lot,” Chief Justice Warren wrote for the majority, “is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does.”⁵⁸

“Although the matter is not entirely free from doubt,” Warren added, “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.”⁵⁹

There was, indeed, more than one reason for doubt. First, there was ample authority for the proposition that such immunity based upon “good faith and honest belief” extended only so far as to mitigate damages (not defeat liability), even when the statute under which the arrest was made was subsequently declared unconstitutional.⁶⁰ Second, as Justice Douglas pointed out in his dissent, there was ample evidence in the Congressional record for the proposition that the 42nd

Congress did not intend to provide judicial or police officers with immunity for presumptive violations of federal law.⁶¹ The statute, Justice Douglas noted, applied to “every person,” and “[t]o most, ‘every person’ would mean every person, not every person except judges.”⁶² Or, for that matter, police officers.

Thus, only seven years after *Monroe*, but 96 years after the statute was passed, the Court began to supply doctrines to protect police officers against liability under section 1983. It was both questionable whether such doctrines existed at common law and whether Congress, by its silence, intended for the Court to supply such doctrines; however, this did not prevent the Court, in ensuing years, from “actively” taking further steps to protect police officers from liability.

What started out as a mere common law affirmative defense of “good faith immunity” has, in the Court’s hands, morphed into a qualified immunity against lawsuit.

In *Harlow v. Fitzgerald* (1982),⁶³ a retaliatory termination claim brought by a former U.S. Air Force employee against former President Nixon and various aides, the Court began molding a new doctrine based upon its own policy concern that section 1983 litigation generates unacceptable social costs. “These social costs,” the Court explained, “include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”⁶⁴ “Finally,” the Court added, “there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”⁶⁵

Prior to *Harlow*, the test the Court had set out for qualified immunity contained both a subjective and objective component. Referring both to the objective and subjective elements, the Court had held that qualified immunity would be defeated if an official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.”⁶⁶

In *Harlow*, however, the Court decided that it was too difficult for defendants to disprove, in the face of factual disputes raised by plaintiffs, that they were acting in subjective good faith. This difficulty was inconsistent with the Court’s new-found policy goal of dispensing with insubstantial cases early in litigation. So, the Court changed the test, removing the subjective component. From thereon, a defendant had to establish that, objectively speaking, the law was not “clearly established” at the time of the defendant’s actions. The legal system, the Court reasoned, does not expect public officials to anticipate further developments in the law.⁶⁷

Further favoring the police defendants, the Court added a procedural rule in *Mitchell v. Forsyth* (1985)⁶⁸ that all discovery must be stayed until the immunity issue had been resolved. The Court added still another procedural rule in *Mitchell*,⁶⁹ permitting defendants, whose motion for early dismissal based upon their assertion of a qualified immunity defense was denied, to immediately appeal their rulings, rather than wait for a final appealable order terminating the entire litigation, as is required of most other defendants.⁷⁰

By *Mitchell*, the Court had conceded that qualified immunity was not an ordinary affirmative defense, but “an entitlement not to stand trial under certain circumstances.”⁷¹ That is, the Court, was engaged in rule making entirely unhinged from the original justification for the doctrine’s existence.

By *Saucier v. Katz* (2001),⁷² qualified immunity had morphed to the point that a defendant police officer whose use of force was otherwise determined to be unreasonable under the applicable 4th Amendment standard, might still be entitled to a summary judgment by a court if his or her mistake was nonetheless reasonable. “[A]n officer,” the Court explained, who “reasonably, but mistakenly, believed that a suspect was likely to fight back . . . would be justified in using more force than in fact was needed.”⁷³ Furthermore, “an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances.”⁷⁴ Through such legal gymnastics, a use of force considered “unreasonable” for purposes of the 4th Amendment, might be considered “reasonable” for purposes of insulating the defendant police officer.⁷⁵

Similar doctrinal manipulation has occurred in the development of municipal liability claims. Qualified immunity typically applies to individual police officer defendants, but not the police officers’ municipal employers.⁷⁶ The Court, nevertheless, has thrown other obstacles in the way of section 1983 plaintiffs.

Originally, in *Monroe*, the Court upheld dismissal of the defendant City of Chicago because a municipality was not a “person” within the meaning of section 1983.⁷⁷ In 1977; however, the Court was faced with the following problem: Who does a plaintiff sue when the entire municipal entity has ratified and is following a policy that violates her rights? In *Monell v. Department of Social Services* (1977),⁷⁸ the employee’s department had an express policy that compelled uncompensated pregnancy leaves, thereby violating federal law. The Court was faced not only with an embarrassing gap in the law, but, it would turn out, an embarrassing previous misinterpretation of law.

In 1871, in addition to the Ku Klux Klan Act, Congress had additionally passed “The Dictionary Act of 1871.”⁷⁹ This act expressly stated that a municipality was “a person” for purposes of Congress’ enactments. Thus, the Court corrected the mistake in *Monroe* by holding that a municipal entity could be sued under section 1983.

The, then Associate Justice William Rehnquist dissented, contending that even though the Court got it wrong in *Monroe*, it was up to Congress to fix the problem.⁸⁰ The fact that Congress had not acted since *Monroe* indicated to Rehnquist that it was essentially satisfied with the status quo.

As a matter of formal, theoretical reasoning, Justice Rehnquist’s position is unimpeachable. Against the historical backdrop of civil rights legislation, however, including the typically eight to nine decades of retrenchment for each decade of concentrated interest in civil rights legislation and enforcement, his reasoning is troubling. How many times would Congress have to pass civil rights legislation before the federal courts would give such legislation effect?

A further problem was raised in *Monell*, which would take more than another decade to resolve. In *Monell*, the responsibility for the unconstitutional action against the

employee was easy to establish. The duly enacted written policy of compelled pregnancy leave without pay, on its face, discriminated against the plaintiff. But, what of the instances in which the written policies were benign, but, in reality, not the way the municipality actually functioned? Whereas, on paper, the entity was fine (as, on paper, Illinois had laws against lawless search and seizures in *Monroe*), what if the way it really did business, by and through its “customs, policies, and practices,” resulted in the deprivation of federally protected rights?

At common law, a corporation is typically responsible for the torts of its employees under the doctrine of *respondeat superior*. Yet, based upon its analysis of a rejected amendment to the Civil Rights Act of 1871, presented by Senator Sherman of Ohio, the *Monell* Court rejected the doctrine of *respondeat superior*. In the amendment, Sherman proposed holding an entire municipality liable, which failed to prevent otherwise privately motivated civil rights violations, such as lynchings.⁸¹ Dubiously, the Court reasoned from that rather broad and innovative concept to conclude that Congress had also rejected the more conservative concept of *respondeat superior* for the torts of municipalities’ *own* employees.

Once this principal had nonetheless taken root in *Monroe* and *Monell’s* dicta, the next question for the Court to resolve was as follows: To what standard of liability must a municipality be held responsible for subjecting, or causing to subject, someone to a deprivation of his or her federally protected rights?

In one case that left the matter unresolved, Justice John Paul Stevens contended in dissent that the mere negligence of a municipality should be sufficient, given that such a common law approach comported with the intent of the 42nd Congress to establish a system of constitutional torts.⁸² Under his view, if a municipal entity had failed to reasonably fulfill its duty of hiring, training, supervising, or disciplining officers, it should be held liable.

Against this common sense view, however, a majority of justices ultimately held in *City of Canton v. Harris* (1989),⁸³ that a more forgiving standard would apply. In *Harris*, a police officer mistook signs of severe emotional ailment for belligerence, a mistake that is still commonly made.⁸⁴ Consequently, Canton officers arrested and processed, rather than procured medical care for this woman. Afterwards, she brought an action against the officers’ police department for failure to adequately train the city’s officers.

The court held that “the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”⁸⁵

Justice White, writing for the majority, stated, “[t]o adopt lesser standards of fault and causation would open municipalities to unprecedented liability under §1983.”⁸⁶ Yet, the fact is that to apply *any* standard of fault would have exposed municipalities to unprecedented liability because, between 1871 and 1977, courts had essentially nailed the courtroom doors closed to such claims. In *Canton*, the Court had opened a crack in the doorway by creating a standard that is a “judicial gloss.” “Judicial gloss” is a polite way of saying that the Court created the standard. It is found nowhere in the statute or legislative history. Instead, it was the Court’s ungrounded policy considerations, based upon fear of increased municipal liability that guided the judicial creation.

Arguably, the current Chief Justice Rehnquist would have staked a position more consistent with his dissent in *Monell* if he had, rather than join the majority, argued for a common law reasonableness standard. The Court could, thus, let Congress correct the “mistake” if it was unsatisfied with the empirical results of faithfully following the intent of the 42nd Congress, rather than create a new standard out of whole judicial cloth.

Unlike the 8th Amendment subjective deliberate indifference standard mentioned above, the section 1983 municipal liability deliberate indifference standard is an objective one. Yet, it retains two of the same anomalies as the 8th Amendment standard. By legal definition, it is a harder standard to prove than mere negligence. Stated alternatively, the mere unreasonableness of how the entity functioned is insufficient to establish liability. By legal definition, then, a municipal entity can operate at a level less than what would otherwise be considered reasonable and still evade responsibility for the injuries of such unreasonable practices and patterns.

The second anomaly is that the phrase “deliberate indifference” is, itself, an oxymoron. As such, it tends both towards incoherence and corruption. Defined as something between a ceiling of outright intent and a floor of “mere negligence,” it has become something of a Rorschach test in which judges with a more rigid view of individual responsibility set the line very near the ceiling. Since the standard was adopted, many courts have issued written opinions upholding the dismissal of cases because the evidence shows “mere negligence.”⁸⁷ By contrast, there are no cases of which this author is aware in which a court directed verdict in favor of plaintiff because the defendant municipality’s conduct could not possibly have been more indifferent without being outright deliberate. An example of a case in which a federal court should have so ruled is discussed below.⁸⁸

As in the qualified immunity line of cases, federal courts could not resist creating additional procedural rules to provide an even more forgiving legal environment for municipal defendants as well as officers. Until *Leatherman v. Tarrant County* (1993),⁸⁹ for example, various courts insisted that plaintiffs alleging misconduct against municipal liability must meet “heightened” pleading requirements in their complaints, or face early dismissal. In *City of Los Angeles v. Heller* (1986),⁹⁰ the Court, without briefing, dubiously held in its *per curiam* opinion that a municipal entity could not be held liable in the second half of a bifurcated trial in which in the first half, the individual officers had been exonerated.⁹¹ And, in *City of Los Angeles v. Lyons* (1983),⁹² the Court held that a person who was subjected to a chokehold could not challenge the LAPD’s practice of employing chokeholds because he could not, in essence, prove that he was likely to be subject to another chokehold, thereby depriving him of the narrow standing permitted for his request for injunctive relief under section 1983 to proceed. This sample of how the Court has limited constitutional rights and remedies is hardly exhaustive.⁹³

From this brief history of section 1983, there are four troubling aspects of which the police or prison administrator attempting to understand the signals from federal courts should be aware.

First, “activist judges” have repeatedly subverted the Congressional intent behind section 1983 and retarded the growth and development of modern doctrines of constitutional torts. In the culture wars, it has been typically conservative-oriented

judges and commentators who have criticized a liberal elite from departing from black letter constitutional text and original intent.⁹⁴ In doing so, they have achieved considerable success in inspiring a skeptical, if not cynical attitude in their readers and listeners towards federal courts.⁹⁵

Ironically, though, it is the socially conservative judges in particular who have “actively” engrafted their own prejudices and policy preferences into the area of section 1983 and constitutional torts. Indeed, it is this tendency that was the padlock that kept the victims of Jim Crow out of the federal courts.

In addition, this judicial tinkering has altered not only the development of such law but altered the deterrence calculus that a more neutrally interpreted system of constitutional torts would have provided. Almost by definition, by making it harder for plaintiffs to vindicate instances of misconduct or abuse, it makes it easier for defendants to engage in misconduct by reducing potential accountability.

This judicial activism is also profoundly undemocratic and derogates from some of the principal strengths of organizing a society with democratic principles. At its most basic level, courts in America are generally organized around the proposition that judges should interpret law, but juries must decide facts. Indeed, the right to a jury trial is fundamentally undermined when a court prematurely and wrongly decides issue of fact.⁹⁶ The development of common law is fed from the ground up by the inclusion of individual citizens’ experiences, as brought to the court in the form of evidentiary facts. When courts are dismissive of such facts and base their ruling on a discourse with each other, dogma and prejudice tend to predominate over experience.⁹⁷ If Justice Oliver Wendell Holmes, Jr., is correct, that “the life of law has been not logic, it has been experience,”⁹⁸ than such tendencies not only derogate from citizen participation in government thereby promoting cynicism and alienation, but they also impoverish the entire process by depriving the development of common law of the essential nutrients of modern experience.

Finally, the modern law of constitutional torts tends to send the wrong signals to police and prison officials. Because the courts have habitually interfered in the natural development of a system of constitutional tort law by coming down on the side of government officials, the courts have retarded the development of modern and better approaches to policing and incarceration. It was not until the *Warren* court that important portions of the Bill of Rights became applicable to state action, or before section 1983, that a remedy existed to enforce those rights. It has taken decades longer for the various basic constitutional issues, which were placed on hold for literally centuries, to reach the high court’s attention.

In *Farmer v. Brennan* (1993),⁹⁹ for example, the high court finally got around to articulating a standard for what an inmate who has been placed in a position of physical danger and seriously injured must prove. By this time, America was already incarcerating its population at a higher rate than any other nation and had developed the most elaborate and expensive system of penitentiaries in history. Between the late 18th century Enlightenment when the 8th Amendment prohibiting cruel and inhuman punishment was passed and the post-modern end of the 20th century when the court handed down *Farmer*, there were several centuries of largely court-imposed silence on the subject. During this time, there could be little systematic pressure from the most interested persons involved, the victims of abuse who

might otherwise advance their interests in court to develop standards, methods, procedures, or modes of ensuring minimally safe conditions of confinement. As stated above, it should be no surprise that American prisons, such as the entire California Department of Corrections and Rehabilitation, are currently in a position of recrudescence and intractable crisis. Over 200 years after the prohibition on cruel and inhuman punishment was conceived, federal courts are finally getting around to interpreting the standards that might apply to modern jails and prisons.

For the conscientious police or prison official or administrator, understanding that the courts have acted more like permissive and, even, lax parents towards law enforcement than meddling second guessers of officers acting in dangerous, stressful incidents (as they are often characterized and, indeed, self-characterized) is the first step in framing a coherent and intelligent response to the signals the courts send regarding how to effectively, intelligently, and ethically police or incarcerate.

Four concrete examples in which courts sent a signal that has been misinterpreted by law enforcement to the detriment of the greater good are as follows.

Part III A

In July, 2001, W. Raymond Nelson, a patterns and practices consultant, issued the "Nelson Report."¹⁰⁰ Nelson was hired by the Orange County Sheriff's Department to review the use-of-force policies and practices at the department's detention facilities, the tenth largest jail in the country.

In his report, Nelson explained . . .

The [OCSD's] Training Academy changed its "use-of-force" training curricula in 1995 from a "Force Continuum" approach to a "Force Option" approach. The traditional "Force Continuum" approach reflected the department's policy that "Deputies will use only that force and restraint necessary to control an inmate who is uncooperative, combative, or violent towards staff or others." This strategy instructed deputies to increase the degree of force as necessitated by the inmate's behavior. The "Force Option" approach instructs deputies in a variety of force options that they may use at their discretion as long as they can reasonably justify their choice of options. As one deputy related, "its more like street fighting."¹⁰¹

The jail corridor videos that this writer has reviewed in the course of litigation against the Orange County Sheriff's Department do, indeed, look like street fighting [to the extent the uses of force are not obscured by deputies standing in a circle around the efforts to subdue inmates].¹⁰² It was some of these videos making it onto the local television news, together with a number of lawsuits that provided the backdrop to the department's request review by an outsider of its use-of-force policies.¹⁰³

In *Graham v. Conner* (1989),¹⁰⁴ the Supreme Court determined that cases alleging excessive use of force, during an arrest, investigatory stop, or other "seizure" of an otherwise free person, would be judged by 4th Amendment standards. As for persons in custody but not yet convicted, the courts have split on whether the applicable standards are based upon the 8th Amendment's prohibition on cruel and inhuman punishment or the 14th Amendment's due process clause.¹⁰⁵ Ultimately,

pretrial detainees might be entitled to either the protection of the 4th Amendment or a 14th Amendment standard analogous to the 4th Amendment one. More than 200 years after the bill of rights passed, 138 years after the 14th Amendment, this issue is still not settled.

Determining whether a use of force was reasonable under the 4th Amendment requires, as the *Graham* Court settled the matter, a careful balancing “of the nature and quality of the intrusion on the suspect’s Fourth Amendment interests, against the countervailing governmental interests at stake.”¹⁰⁶

Cautioning against any precise definition or mechanical application of the reasonableness inquiry, the Court commanded “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹⁰⁷

As *Graham* has been interpreted, the law does not require officers to exhaust less intrusive uses of force, as nominally required in a force continuum scheme.¹⁰⁸ For example, in *Scott v. Henrich* (1994),¹⁰⁹ Judge Alex Kozinski writing for the Ninth Circuit panel explained an upholding summary judgment in favor of defendant police officers accused of a wrongful shooting:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.¹¹⁰

The plaintiff in *Scott* further contended that the police officers’ conduct violated police department guidelines for dealing with barricaded suspects. Under those guidelines, arguably, the police officers shouldn’t have tried to seize the suspect immediately but should instead have developed a tactical plan to deal with the situation, sealed the possible escape avenues, called for assistance, and tried to get the suspect to surrender.

Assuming internal police guidelines are relevant to determining whether use of force is objectively reasonable, Kozinski explained, they are relevant only when one of their purposes is to protect the individual against whom force is used.¹¹¹ Thus, for example . . .

If a police department limits the use of chokeholds to protect suspects from being fatally injured, or restricts the use of deadly force to protect suspects from being shot unnecessarily, such regulations are germane to the reasonableness inquiry in an excessive force claim. But if, for example, the department bans

high-speed chases in order to save gas, or to protect bystanders, a suspect arrested after an unauthorized chase can't complain about the violation of a rule not intended for his benefit.¹¹²

While it isn't clear whether the Orange County Sheriff's Department staff who opted to switch to a "force option" regime rather than a use-of-force continuum was responding to this or other similar cases, three observations are nonetheless pertinent to the inquiry:

1. Had the courts determined that a use-of-force continuum was the only reasonable response, unless the departure from the continuum was justified by extenuating circumstances, the Orange County training staff would not have been in a position to recommend the regression to the "force option" regime.¹¹³
2. By nonetheless making the availability of such internal regulations potentially relevant to the plaintiff's case, the *Scott* opinion gives a perverse option for law enforcement officials to remove regulations designed, in part, to promote the safety of the suspect, in an effort to limit the department's and officers' potential liability.
3. The courts, by engaging in this top down approach to interpreting the 4th Amendment and section 1983 and selectively dismissing such cases before the facts are presented to a jury, cut off the bottom-up flow of human experience that should inform the development of a modern common law type of system of constitutional torts. Juries, for example, might otherwise accept the testimony of police patterns and practices experts, who might logically conclude and testify that not having a use-of-force continuum regime in place, and not following it, unless under unusual circumstances, falls below what modern police departments regard as a reasonable form of policing.¹¹⁴

If the Orange County Sheriff's Department, among others, had been held to a higher standard initially, it might not have been tempted to discard the use-of-force continuum. In an effort ostensibly to make deputies' tasks easier and less subject to liability, the department sowed instead a jail in which the uses of force came to resemble "street fighting." This neither promoted the safety of the deputies or was fair to inmates like John Lolli, who while serving a brief detention arising from an unpaid bicycle infraction was, for insisting that he was going into diabetic shock, pulled from his cell and severely beaten, suffering, *inter alia*, three broken ribs. No progression through the use of force continuum was required of the deputies who beat Lolli. Lolli's case is among the many against the Orange County Sheriff's Department working its way through the courts.¹¹⁵ A more forgiving standard led to more force, injury, and liability.

Part III B

On December 20, 1997, Daniel Segovia, who our office represented, was dragged—after all the cell doors on his row in a Men's Central Jail gang module inexplicably opened simultaneously—into a cell with six other inmates, mauled, and stabbed 52 times.¹¹⁶

The standard which Segovia was required to establish in order to recover was "deliberate indifference." "Deliberate indifference" is what he demonstrated. "Deliberate indifference" is how the courts responded. "Deliberate indifference" accurately describes how the jail continued to be operated after the incident.

The jail's policy was to leave all the gang module doors locked and closed. No one can (or will) say why Segovia was called out of his cell for a visitor who never existed or why, after he was on the row, all cell doors suddenly opened in violation of this policy. This is because the jail could not establish who was on duty at the time. Of the entire pool of deputies who might have been at the door-switch post, none recalled an inmate being stabbed 52 times after someone threw that switch.

Neither the sheriff's investigation of the incident nor the supervisor signing off on the report ever asked, "Who was on duty? Who opened the doors? Why?" and "Why wasn't the policy breach reported?" The sheriff's investigator interviewed each of the six inmates in close proximity to one another where they were able to monitor each other's cooperation. No one was prosecuted. Each of the six got off with 10 days' loss of privileges.

That was in 1997. In June 2004, the Los Angeles County Sheriff's Department had conceded that no less than five jail inmates have been killed or beaten during the prior 18 months in retaliation of testifying against other inmates.¹¹⁷ It reached the point of scandal when it was publicly reported that an inmate facing trial used another inmate's court pass to get out of his cell and wandered around the jail for five hours until entering the cell where the key witness against him and four others were sleeping.¹¹⁸

During litigation, Segovia asked for jail statistics on inmate-on-inmate violence. He twice was told none existed. After persistent effort, though, he finally was given statistics for 1995 (761 incidents), 1996 (766), and 1997 (896). These numbers, probably understated, demonstrated not only a high level of violence but a rising trend. In the month Segovia was stabbed, there were, on average two incidents of inmate-on-inmate violence reported per day.

In his lawsuit, Segovia asked the federal court how the county could possibly have been more indifferent without being deliberate? But the District Court summarily dismissed his lawsuit on grounds that the deliberate indifference standard had not been met. A 9th U.S. Circuit Court of Appeals panel, foregoing oral argument, upheld the dismissal in an unpublished opinion. The 9th Circuit declined the plaintiff's request to review the matter *en banc*. No changes in policy, training, reporting, supervision, or discipline were ever instituted as a result of his stabbing.

It should come as no surprise that when jails and prisons are continually underbudgeted, federal standards of liability set the base level of jail conditions. If the federal courts had set the standard at reasonableness—the standard by which private individuals and corporations typically must regulate their behavior—then jails and prisons would no doubt be funded to provide reasonable conditions of confinement.

Deliberate indifference is, however, the standard the court sowed. In return, deliberate indifference is what the criminal justice system reaped. What the Board of Supervisors saw when they toured Los Angeles County jails in May 2005 is what my law partner Marina R. Dini and I saw when we visited the jail five years earlier during the Segovia case: The jail is so thoroughly overcrowded,¹¹⁹ unsanitary,¹²⁰ and violent¹²¹ that the county could not possibly be more indifferent to the rights of inmates without deliberately willing their violation.

In November 1999, I wrote to the Sheriff's Department's special monitor about the Segovia case, complaining that inmate-on-inmate violence was so poorly investigated and reported that no one had any way of knowing how many preventable assaults were occurring within the jail. Regrettably, the special monitor never responded.¹²²

Had someone in a position of responsibility paid close attention to Segovia's case, he or she might have insisted that, when instances of inmate-on-inmate violence occurred, at a minimum, jail staff should report whether the jail's door polices were followed, and, if not, whether appropriate remedial discipline, retraining, or rule revision were implemented or, even, considered.

Instead, jail management regressed to the point at which an inmate was allowed to freely roam throughout the jail, seek out the witness set to testify against him, and execute him.¹²³ Had the standard not been deliberate indifference, and had the district court not construed deliberate indifference in a forgiving way towards the law enforcement defendant, the Los Angeles County Jail would have been forced to confront its failure to manage the jail to a minimally reasonable standard, prior to public scandal and the familiar round of public inquiry commissions that typically follow.

Instead, the seeds sowed yielded intimidation, violence, murder, injustice, and liability.

Part III C

The latest statistics from the National Transportation Safety Department indicate that California leads the nation in the number of fatalities caused by police pursuits. Almost half of those fatalities are innocent bystanders or passengers.¹²⁴ Even adjusted for California's size, the carnage is disproportionately high. The one glaring difference in public policy between California and most other states is the extremely broad immunity the legislature has granted to law enforcement agencies from civil lawsuit. In California, police agencies are required to promulgate reasonable pursuit policies. Remarkably, though, they are not required to follow them!¹²⁵

Law enforcement officials have been steadfast against changing this generous immunity, and so far, they have been successful.¹²⁶ Instead, law enforcement overwhelmingly favors increasing criminal penalties for suspects who flee.¹²⁷

There may still be areas in which the best public policy is to build more jails but not likely here.¹²⁸ Increasing criminal penalties without addressing the immunity issue will likely result in more, not less pursuits.¹²⁹ Moreover, it will cost more while still failing to address the central challenge—to increase public safety, fairness, and accountability.

As California law now stands, a police officer cannot recklessly fire his or her weapon across a school yard to stop a pursuit, no matter how trivial the underlying offense, without being held civilly accountable. He or she can, however, recklessly drive his or her vehicle across it in high-speed pursuit.¹³⁰ To understand California law on the subject, though, it is necessary to understand a little bit about the related federal law.

Since *Tennessee v. Garner* (1985),¹³¹ it has been settled that the use of deadly force to prevent the escape of a fleeing felon is bound by the 4th Amendment's requirement of reasonableness. Specifically, an officer can only use deadly force when he or she has probable cause to believe that the suspect poses a threat of death or serious physical harm to the officer or others. As in the subsequent case of *Graham*, the court employs a balancing test, weighing the individual's 4th Amendment interests against the important governmental interests in apprehending fleeing felony suspects.¹³²

In *County of Sacramento v. Lewis* (1998),¹³³ by contrast, the Court held that a person injured or killed in a high-speed pursuit was not "seized" within the meaning of the 4th Amendment. Instead, the Court concluded that the victim's due process rights had potentially been violated; therefore, instead of measuring the officer's actions against a standard of reasonableness, they are measured against a more forgiving "shocks the conscious standard."¹³⁴ Specifically, an officer is only liable for a substantive due process violation to persons injured in a high-speed pursuit when his or her conduct shocks the conscious. Similar to the cases discussed above, the Court again has created a "judicial gloss," with no roots either in constitutional text or the statutory intent behind section 1983. Not surprisingly, the judicial gloss favors the defendant police officer over the plaintiff and tends to take cases away from juries.

The contrast between *Garner* and *Lewis* highlights a strange anomaly in this area of federal law. In *Lewis*, deputies responded to the scene of a fight. An 18-year-old boy and his 16-year-old friend, neither of which had anything to do with the fight, fled the scene on a motorcycle. After a high-speed pursuit, which lasted for a little over one mile, the 18-year-old lost control of the motorcycle as he was taking a corner. The patrol car was unable to stop before fatally striking the 16-year-old passenger.

If the officer had continued the chase on foot against the 18-year-old and fatally shot him in the back, that separate action would have been considered a "seizure." Both boys would have been in the morgue, but only one would have been seized. In only one instance would the officer's conduct be subsequently analyzed for its reasonableness.¹³⁵

Given this state of federal law, it is easy to see why law enforcement interests in California would push to immunize engaging in a high-speed pursuit but not immunize high-risk shooting. Immunizing the latter would be pointless because the officer is still going to face liability under federal law for an unreasonable use of deadly force.

Consequently, under California law, police officers cannot wantonly fire a gun aimed across a school yard or a shopping mall, but they are free—at least in terms of civil liability—to engage in high-speed pursuits, no matter how reckless, over the same ground. A California appellate court, which reluctantly dismissed the lawsuit of a widow of someone killed by just such a pursuit across a school yard, expressed its disgust at the "get out of liability free card" that California law gave law enforcement.¹³⁶ The court added, it was "especially chilling that this particular instance occurred on the property of a school where students were present, but it is also sad that one blameless person was seriously injured as a result of the pursuit, and that his family has no option for redress."¹³⁷

Nor did Kristie Priano's parents. Their daughter was killed in Northern California as the result of a trivial pursuit.¹³⁸ The officer initiated a high-speed pursuit through

a residential area of a teenager accused of taking her mother's car, even though he knew where the teenager lived. Her car slammed into the van in which Kristie was a passenger.

Regarding the chase resulting in Kristie's death, Chico Police Chief Bruce Hagerty stated that the officers followed policy. "As pursuits go," Hagerty said, "this is as controlled as you can get."¹³⁹

That is precisely the problem. Police chases are, according to Los Angeles Sheriff Lee Baca in a letter opposing a bill to remove immunity sponsored by Kristie's parents, "extremely complex, dynamic, and unpredictable events."¹⁴⁰ As such, however, they are extremely simple and predictable in their result: the more police chases, the more unintended consequences, carnage, and tragedy. All the more reason to subject them to outside supervision, which leads to another predictable result—the more law enforcement is exposed to potential liability, the less resulting police pursuit carnage.¹⁴¹

Police opposition focuses on the legislation's potential cost in terms of municipal liability. The issue, however, is not so much *What is the cost?* as *Who shall bear it?* The law is that the innocent victim injured, maimed, or killed at random must bear the entire cost of such policies. The logic of the law is that police pursuits are not so important that the public should underwrite their foreseeable costs but important enough to impose a negative lottery ticket on the Kristie Prianos who are mowed down at random.

The ethicist John Rawls famously tested the fairness of public policy by conducting a thought experiment, positing a veil of ignorance: If everyone was afforded a preunderstanding of the distribution of a policy but was unaware on whom the distribution fell, would he or she consent to the policy beforehand?¹⁴² Translated to police pursuits: If we know in advance that police pursuits to benefit the polity are going to mow down innocent victims, would we distribute the cost of that benefit across the polity or concentrate it only on the victims?¹⁴³

People would be unlikely to disagree about whether a child should be sacrificed for the overzealous enforcement of law that, with but a little police patience, could have been enforced anyway. Holding such negative lottery tickets is not part of the social contract. As a former police chief aptly put it, "These citizens do not volunteer to be rolling roadblocks for police."

Supporters of police pursuits complain that the question, as phrased, misdirects blame away from the person who started the pursuit. Instead, critics suggest the better approach is increased criminal penalties for fleeing. It takes two to form a pursuit, however. The issue is not inviting a pursuit. It is accepting the invitation. Added criminal penalties are unlikely to deter when a fleeing suspect's judgment, presumptively lacking, is impaired by alcohol, drugs, mental illness, or, in the case of the driver who slammed into the van carrying Kristie, teenage immaturity.

If people assume that police pursuits serve a public benefit, then the public should pay the cost. Still, Baca warns against a potentially "enormous liability"¹⁴⁴ for law enforcement from the bill. It is implied, then, that the more "enormous" the liability, the more enormous the cost now unfairly imposed at random.

Finally, some police officers express resentment, even a sense of betrayal, at the thought of having their streetwise judgments questioned “with the benefit of 20/20 hindsight” in the sanctity and calm of court. In court, however, the defendant police officers’ jobs are not at stake, nor do they face discipline as they might under the present system of internal police department review to determine whether they followed the department’s promulgated policy. At stake in court is the question of who shall pay the otherwise private cost of a public benefit.

The real second-guessing comes from the responsible department heads or municipal entities in determining whether such chases are, after accounting for *all* of their costs, an effective use of budgetary resources. That is, those managing public resources must, when confronted with the entire costs of their policies, continually review whether the benefits outweigh the costs and justify those decisions to the polity.¹⁴⁵

Under pressure to reduce costs, a competent manager might also look to improved ways of ending police pursuits, including emerging technology.¹⁴⁶ Until the courts impose liability for organizing police pursuits that unreasonably lead to carnage and idiosyncratically imposed tragedy for a poorly measured public benefit, however, the modern problem of police pursuits will continue to outrun modern solutions.

Part III D

The major theme of this article has been how federal courts have deferentially favored police and prison official defendants and, thereby, distorted the development of modern law. Often at, or near, the surface has been an express fear by the court that to do other than come down on the side of law enforcement would be to unleash “massive liability.” It is, in form, a slippery slope argument. Often, such arguments are specious and empirically unsupported. Perhaps, there should be a rule. Every time an opinion predicts, Cassandra-like, that a particular holding will “open the floodgates” to litigation, the hydrology should be supported with empirical evidence. Not only are the legal locks an overworked cliché; they are a reliable hint that judges have let their public policy imagination and biases fill in for reliable fact.¹⁴⁷

The dissent in *Kennedy v. Ridgefield* (2006)¹⁴⁸ is an example of nine conservative judges on the Ninth Circuit reflexively engaging in a slippery slope argument to plainly favor police interests. The *Kennedy* dissent, ostensibly drafted to whet the Supreme Court’s appetite for review, is from an order wherein the Ninth Circuit correctly denied a petition for rehearing *en banc*. The dissenting judges’ reasoning is so faulty, however, that their proposed rule would hurt law enforcement’s core interest in being able to cultivate confidential sources.

The facts in *Kennedy* are, as the dissent points out, “undeniably tragic.”¹⁴⁹ One feature of the tragedy worth recounting, is that the dénouement typically is not a random event. Instead, it is the foreseeable product of human action or inaction. Almost by definition, tragedy is preventable. In *Kennedy*, the preventable cause was that police broke a promise.

In 1998, Kimberly Kennedy informed the Ridgefield Police Department (in the State of Washington) that her 13-year-old neighbor, Michael Burns, had molested her 9-year-old daughter. Kennedy warned a Ridgefield officer that Michael and his mother had dangerous tendencies. In response, Kennedy relates, the officer

assured her that she would be given prior notice before any attempt was made by investigators to contact the Burns residence. The promise was broken.

After Kennedy left a telephone message with the officer requesting a status update, the officer went to Burns home to inquire whether the relevant agency had contacted them. When the officer informed Kennedy of his direct contact with Burns, that fact induced enough panic to inspire a second promise.

Rather than pack her family's bags and immediately leave, Kennedy elected to stay through the evening and leave early the next morning. This decision was made in reliance upon the officer's assurance that the Ridgefield Police would specifically patrol her neighborhood that evening. This promise was broken as well.

Early the next morning, Michael broke into the home and shot both Kennedy and her husband, wounding her and killing him. Subsequently, Kennedy brought a lawsuit on her children's, her husband's estate's, and her own behalf in federal court under 42 U.S.C. § 1983.

Two of the three-judge panel in *Kennedy* upheld the denial of the defendant Ridgefield police officer's motion for summary judgment against the constitutional tort claim arising from the broken promise. The primary argument of the dissent from denial of *en banc* review is that the panel's "expansive new holding opens the floodgates to § 1983 lawsuits by citizens who will claim deliberate indifference following any failure on the part of police to adequately protect them from harm . . ." ¹⁵⁰ The dissent menacingly adds, "[t]he slippery slope of liability created by the court's opinion has implications of great magnitude for public safety officials everywhere and the ruling cannot be confined to extraordinary cases." ¹⁵¹

This hyperbole, however, doesn't test well against reality. California, for example, is a jurisdiction in which there is liability for both failure to warn and failure to protect when a special relationship has been created by, respectively, a promise to warn or protect.

In *Wallace v. City of Los Angeles* (1993), ¹⁵² an appellate court reversed nonsuit of a claim brought on behalf of the estate of a prosecution witness murdered by the suspect against whom she was to testify. The claim was brought against the detective who promised to relocate her if she was threatened but neglected to tell her the alleged murderer was a suspect in two other murders. Instead, the detective reassured the witness that she did not really need to testify because he had other eyewitnesses, that if he felt she was in any danger he would tell her and hide her, and that she didn't need to change her daily routine. "[W]hen the government's actions create a foreseeable peril to a specific foreseeable victim," the court explained, "a duty to warn arises when the danger is not readily discoverable by the endangered person." ¹⁵³

Similarly, in *Carpenter v. City of Los Angeles* (1991), ¹⁵⁴ the victim of a robbery testified at a preliminary hearing against a suspect. After the hearing, the suspect accosted the witness in the hallway, warning him that "God punishes people who lie." Concerned for his safety, the witness told the detective who assured him there was no need to worry, that the suspect was just a street punk. The same robbery division, however, failed to pass on reliable information that the suspect had tried to hire an informant to do a "contract hit" on the witness. He was subsequently shot and, only then, placed in a witness protection program. The appellate court reversed

the grant of summary judgment in favor of the city, stating that “. . . appellant, as a witness in a criminal prosecution who had been assured that the defendant posed no real danger to him, enjoyed a special relationship with the City, through its police department, such that the City owed appellant a duty of care, which required it to warn appellant about [the suspect’s] subsequent threat to appellant’s life.”¹⁵⁵

Several lessons can be drawn from these 1991 and 1993 cases. First, since 1991, other than a handful of truly tragic and preventable cases, there has been no flood of litigation in California regarding such claims.¹⁵⁶ Nor have there been any “explosions,” “downpours,” or “tidal waves.”

This is particularly significant because, in California, the standard for such special relationship claims is negligence. By contrast, the standard for the analogous due process claim in federal court, employed in *Kennedy*, is “deliberate indifference.” Similar to the deliberate indifference standard employed in 8th Amendment cases, it is a judicial gloss set somewhere above negligence and below outright intent.¹⁵⁷ Its main practical effect, as contended throughout this article, is to sometimes confuse the issue and often summarily pick off cases that would otherwise be decided by jury.

In addition, because the state standard is already an easier hurdle for plaintiffs than the federal one (at least in California), one can expect *no* net increase in litigation of such claims. The only possible change will be that some claims, which would have been filed in state court, might be filed in or removed to federal court.

There is also, based upon California’s experience, no reason to expect flooding in other jurisdictions either. One reason is that the prescription such cases supply for law enforcement is simple and comports with common sense. The police must merely refrain from making promises either to warn or protect unless they intend to carry out the promise.

The *Kennedy* dissent raises a second fear—that unless the state-created danger doctrine is limited, it will “deter government officials from taking risks and executing their functions for the public good.”¹⁵⁸ If such promises are unreliable, however, confidential informants such as Kennedy, Wallace, and Carpenter risk being functionally executed for testifying on behalf of the public good. The dissent’s police bias prevents them from seeing that the other side of the coin shines brighter.

Finally, the dissent argues, “we have an entire body of retaliation laws in the criminal codes of every jurisdiction recognizing the inherent danger, and imposing responsibility on the actual perpetrator of the violence, for which the court now imposes civil rights liability on the hapless officer who has the misfortune to take the initial complaint and conduct a follow-up investigation.”¹⁵⁹

The *Kennedy* dissent’s pity is misplaced. It isn’t enough to open Pandora’s Box; then merely blame Pandora. The fact that the danger is so inherent is all the more reason why citizens should not be exposed to false promises by “hapless” police. Pity, instead, the woman who, before the molestation of her 9-year-old daughter was investigated, was, with her husband, needlessly exposed to the psychopathic molester and gunned down.

Regardless of whether the Supreme Court accepts review and regardless of where the standard is ultimately set, the better rule a police supervisor should enforce is simple, and its justification obvious: A police officer should not promise to give warning or protection to a confidential informant unless he or she has the means, ability, and will to successfully carry out that promise.

Part IV

As stated above, the United States has the highest incarceration rate in the world. Historically, American rates were essentially stable until the 1970s when they significantly rose in response to the “War on Crime.”¹⁶⁰ This dramatic increase continued through the 1980s and 1990s, but there was no commensurate rise in jail and prison capacity.¹⁶¹ Overcrowding and its attendant problems appear not least in the Los Angeles County jails and the California Department of Correction & Rehabilitation’s (CDCR) various institutions.¹⁶² The California Institutions for Men at Chino, for instance, was designed to hold 2,778 inmates. It currently holds 6,298.¹⁶³

During the same three decades, though, federal courts have considerably eroded the 8th Amendment standards prohibiting cruel and inhuman punishment imposed on prison administrators.¹⁶⁴ Conservative courts have returned in spirit to the early 19th century when, as a matter of doctrine and principle, courts refused to impose minimum standards on what was considered another branch of government, rather than an integrated component of the justice system.¹⁶⁵ Courts have returned to these old ways by, rather than imposing minimally decent levels of health and security, applying, instead, esoteric state-of-mind requirements that make it harder to prove and remedy constitutional deficiencies.¹⁶⁶

Even in this forgiving environment, a majority of the country’s state prison systems nonetheless had at least one major institution which, in the 1990s, fell under a federal court order to provide minimum conditions of confinement.¹⁶⁷ Currently in California, over \$1 billion of the CDCR’s \$6-7 billion budget related to the delivery of prison healthcare has been placed in a federally imposed receivership.¹⁶⁸ This judge is intent on bringing the system up to, at a minimum, the otherwise forgiving constitutional standards. Stated alternatively, the court is addressing the court’s finding that, on average, one inmate perishes each month in the CDCR due to medical neglect.¹⁶⁹

Recently, the CDCR released another in a series of audits and reports stimulated by an inmate fatally stabbing a correctional officer in 2005 at CIM.¹⁷⁰ The incident garnered considerable media attention not least because the protective vest that might otherwise have saved the officer’s life was, for dubious administrative reasons, left undistributed in a warehouse.¹⁷¹ The post-incident critiques also revealed numerous other basic problems such as the systematic failure to follow basic security protocols or properly classify inmates.¹⁷² Even in prisons, there must be prisons within the prison to protect inmates in the general population. Called administrative segregation, not only were there inadequate beds in CIM’s administrative segregation, there was inefficient use of those available.¹⁷³

This is the same problem that led, recently, to the racially motivated inmate riots in the Los Angeles County’s North County Correctional Facility at Castaic.¹⁷⁴ One of the elements that brought matters to a head was the housing of violent gang members in a general population who should have been separately celled. The

other, ironically, is the Supreme Court's recent decision limiting prison and jails' ability, except in emergency, to segregate by race.¹⁷⁵

Heretofore, the way to administratively segregate on the cheap was to segregate by race. It was left to gangs to organize and arrange protection for each other in otherwise untenable yards and common areas.¹⁷⁶ Small wonder, then, that the way inmates in California are incarcerated has tended to strengthen, not break the hold of gangs.¹⁷⁷ Adding an additional level of irony, the same week the County jail erupted, generals appeared before the U.S. senate to complain that the way prisoners were being incarcerated in Iraq appeared to be helping the regime's violent opposition organize.¹⁷⁸

One other problem identified in the audits following the stabbing of the correctional officer was that the first responding medical staff was entirely unprepared to properly treat a stabbing wound.¹⁷⁹ It shouldn't have taken the stabbing of a correctional officer and a lawsuit by his widow to uncover this deficiency. Prior to the officer fatality, CIM averaged 108 inmate-on-inmate assaults with weapons—typically shanks—for each of the prior three years.¹⁸⁰

A judicial officer who had supervised prison reform in Mississippi privately conceded that, even in the deep South, prison officials grudgingly liked their federal courts. It is because officials have someone to blame when they are forced to make plainly necessary reforms for which they stand no chance of mustering political support.¹⁸¹ In this era of deliberate indifference, American prisons and jails, particularly in California, have repeatedly demonstrated sustained dysfunction, which merits strong intervention. To reverse this embarrassment, federal courts must continue getting back in the game.

This means returning to a model of constitutional tort liability intended by Congress in enacting the Civil Rights Act of 1871 and partially restored by Justice Douglas and the Court in *Monroe*.

Part V

In 1871, Wardlaw, a black South Carolinian recounted the abuse he suffered for the record of the Congressional debate over the proposed Civil Rights [or Ku Klux Klan] Act of 1871 which is now Title 42 of the United States Code, section 1983:

*Pres. Blackwell kicked one of my little children that was in the bed. They took my brother-in-law's gun and broke it against a tree in the yard. They laid me down on the ground, after stripping me as naked as when I came into the world, and struck me five times with a strap before I got away from them. After escaping, they fired four shots at me but did not hit me. I was so frightened I laid out in the woods all night, naked as I was, and suffered from the exposure. Mr. Richardson afterward told me he was very sorry that I had escaped from them. My brother-in-law died from the beating he got that same night.*¹⁸²

In 1960, James Monroe's complaint in federal court alleged that . . .

. . . 13 Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living

room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him “nigger” and “blackboy”; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets on the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on “open” charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate’s courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.”¹⁸³

In February 2004, the International Red Cross report describes flaws in the coalition forces’ methods in Iraq:

*Arrests as described in these allegations tended to follow a pattern. Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets, and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped, or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest sometimes in pyjamas or underwear and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items, medicine, or eyeglasses. Those who surrendered with a suitcase often had their belongings confiscated. In many cases, personal belongings were seized during the arrest with no receipt being issued.*¹⁸⁴

The premise of the Civil Rights Act of 1871 was that rights must have remedies. As we have seen, the history of the implementation of the Act has been a history of limiting those rights and remedies. Justice Douglas, by contrast, who wrote the majority opinion in *Monroe* in 1961, had a vision of a system of constitutional torts that developed naturally like the common law—that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”¹⁸⁵

Two years after *Monroe*, at the height of the Cold War, Douglas proudly expounded on the United States Supreme Court’s development of individual rights in *The Anatomy of Liberty, The Rights of Man Without Force*, his vision of America’s system of individual rights:

Those who want to build a Free Society where none has ever existed need instruction in the anatomy of liberty and guidance along the way. The West must send teachers of law, government, and history by the tens of thousands to provide this leadership. Moreover, as James J. Wadsworth, former United States Ambassador to the United Nations recently said, “If we have confidence that our way of doing things is better than that of our competitors, we don’t have to prove it by force. What we desperately need to do is to develop a force of example, which proclaims our inward force of character.”¹⁸⁶ We who believe in liberty must indeed live our ethic if it is to be an important influence abroad.

As we assess where we currently stand in terms of individual liberties and as we attempt to promote an American model abroad, it is worth noting the irony that Douglas' *The Anatomy of Liberty* was based upon a series of lectures he delivered in 1962 at the University of Bagdad.

If it appears that some of the legal problems in policing and incarceration have remained static, it is likely, then, the legal rights and, in particular, remedies have remained static as well. If it is to be assumed that such abuses are not a necessary byproduct of our system of government, but, instead, correctable, then it must be conceded that their reoccurrence challenges whether our system of legal accountability has matured to the task. For those who aspire to an increasingly modernized and professionalized law enforcement effort and, indeed, a freer society, the correct response is to set their own departmental standards above the forgiving floor set by federal courts.

Endnotes

¹ The 8th Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (U.S. Const. VIII amend). The 8th Amendment applies to the states through the Due Process Clause of the 14th Amendment. See *Wilson v. Seiter* 501 U.S. 294, 296-297, 111 S. Ct. 2321 (1991) [citing *Robinson v. California* 370 U.S. 660, 82 S.Ct. 1417 (1962)]. The 14th Amendment provides in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law" (U.S. Const., XIV amend., § 1).

² See, e.g., *Farmer v. Brennan* 511 U.S. 825, 114 S.Ct. 1970 (1994).

³ *Id.* 511 U.S. at 835, 114 S.Ct. 1970 ["Although we have never paused to explain the meaning of the term "deliberate indifference," the case law is instructive. The term first appeared in the United States Reports in *Estelle v. Gamble* (429 U.S. 97, 104, 97 S.Ct. 285, 291), and its use there shows that deliberate indifference describes a state of mind more blameworthy than negligence."]

⁴ See, e.g., Peter F. Nardulli, Symposium: *Prison Crowding: The Misalignment of Responsibilities and State Prison Crises: Costs, Consequences, and Corrective Actions*, 1984 U. Ill. L. Rev. 365 (1984).

⁵ See Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, September 23, 2003, Part II, p. 27 [available online at www.hrw.org (last visited May 21, 2006)]:

By any measure, the U.S. inmate population is enormous—in absolute numbers, in the proportion of U.S. residents behind bars and in comparison with global figures. With the country's prisons and jails holding some two million adults—roughly one in every 140 persons—the rate of incarceration in the United States is about 727 prisoners per 100,000 residents. No other country in the world is known to incarcerate as many people, and only a small handful of countries have anything approaching a similar rate of incarceration. Most European countries, for example, imprison fewer than 100 people per 100,000 residents, a rate more than seven times lower than that of the United States." [footnotes omitted]

In 1998, U.C., Santa Cruz Professor Craig Haney wrote the following:

Notwithstanding the claims of politicians and media pundits, the health and well-being of the nation in the waning years of the 20th century are threatened less by a crime wave than a punishment wave. A punishment tidal wave. Over the last 20 years, the United States has witnessed truly unprecedented growth in its punishment industry—both in the amount of pain we dispense in the name of “criminal justice” and, correspondingly, the size of what is sometimes referred to as the “prison industrial complex.” In fact, such expansion has been so spectacular and unlike anything else we have seen in the history of criminal justice in this society that even the word *unprecedented* does not quite begin to capture it. Indeed, each succeeding year of this growth has seemed more unprecedented than the year before. [Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency* 9 *Hastings Women’s L.J.* 27, 28 (1998)] [footnotes omitted]

The latest report presented by the Bureau of Justice 2004 statistics: As of December 31, 2004, 2,135,901 prisoners were held in state or federal prisons or in local jails—an increase of 2.6% from year end 2003, less than the average annual growth of 3.4% since year end 1995. There were an estimated 486 prison inmates per 100,000 U.S. residents—up from 411 at year end 1995.

- 6 In 1981, Chief Justice Burger remarked, “After society has spent years and often a modest fortune to put just one person behind bars, we become bored. The media loses interest, and the individual is forgotten. Our humanitarian concern evaporates.” Address by Chief Justice Warren E. Burger, Annual Report to the A.B.A., 8 (February 8, 1981).
- 7 *Cf.*, Amanda C. Pustilnik, *Criminal Law: Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, *Journal of Criminal Law & Criminology*, 96, 217, 219 (2005). *See also*, Letter from Nat’l Ass’n of Attorneys Gen. to Senator Bob Dole (Sept. 19, 1995), 141 Cong. Rec. S14, 417-18 (daily ed. Sept. 27, 1995) (“The issue of frivolous inmate litigation has been a major priority of this Association . . . We estimate that inmate civil rights suits cost states at least \$81.3 million per year. Experience . . . suggests that, while all of these cases are not frivolous, more than 95% of inmate civil rights suits are dismissed without the inmate receiving anything.”) As of 2001, however, state prison spending had risen to nearly \$30 billion. Bureau of Justice Statistics, *State Prison Expenditures 2001*, June 14, 2004, Retrieved May 19, 2006, from www.ojp.usdoj.gov/bjs.
- 8 Under California state law, for example, prisoners are discouraged from bringing lawsuits by both procedural barriers, such as a government tort claim filing requirement (California Government Code § 915, *et al.*), and numerous statutory immunities afforded to government entities and employees. *See e.g.*, California Government Code §§ 844.6, 845.6.
- 9 Some challenge the assumption that successful lawsuits put meaningful pressure on government entities and their employees. For example, Professor Daryl J. Levinson questions whether police officers internalize the benefits of their actions, including actions that violate constitutional rights; and, if they do, whether there is a way of measuring those benefits. Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 *U. Chi. L. Rev.* 345, 350-353, 356 (2000).

Professor Myriam E. Gilles counters:

I believe we can reasonably postulate that government, when exposed to constitutional tort damages, is induced to take affirmative remedial steps to eliminate socially undesirable activity. Professor Levinson may be right that it is difficult or even impossible to explain why the mere act of paying settlements and judgments would cause governments to take reformative or preventative steps, given that we cannot view governmental units the way we view wealth-maximizing firms. But there are other important reasons why we should reasonably expect government to respond to the imposition of constitutional tort damage remedies. Indeed, there are noneconomic, deterrence-producing values to municipal liability, which the law and economics paradigm, itself, seems incapable of internalizing.

Myriam E. Gilles, Symposium: Re-Examining First Principles: Deterrence and Corrective Justice Inconstitutional tort: In defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 *Ga. L. Rev.* 845, 858-859 (2001).

- ¹⁰ Alphonse A. Gerhardtstein, "Anatomy of the Modern Prisoners' Rights suit: A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs," 24 *Pace L. Rev.* 691 (2004). Gerhardtstein writes . . .

Jurors are taxpayers, voters, victims of crime, and often next of kin or friends of law enforcement officers. Jurors are challenged by a legal system that would award a prisoner damages when the victim of the prisoner's crime may never be compensated for the brutality of that prisoner. Jurors likely have bought into the "tough-on-crime" agenda. Equally important, most jurors are white, and far too many prisoners are black.

Id. 24 *Pace L. Rev.* at 700 [citing, Dennis Schrantz & Jerry McElroy, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (Jenni Gains Borough & Marc Mauer eds., 2000), Retrieved May 25, 2006, from www.sentencingproject.org/pubs-08.cfm

- ¹¹ Bureau of Justice Statistics, U.S. Department of Justice, "Prison and Jails 2004" ["While prisoner petitions filed in U.S. district court nearly tripled between 1980 and 1996—increasing from 23,230 to 63,634—they increased at a slower rate than the prison population. Consequently, the number of petitions filed per 1,000 inmates decreased 17% between 1980 and 1996. In 1995, 62% of prisoner petitions filed and 52% of those appealed were dismissed. Less than 2% of those filed were decided in favor of the inmate."] By contrast, typically 34% of civil rights plaintiffs generally prevail in bench or jury trials. Bureau of Justice Statistics, U.S. Department of Justice, Civil Rights Complaints in U.S. District Courts 2000, p. 2. Retrieved May 19, 2006, from www.ojp.usdoj.gov/bjs.

- ¹² See, e.g., Leonard, J. (2005, April 19). "Windfall to Ease L.A. Jails' Crowding," *Los Angeles Times*, p. A.1 ["Supervisor Zev Yaroslavsky praised county administrators for finding the money for the jails but noted that the Board of Supervisors has no control over how Baca spends his money once it is allocated. Yaroslavsky urged the sheriff to use the money as it is intended."]; Leonard, J. (2005, February 1). "Jail Funds Still Short, Baca Says," Even with increased support, inmates will continue to be released early, county sheriff tells Board of Supervisors," *Los Angeles Times*, p. B.5.

¹³ There is the further concern that budget constraints will even be used to justify imposing unconstitutional conditions of the confinement when subjective standards are applied by the courts. This concern was raised by Justice Blackmun in his dissent in *Farmer*: “The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature . . . Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably.” *Farmer, supra* 511 U.S. at 855- 856, 114 S.Ct. 1970. For a further analysis of how budgetary constraints bleed into the liability analysis, see Barbara Kritchevsky, “Is there a cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation,” *Rutgers L. J.*, 35 483 (2004).

¹⁴ In support of his assertion that “[v]irtually every serious commentator who has addressed the issue during this period has concluded that our prison system is ‘in crisis,’” Professor Craig Haney provides the following support: See, e.g., Stephen Gottfredson, Institutional Responses to Prison Crowding, 12 N.Y. U. Rev. L. & Soc. Change 259, 259-60 (1983-84) (“It is widely acknowledged that our prisons are now in crisis . . . Crowding in American prisons and jails is a national problem of epidemic proportions.”); Marvin Zalman, Sentencing in a Free Society: The Failure of the President’s Crime Commission to Influence Sentencing Policy, 4 Just. Q. 545, 553 (1987) (citation omitted) (“The doubling of prison populations from approximately 230,000 in 1974 to over 500,000 in 1986 created an unprecedented crisis in American corrections.”); Richard V. Ayre, The Prison Crisis: An Essay on the Social and Political Foundations of Criminal Justice Policy, 19 Pub. Admin. Q. 42 (1995); America’s Correctional Crisis: Prison Populations and Public Policy (Stephen D. Gottfredson & Sean McConville eds., 1987); William L. Selke, Prisons in Crisis (1993). See, Haney, *supra* 9 *Hastings Women’s L.J.* at 31, n.21.

¹⁵ “Status Report: State Prisons and the Courts (Winter 1994/1995).” National Prison Project Journal. As of January 1995, only three states had never been involved in major litigation dealing with crowding or conditions in their prisons (Minnesota, New Jersey, and North Dakota).

¹⁶ Warren, J. (2006, February 12). A U.S. judge picks a Santa Clara County official to take over inmate care in a move shifting power from the state to the federal level. *Los Angeles Times*, p. B.1. See, *Plata v. Schwarzenegger* 2005 WL 2932253 (N.D.Cal. Oct 03, 2005) (NO. C01-1351 TEH).

¹⁷ *Id.* 2005 WL 2932253 at *8.

¹⁸ Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871). The Act was subtitled, “An Act to enforce the Provisions of the 14th Amendment to the Constitution of the United States, and for other Purposes.” Its current codification, 42 U.S.C.A. § 1983 provides the following:

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

that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

¹⁰ *Ibid.*

²⁰ See 42 U.S.C.A. § 1988, which provides in pertinent part . . .

(b) Attorney's fees – In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction. (c) Expert fees – In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

²¹ S. Rep. No. 1, 42nd Cong., 1st Sess. (1871).

²² See e.g., *Monroe v. Pape* 365 U.S. 167, 171-186, 81 S.Ct. 473 (1961); *Monell v. Dept. of Social Services* 436 U.S. 658, 664-690, 98 S.Ct. 2018 (1978).

²³ The 13th Amendment states in pertinent part, "neither slavery nor involuntary servitude . . . shall exist within the United States," U.S. Const. amend. XIII, § 1, and empowers Congress to enforce its provisions, see U.S. Const. amend. XIII, § 2.

²⁴ The first section of the 14th Amendment provides the following: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 5 of the 14th Amendment provides the following: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (U.S. Const. amend. XIV, § 5).

²⁵ 18 U.S.C.A. § 242 provides the following:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, 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 person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

²⁶ See, e.g., *Koon v. United States* 518 U.S. 81, 88, 116 S.Ct. 2035 (1996).

²⁷ See, e.g., *Wilson v. Garcia* 471 U.S. 261, 276, 105 S.Ct. 1938 (1985).

²⁸ 42 U.S.C.A. § 1983 provides a remedy to “any citizen of the United States or other person within the jurisdiction” who is deprived of any rights, privileges, or immunities secured by the Constitution and laws. [Emphasis added.] Likewise, the 14th Amendment addresses the “privileges or immunities of citizens of the United States” and prohibits any State from depriving “any person of life, liberty, or property, without due process of law” or “any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1 [Emphasis added.]

²⁹ *The Slaughter House Cases* 83 U.S. 36 (1872).

³⁰ “[T]he right of the citizen . . . to come to the seat of the government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to seaports . . . and courts of justice in the several States . . . [and] to demand the care and protection of the Federal government . . . when on the high seas or within the jurisdiction of a foreign government.” *Id.* 83 U.S. at 79 [as quoted in: Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (1997), § 6.3.2.].

³¹ *Civil Rights Cases* 109 U.S. 3, 3 S.Ct. 18 (1883).

³² *Plessy v. Ferguson* 163 U.S. 537, 16 S.Ct. 1138 (1896).

³³ Harry A. Blackmun, “Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?” 60 *N.Y.U.L. REV.* 1, 10 (1985).

³⁴ See Developments in the Law: Section 1983 and Federalism, 90 *HARV. L. REV.* 1133, 1156-61 (1977).

- ³⁵ The name “Jim Crow” derives from a character in the 1828 song and dance “Jump Jim Crow,” first performed by Thomas D. Rice. Jim Crow Laws refer to local and state laws enacted in the Southern and border states of the United States and in force between 1876 and 1964 that restricted access of African-Americans to public facilities. Jim Crow, or the Jim Crow period or the Jim Crow era, refers to the time during which this practice occurred. Retrieved May 16, 2006, from Wikipedia.com
- ³⁶ *Id.* 60 N.Y.U.L. REV. at 12.
- ³⁷ *Brown v. Board of Education of Topeka, Shawnee County, Kan.* 347 U.S. 483, 74 S.Ct. 686 (1954).
- ³⁸ Blackmun, *supra* 60 N.Y.U.L. REV. at 19.
- ³⁹ *Monroe v. Pape* 365 U.S. 167, 81 S.Ct. 473 (1961).
- ⁴⁰ *Id.* 365 U.S. at 172, 81 S.Ct. 473.
- ⁴¹ *United States v. Classic* 13 U.S. 299, 61 S.Ct. 1031 (1941).
- ⁴² *Screws v. United States* 325 U.S. 91, 65 S.Ct. 1031 (1945).
- ⁴³ *Monroe, supra* 365 U.S. at 173-174, 81 S.Ct. 473.
- ⁴⁴ *Ibid.*
- ⁴⁵ *Ibid.*
- ⁴⁶ For a general feel for Chicago under Mayor Richard J. Daley, *see*, Mike Royko, *Boss: Richard J. Daley of Chicago*, (Penguin, New York 1971). Therein, Royko famously suggested the city’s slogan “Urbs in Horto” (City in a Garden) be changed to “Ubi Est Mea” (Where’s Mine?).
- ⁴⁷ *Id.* 365 U.S. at 187, 81 S.Ct. 473.
- ⁴⁸ Earl Warren was Chief Justice of the United States Supreme Court from 1953 until 1969.
- ⁴⁹ For a clear discussion about the incorporation of portions of the Bill of Rights into the due process clause of the 14th Amendment, *see*, Erwin Chemerinsky, *Constitutional Law, Principals and Polices*, (Aspen L. & B. 1997) § 6.3.3, pp. 378-385.
- ⁵⁰ *Wolf v. Colorado* 338 U.S. 25, 69 S.Ct. 1359 (1949).

⁵¹ “Between 1961 and 1979, the number of federal filings under § 1983 (excluding suits by prisoners) increased from 296 to 13,168. Civil rights petitions by state prisoners increased from 218 cases in 1966 to 11,195 in 1979. In 1976, almost one out of every three ‘private’ federal question suits filed in the federal courts was a civil rights action against a state or local official.” Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 15, 20-21 (1980) [as quoted in, “Comment: *Harlow v. Fitzgerald*: The Lower Courts Implement the New Standard for Qualified Immunity under Section 1983.” 132 U. Pa. L. Rev. 901, 902, fn. 8 (1984).]

⁵² e.g., Aldisert, *Judicial Expression of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983*, Comity & Federal Caseload, 1973 LAW & SOC. ORD. 557, 563, wherein he called the post-Monroe filings a “deluge” and noting 1100% rise in cases brought under the statute between 1960 and 1970. Judge Aldisert concluded that the expanded reach of section 1983-generated claims endangers judicial economy and federalism (as cited in, 132 U. Pa. L. Rev. at 902, fn. 8).

⁵³ By contrast, Cornell Professor Theodore Eisenberg argued in “Section 1983: Doctrinal Foundations and an Empirical Study,” 67 CORNELL L. REV. 482 (1982) that “section 1983 cases are not overwhelming the federal courts; trivial claims, involving little if any federal policy, do not dominate district court dockets, and courts are not, at the behest of state prisoners, eagerly overseeing minute details of prison life” Id. at 484. His study of section 1983 cases filed in the Central District of California leads him to believe “that the number of cases is only a fraction of what many of us have believed” (Id. at 533; as quoted and cited in, 132 U. Pa. L. Rev. at 902, fn. 8).

⁵⁴ *Pierson v. Ray* 386 U.S. 547, 87 S.Ct. 1213 (1967).

⁵⁵ *Id.* 386 U.S. at 555, 87 S.Ct. 1213.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Id.* 386 U.S. at 554, 87 S.Ct. 1213.

⁵⁹ *Ibid.*

⁶⁰ *Caveat*, Restatement, Second, Torts § 121, at 207-208 (1965); *Miller v. Stinnett* 257 F.2d 910 (10th Cir. 1958) at p. 914:

On the other hand, there is authority for holding the officer civilly liable for arrests made under statutes subsequently declared invalid. The rule is predicated upon the concept, first announced in *Norton v. Shelby County* 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178, to the effect that an unconstitutional act confers no rights, imposes no duty and affords no protection to anyone acting under authority of it. See *Smith v. Costello* 77 Idaho 205, 290 P. 2d 742, 56 A.L.R.2d 1020; 43 Am.Jur. Public Officers, § 284; 11 Am.Jur. Constitutional Law, § 149; Annotation 53 A.L.R. 268. And, this is so even in the absence of malice and in the presence of probable cause. See Annotation 137 A.L.R. 504. Good faith and honest belief is admissible only in mitigation of the damages. *S. H. Kress & Co. v. Powell* 132 Fla. 471, 180 So. 757; *Gogue v. MacDonald* 35 Cal.2d 482, 218 P. 2d 542, 21 A.L.R.2d 639; *Singleton*

v. Perry 45 Cal.2d 489, 289 P. 2d 794. Restatement protects the officer for an arrest without a warrant where he acts under a reasonable mistake of fact, but affords no protection where he acts, however reasonably, under a mistake of law, 'other than a mistake as to the validity of a statute or ordinance.' As to that, it expressly refrains from an opinion." See Restatement Torts, § 121, Caveat to Comment i.

⁶¹ *Id.* 286 U.S. at 559, 87 S.Ct. 1213 (Douglas, J., dissenting).

⁶² *Ibid.*

⁶³ *Harlow v. Fitzgerald* 457 U.S. 800, 102 S.Ct. 2727 (1982).

⁶⁴ *Id.* 457 U.S. at 814, 102 S.Ct. 2727.

⁶⁵ *Ibid.*

⁶⁶ *Id.* 457 U.S. at 815, 102 S.Ct. 2727.

⁶⁷ *Id.* 457 U.S. at 819, 102 S.Ct. 2727.

⁶⁸ *Mitchell v. Forsyth* 472 U.S. 511, 526, 105 S.Ct. 2806 (1985).

⁶⁹ *Id.* 472 U.S. at 530, 105 S.Ct. 2806 (1985).

⁷⁰ See 28 U.S.C. §§ 1291, 1292 ["final judgment" rule and limited exceptions for "interlocutory orders].

⁷¹ *Id.* 472 U.S. at 526, 105 S.Ct. 2806.

⁷² *Saucier v. Katz* 533 U.S. 194, 121 S.Ct. 2151 (2001).

⁷³ *Id.* 533 U.S. at 205, 121 S.Ct. 2151.

⁷⁴ *Ibid.*

⁷⁵ The Honorable Jon O. Newman warned against the incoherence of such an approach in: *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L. J. 447, 460 (1978) ["Surely the officer could not reasonably believe there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe that there was probable cause."] For more general criticism of the Court's approach to immunity questions, see, Erwin Chemerinsky, *Federal Jurisdiction* (3d ed. 1999), § 8.6, pp. 494-496.

⁷⁶ See *Owen v. City of Independence, Mo.* 445 U.S. 622, 100 S.Ct. 1398 (1980).

⁷⁷ *Monroe, supra* 365 U.S. 167, 187-188, 81 S.Ct. 473.

⁷⁸ *Monell, supra* 436 U.S. 658, 98 S.Ct. 2018.

⁷⁹ Act of Feb. 25, 1871, § 2, 16 Stat. 431.

- ⁸⁰ *Id.* 426 U.S. at 718-719, 98 S.Ct. 2018 (Rehnquist, J., dissenting).
- ⁸¹ *Id.* 426 U.S. at 702, 98 S.Ct. 2018 (appendix).
- ⁸² *City of Oklahoma City v. Tuttle* 471 U.S. 808, 834-843 105 S.Ct. 2427 (1985) (Stevens, J., dissenting).
- ⁸³ *City of Canton, Ohio v. Harris* 489 U.S. 378, 109 S.Ct. 1197 (1989).
- ⁸⁴ *See, e.g.*, instances in which diabetic shock is mistaken for intoxication: Jason Kravarik, Diabetic driver talks about incident, April 18, 2005. Retrieved May 15, 2006, from <http://ksnw.com/news/stories/7544938.html> (15, 2006); *Hirsch v. Burke* 40 F.3d 900 (7th Cir.1994); *Wertish v. Krueger* 433 F.3d 1062 (8th Cir. 2006); *Howell v. Cataldi* 464 F.2d 272 (3rd Cir. 1972).
- ⁸⁵ *Id.* 489 U.S. at 388, 109 S.Ct. 1197.
- ⁸⁶ *Id.* 489 U.S. at 391, 109 S.Ct. 1197.
- ⁸⁷ *Board of County Com'rs of Bryan County, Okl. v. Brown* 520 U.S. 397, 421, 117 S.Ct. 1382 (1997) (Breyer, J., dissenting); *Golberg v. Hennepin County* 417 F.3d 808 (8th Cir. 2005); *Garretson v. City of Madison Heights* 407 F.3d 789 (6th Cir. 2005); *Lund v. Hennepin County* 427 F.3d 1123 (8th Cir. 2005) (asserting "mere negligence" insufficient to support due process claim).
- ⁸⁸ *See, Segovia, infra* at: note 117.
- ⁸⁹ *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* 507 U.S. 163, 113 S.Ct. 1160 (1993).
- ⁹⁰ *City of Los Angeles v. Heller* 475 U.S. 796, 106 S.Ct. 1571 (1986).
- ⁹¹ The same year as *Heller*, the Sixth Circuit upheld a jury verdict rendered against a municipal entity, but not against the individual defendants. It was brought by the widow and parents of an arrestee who died as a result of inadequate medical care, in *Garcia v. Salt Lake County* 768 F.2d 303 (10th Cir. 305). The coherent reasoning of *Garcia* was not considered by the *Heller* Court.
- ⁹² *City of Los Angeles v. Lyons* 461 U.S. 95, 103 S.Ct. 1660 (1983).
- ⁹³ *See e.g.*, David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23 (1989):

Beyond the narrowing of constitutionally protected liberty and property rights, the Court also has engaged in an aggressive reconstruction of the scope of § 1983. This reorientation of civil rights jurisprudence has blunted the impact of § 1983. Doctrines of standing, comity, and federalism have substantially restricted injunctive actions. Damage actions have been sharply curtailed by doctrines of qualified and absolute immunity, a redefinition of some constitutional deprivations, injection of notions of "culpability" beyond

those normally imposed by tort law, and a back-door exhaustion requirement initiated by *Parratt v. Taylor*.

Id. 138 U. Pa. L. Rev. at 25-26 [citing, inter alia, *Parratt v. Taylor* 451 U.S. 527, 101 S.Ct. 1908(1981), overruled in part, *Daniels v. Williams* 474 U.S. 327, 106 S.Ct. 662 (1986)]

Adding an additional level of complication to individuals seeking to vindicate federally protected rights, particularly prisoners in state institutions, has been the Rehnquist Court's resurrection of 11th Amendment immunity from lawsuit. See, generally, John T. Noonan Jr., *Narrowing the Nation's Power, the Supreme Court Sides with the States*, (2001).

⁹⁴ See e.g., Bork, R. (1990). *The tempting of America, the political seduction of the law*. New York: The Free Press.

⁹⁵ See e.g., Sunstein, C. R. (2005). *Radicals in robes*. New York: Basic Books, pp. 243-245.

⁹⁶ U.S. Const., VII amend., provides in pertinent part: "In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

⁹⁷ This theme is elaborated on in: Robert L. Bastian, Jr. (2006, April 25). A Good Legal Education Lies in Truth, Not Blind Adherence to Authority. *Los Angeles Daily Journal*, p. 8.

⁹⁸ Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown, and Co. 1909) (1881).

⁹⁹ *Farmer, supra* 511 U.S. 825, 114 S.Ct. 1970.

¹⁰⁰ W. Raymond Nelson & Assoc., "Proposal and Implementation Plan For a Leadership Institute for the Orange County Sheriff's Department," July 20, 2001.

¹⁰¹ *Id.* at p. 3.

¹⁰² The author's law firm currently has three pending cases against the Orange County Sheriff's Department in which unlawful force is alleged. The Ninth Circuit overturned the lower court's grant of summary judgment in *Lolli v. County of Orange* 351 F.3d 410 (9th Cir. 2003).

¹⁰³ See e.g., Louise Roug and Jack Leonard, "Changes Planned After Jail Clash; More anger management programs will be offered. Overcrowding and the holidays increase inmate stress," *Los Angeles Times*, Orange County Ed., Dec. 5, 1999, B-1; Jack Leonard, "Sheriff to Conduct Investigation of Disturbance at Jail," *Los Angeles Times*, Feb. 4, 2000, B-4; Vik Jolly and Tony Saavedra, "Jail disturbance is probed; Law Enforcement: Investigation follows a claim that deputies beat inmates," *Orange County Register*, Feb. 4, 2000, Local; Tony Saavedra and Bill Rams, "Opinions split on jail video footage; Tape: Two experts see no proof of excessive force. Inmates' lawyer sees proof they didn't resist," *Orange County Register*, June 24, 2000, Local, p. 1; Aldrin Brown, "Inmates accuse deputies of staging O.C. jail fights; Courts: Lawsuits have been filed against the County and

individual officers,” *Orange County Register*, Dec. 5, 2000, Local, p. 1

¹⁰⁴ *Graham v. Connor* 490 U.S. 386, 109 S.Ct. 1865 (1989).

¹⁰⁵ *Compare, e.g., Nerren v. Livingston Police Dept.* 86 F.3d 469, 474 (5th Cir. 1996) [“We contrast pretrial detainees and convicted prisoners because the due process clause of the 14th Amendment accords pretrial detainees rights not enjoyed by convicted inmates under the 8th Amendment prohibition against cruel and unusual punishment.”]; *Barrie v. Grand County, Utah* 119 F.3d 862, 867 (10th Cir. 1997) [Under the 14th Amendment’s due process clause, pretrial detainees, like Frohmader, are entitled to the same degree of protection regarding medical attention as that afforded convicted inmates under the 8th Amendment.]

¹⁰⁶ *Graham* 490 U.S. at 396, 109 S. Ct. 1865 [citing, *Tennessee v. Garner* 471 U.S. 1, 8, 105 S.Ct. 1694 (1985)].

¹⁰⁷ *Graham* 490 U.S. at 396, 109 S. Ct. 1865 [citing, *Garner* 471 U.S. 1, 8-9, 105 S.Ct. 1694].

¹⁰⁸ A use-of-force continuum approach is generally described in Ryan P. Hatch, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution*, 21 *Ohio St. J. on Disp. Resol.* 447 at pp. 478-479:

In training police officers, most police departments employ some type of “use-of-force continuum,” which often takes the form of a pyramid or ladder, that represents a “fluid and flexible policy guide” for officers to use in the field when confronted with a situation requiring force. At the first, or lowest, level of the typical use-of-force continuum is the mere presence of an officer, which includes body language, demeanor, and identification of authority. The second level of force involves verbal communication—giving a direct order, questioning, or persuasion—when the individual is argumentative or verbally resistant. The third level of force involves an officer using physical contact, or “soft-hands techniques,” which includes directional contact or escorting an individual. In the fourth level of force, the police officer uses physical control by means of takedown maneuvers, use of pressure points, or other physical defensive tactics to gain compliance of a physically resistive individual. The fifth level of force is classified as serious physical control, whereby the use of impact or intermediate weapons, or both, focused blows or kicks, or chemical irritants are authorized. The sixth, and final, level of force on the use-of-force continuum is the use of deadly force, which encompasses “any force that is readily capable of causing death or serious bodily injury.” [footnotes omitted]

¹⁰⁹ *Scott v. Henrich* 39 F.3d 912 (9th Cir. 1994).

¹¹⁰ *Id.* 39 F.3d at 915.

¹¹¹ *Id.* 39 F.3d at 916.

¹¹² *Ibid.*

¹¹³ For a presentation in favor of incorporating a “least intrusive method” into the 4th Amendment balancing calculus see, Nadine Strossen, *The 4th Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 *N.Y.U.L. Rev.* 1173 (1988).

¹¹⁴ *Cf.*, *United States v. Mohr* 318 F.3d 613, 623 (4th Cir. 2003) [In the criminal prosecution of a police officer: “James Fyfe, a New York City police officer for 16 years and now a professor of criminal justice and use-of-force consultant to police departments, testified for the government in rebuttal. Like Mazzei, Fyfe placed a K-9 on the use-of-force continuum, but he put a K-9 “just below deadly force” and above an impact weapon. He opined that, based on Mohr’s trial testimony, her release of the K-9 ‘was not in accord with prevailing police practices in 1995.’ His opinion was based on ‘tak[ing] into account the totality of the circumstances and the idea that police should use no more force than is necessary, reasonably necessary, in the totality of the circumstances.’ Fyfe then discussed a number of the factors in Mohr’s version of events and concluded that ‘in those circumstances, it seems to me that the use of the dog on such a quick movement was inappropriate because there were less drastic ways of apprehending these folks who had given no indication that they were armed in any way.’”]

See also, *Gaddis ex rel. Gaddis v. Redford Tp.* 364 F.3d 763, 775 (6th Cir. 2004) “Fyfe testified that in his opinion, the officers’ tactics in the encounter with Gaddis were “terrible” and were not in keeping with optimal police procedures for dealing with mentally or emotionally disturbed persons. We acknowledge that a suspect’s apparent mental state is one of the “facts and circumstances of [the] particular case,” *Graham* 490 U.S. at 396, 109 S.Ct. 1865, that should be considered in weighing an excessive force claim. Moreover, the opinions of properly qualified experts such as Mr. Fyfe are often entitled “to be given weight” in this determination. [cited omitted] . . . However, Gaddis’s arguments here are weakened by the fact that Bain had only fragmentary evidence that Gaddis was mentally disturbed. . . . Here, Gaddis’s incoherent conduct was arguably as consistent with Bain’s initial hypothesis that Gaddis was driving while intoxicated as it was with mental disturbance. The Supreme Court has instructed that we are to judge officers’ conduct from the ‘perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight’ (*Graham*, 490 U.S. at 396, 109 S.Ct. 1865). There may be more than one reasonable response to a given situation, and when this is so, the 4th Amendment does not require officers to use ‘the most prudent course of action’ to handle it.”

¹¹⁵ See, note 103, *supra*.

¹¹⁶ The facts that are contained within the briefs in *Segovia* were not recounted in the unpublished opinion issued by the Ninth Circuit upholding summary judgment [*Segovia v. County of Los Angeles* 41 Fed.Appx.126 (9th Cir. 2002)]. Instead, the court dismissively concluded, “[*Segovia*’s] argument focuses on factors he claims contributed to the jail’s generally dangerous environment, such as whether jailers should have permitted more than one door in the gang module to remain open at a time. Such arguments, however, go only to whether individual jailers may have been negligent” (*Id.* at 127).

- ¹¹⁷ See, Robert L. Bastian Jr., "Courts Show Deliberate Indifference to Jailhouse Violence," *Los Angeles Daily Journal*, June 1, 2004, p. 6; see also, Third Office of Independent Review, Annual Report, Oct. 2004, , available at: <http://laoir.com/reports/2005.pdf>, May 25, 2006.
- ¹¹⁸ André Coleman and Joe Piasecki, "Survival of the sickest, Can 'management' cure L.A.'s outrageously over-stuffed and under-manned county jail?," *Los Angeles City Beat*, May 27, 2004 ["On April 20, Pineda allegedly used another inmate's court pass to get out of his cell and wandered around the jail for five hours until entering the cell where Tinajero and four others were sleeping. The others looked away, said homicide investigator Captain Ray Peavy, as Tinajero was killed and stuffed under a bed. Both men had orders to be segregated from other inmates."] Retrieved May 16, 2006, from www.lacitybeat.com/article.php?id=938&IssueNum=51.
- ¹¹⁹ Pfeifer, S. (2006, May 12). U.S. judge calls for L.A. jail reforms, The jurist expresses dismay at crowded cells in the county's main downtown facility. *Los Angeles Times*, p. B.1;
- ¹²⁰ Leonard, J., & Chong, J. R. (2005, February 15). Staph Cases an 'Emerging Epidemic' Infections once found mostly in jails and hospitals are on the rise in the general population, health officials warn. *Los Angeles Times*, p. B.1; Chong, J. R., & Leonard, J. (2006, January 26). Skin bacteria spread in L.A. County jails, *Los Angeles Times*, p. B.4
- ¹²¹ Winton, R., & Bernstein, S. (2006, March 1). More violence erupts at Pitchess, Black and Latino inmates clash at the north county jail, leaving 13 injured. *Los Angeles Times*, p. B.1; Garvey, M., & Bernstein, S. (2006, February 21). Cycle of Jail Woes Generates Few Fixes, A pattern of criticism and inaction has followed past violence at the county facilities. *Los Angeles Times*, p. A.1.
- ¹²² See, note 118, *supra*.
- ¹²³ See note 119, *supra*.
- ¹²⁴ National Highway Traffic Safety Administration (NHTSA) reports on fatalities due to violent pursuit crashes, 2001, 2002, 2003. Due to the lag in reporting, 2003 is the latest available data. In 2003, again more innocent people were killed on California roads as the result of high-speed chases for nonviolent suspects. In 2001, of the 370 Americans killed in pursuit-related crashes, more than one-third were innocent bystanders (52 people were killed in California). In 2002, the total number of deaths grew to 386 deaths; California was still in the lead with 50 deaths, and 17 of those killed were not in a car being pursued. In 2003, California still led the nation with 51 deaths.
- ¹²⁵ See California Vehicle Code § 17004.7.
- ¹²⁶ Salladay, R. (2004, April 12). "Proposed Law Would Limit Police Chases: Legislation put forward by a Republican state senator has provoked law enforcement unions, which threaten political retaliation," *Los Angeles Times*, p. B.1.
- ¹²⁷ *Ibid*.

¹²⁸ There is a paucity of economic analysis on the subject. In terms of empirical data, Professor Geoffrey P. Alpert has interviewed 146 jailed suspects who had been involved as drivers in high-speed chases in Columbia, South Carolina; Omaha, Nebraska; and Miami, Florida. Geoffrey P. Alpert, *Police Pursuit: Policies and Training*, NIJ Research in Brief Published: May 1997. "Fifty-three percent of the suspects responded that they were willing to run at all costs from the police in a pursuit, and 64% believed they would not be caught. However, 71% said they were concerned with their own safety, and 62% stated that they were concerned with the safety of others while engaged in a chase." *Ibid*.

There is reason not to entirely trust such answers. At the time of the chase, fleeing drivers are often inebriated, under the influence, or behaving irrationally. Such factors undermine the assumption underlying increased criminal penalties that the criminal is making rational choices based upon the disutility of going to jail. In the case of police pursuits, there is also a "negative externality," the possibility that an innocent third person will be injured or killed. The high percentage of such pursuits that end in injury or crashes—according to California Highway Patrol statistics in 2004, there were 6,913 motor vehicle pursuits reported. Twenty-six percent or 1,848, of those pursuits resulted in collisions, and 26 pursuits resulted in fatalities [Bill Analysis: Senate Committee on Public Safety (SB 718) as Amended April 20, 2005]—suggest that neither pursuer or the pursued are making entirely rational decisions.

¹²⁹ On January 1, 2006, a new law took effect in California increasing the criminal penalty for fleeing that causes serious bodily injury or death from three, four, or five years to a term of 3, 5, or 7 years or the specified fine or both the fine and imprisonment when the offense involves serious bodily injury a term of 4, 6, or 10 years in the state prison where the offense involves a death [Cal. S.B. 719 (2005)]. At the urging of law enforcement, the Senate committee rejected Kristie's Law, which would have addressed the immunity issues. Backing the bill to increase penalties were the California Peace Officers' Association, California Sheriffs' Association, California Police Chiefs' Association, Peace Officers' Research Association of California, California Highway Patrol, League of California Cities, and the California State Association of Counties. Press Release by Sen. Romero, dated, Oct. 4, 2005.

So far in 2006, there have been at least 8 instances of innocent victims killed by police pursuits in California. Retrieved May 21, 2006, from <http://kristieslaw.org/victimsNational.htm#california>

¹³⁰ See, e.g., *Nguyen v. City of Westminster* (2002)103 Cal.App. 4th 1161, 127 Cal.Rptr.2d 388.

¹³¹ *Tennessee v. Garner* 471 U.S. 1, 105 S. Ct. 1694 (1985).

¹³² *Id.* 471 U.S. 1, 8-9, 105 S. Ct. 1694

¹³³ *County of Sacramento v. Lewis* 523 U.S. 833, 118 S. Ct. 1708 (1998).

¹³⁴ *Id.* 523 U.S. at 854, 118 S. Ct. 1708.

¹³⁵ It is the Court's choice to analyze the incident under the 14th Amendment due process clause rather than the 4th Amendment, which makes much of the Court's

reasoning ring hollow. The court would not have to choose among the various judicial glosses which led to the circuit split for which the Court granted cert., such as “shocks the conscious,” “gross negligence,” and “deliberate indifference.” Instead, the Court concluded, “[j]ust as a purpose to cause harm is needed for 8th Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case” (*Id.* 523 U.S. at 854, 118 S.Ct. 1708).

The *Lewis* Court added the following:

Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard’s high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard’s outrageous behavior was practically instantaneous, and so was Smith’s instinctive response. While prudence would have repressed the reaction, the officer’s instinct was to do his job as a law enforcement officer, not to induce Willard’s lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part. Regardless whether Smith’s behavior offended the reasonableness held up by tort law or the balance struck in law enforcement’s own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983.

Id. 523 U.S. at 855, 118 S.Ct. 1708.

Yet, the problem is that it wasn’t Willard who was killed, it was his teenage passenger who, as far as anyone knows, committed no crime, nor was he suspected of committing any crime. The idea that the Constitution protects an officer’s *instincts* more than the life of an innocent person is troubling. It was the officer’s instinct to shoot the teenage burglary suspect in *Tennessee v. Garner* in the back as he climbed a fence. Yet, not only was his instinct, constitutionally unreasonable, but it is the type of police behavior that can be controlled by training.

The *Lewis* majority repeated the dicta from *Graham* that; “police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving” (*Id.*, 490 U.S. at 833, 118 S.Ct.1865). Yet this wasn’t a split second decision. The officer had plenty of time to call off the chase. Nor are these facts that courts should be deciding. *See, e.g.*, Michael Avery, Article: Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People, 34 Colum. Human Rights L. Rev. 261, 322-323 (2003) [“Many of the lower federal courts have become mesmerized by the concept that police officers are forced to make decisions about the use of force in split seconds. Not only is this unrealistic when the preparation officers receive in training is taken into account, but it drastically distorts the “totality of the circumstances” standard. Rather than judging the use of force in the more appropriate matrix of the “totality of the circumstances,” the urgent perceptions and fears of the officer at the precise instant force is used become controlling factors. Thus, in most of the cases, little weight has been given by the courts to the failure of police officers to follow the training they have received.”]

For further analysis of why the 4th and not the 14th Amendment should have been applied to police pursuits, see, M. Amanda Racines, Case Note: Constitutional Law - To Chase or Not to Chase: What "Shocks the Conscience" in High-Speed Police Pursuits?, 73 Temp. L. Rev. 413 (2000).

¹³⁶ *Nguyen* 103 Cal.App. 4th at 1168, 127 Cal.Rptr.2d 388.

¹³⁷ *Id.* 103 Cal.App. 4th at 1169, 127 Cal.Rptr.2d 388. By contrast, Nebraska is one of many states that imposes a negligence standard. See note 141, *infra*.

¹³⁸ Kristie Priano's parents have become activists in the effort to reform the law with respect to police pursuits. Candy Merchant Priano, Kristie's mother, maintains a website at www.Kristie'sLaw.org, which, *inter alia*, provides the facts regarding the pursuit that took Kristie's life.

¹³⁹ Candy Merchant Priano, Pursuing Justice. Retrieved May 15, 2006, from www.Kristie'sLaw.org/pursuing_justice.htm

¹⁴⁰ See note 127, *supra*.

¹⁴¹ The most recent survey of the various states' approach to police pursuits is Patrick T. O'Connor and William L. Norse, Jr., "Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law," 57 Mercer L. Rev. 511 (2006). O'Connor and Norse rank liability on a continuum. On one end, there are those states who impose something close to negligence liability—such as Alabama, Alaska, Arizona, Connecticut, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Washington. Perhaps, the most plaintiff favorable, at least for innocent passenger victims, is Nebraska (*Id.* 57 Mercer L. Rev. at 518-525).

Next, there are states who maintain intermediate standards such as recklessness (Iowa, Mississippi, New York, Rhode Island, and Vermont), gross negligence (Delaware; District of Columbia; North Carolina; North Dakota; and, to a lesser extent, South Carolina and Virginia), and willful and wanton conduct (Illinois, New Jersey, Ohio). The authors present Louisiana and Maryland as hybrids between negligence and gross negligence (*Id.* 57 Mercer L. Rev. at 525-539).

States that provide a high degree of immunity are Colorado, Georgia, Maine, Minnesota, and Texas (*Id.* 57 Mercer L. Rev. at 539-544). Similarly, Florida rejected a police duty to passengers (*Id.* 57 Mercer L. Rev. at 527). "California," according to the authors, "sits alone at the right edge of the Police Pursuit Continuum" (*Id.* 57 Mercer L. Rev. at 544).

Comparing the approaches to the latest state-by-state data for police pursuit fatalities in 2003, [Police Pursuit Fatality Analysis by the National Highway Traffic Safety Administration (2003). Retrieved May 15, 2006, from www.kristieslaw.org/nationwide.htm] even in the absence of regression analysis or controlling for state size and other factors, some fairly obvious correlations stand out:

No states that employed a negligence standard had more than 10 or less than 19 fatalities; 17 of the 24 had less than 10, with 3 having 0. Among the states with intermediate standards, only 1 had 0 (Mississippi), while 11 had between 1 and 9 fatalities. North Carolina had between 20 and 30.

Among the states with immunities, no state was free from fatalities. Eleven had between 1 and 9. Georgia had between 10 and 19, and Texas had between 20 and 29. Florida had between 20 and 29 fatalities. California was over 50.

Generally, the more immunity, the more carnage.

¹⁴² John Rawls, *A Theory of Justice* (rev. ed. 1999).

¹⁴³ Retired Police Chief Donald Van Blaricom, Bellevue, Washington. Retrieved May 15, 2006, from <http://kristieslaw.org/nationwide.htm>.

¹⁴⁴ Salladay, *supra*, Note 125.

¹⁴⁵ See Note 10, *supra*.

¹⁴⁶ See e.g., Geoffrey P. Alpert, Police Pursuit: Policies and Training, NIJ Research in Brief Published: May 1997 ["Continued improvements in technology to slow or stop a vehicle may reduce risks in pursuits. The use of helicopters or fixed-wing airplanes, while expensive, already can allow law enforcement to monitor a fleeing suspect unobtrusively and alert ground units when he or she stops. The spike belt, a strip of spikes that slowly deflate a vehicle's tires when run over, has been available for several years; nets and barricades are being developed to bring vehicles to a stop; and emerging technology promises remote-control devices to allow police to shut down a car's electrical system."]

Tucson, Arizona, for example, has a rule that "when air support is used to assist in a hot pursuit . . . the dispatcher shall then advise the ground units that the air support unit has visual contact, and the air support unit will then coordinate the remainder of the pursuit. Pursuing ground units will immediately slow down and respond to the directions of the air support unit." *Estate of Aten v. Tucson* 169 Ariz. 147, 817 P. 2d 951 (Ariz. 1991) [cited in, Patrick T. O'Connor and William L. Norse, Jr., Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law, 57 Mercer L. Rev. 511, 521-522 (2006)]. When a ground unit did not break off its pursuit pursuant to that rule, resulting in the death of an innocent bystander, the state appellate court held that a triable issue of fact was raised regarding whether the driver was negligent (*Aten* 169 Ariz. 147, 151, 817 P. 2d 951).

¹⁴⁷ For a "neutral" analysis of slippery slope arguments, see, Frederick Schauer, 99 Harv. L. Rev. 361 (1985). Professor Schauer sees the following, in slippery slope arguments:

. . . an implicit concession that the proposed resolution of the instant case is not itself troublesome. By focusing on the consequences for future cases, we implicitly concede that this instance is itself innocuous, or perhaps even desirable. If we felt otherwise, then we would not employ the slippery slope argument, but would rather claim much more simply that this case, in itself, is impermissible.

Id. 99 Harv. L. Rev. at 368-369.

If this much is conceded, the problem with the overuse of slippery slope arguments is two fold: (1) it is dismissive of the need for justice in a particular case, thereby violating principles of equal justice and Kantian notions of not using people as means to other ends (*i.e.*, respect for the individual autonomy of others) and (2) it permits courts to be dismissive of facts that other jurists or juries might interpret in a way better suited to the ends of justice, thereby, interfering with a development of a body of law that is larger than any one judge's policy proclivities.

That other treatments of slippery slope arguments are less neutral can be inferred from the following titles: Ruth E. Sternglantz, Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in *Lawrence v. Texas*, 153 U. Pa. L. Rev. 1097 (2005); and Toby J. Stern, Federal Judges and Fearing the "Floodgates of Litigation," 6 U. Pa. J. Const. L. 377 (2003).

¹⁴⁸ *Kennedy v. City of Ridgefield* 440 F.3d 1091 (9th Cir. 2006).

¹⁴⁹ *Id.* 440 F.3d at 1092.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Wallace v. City of Los Angeles* (1993) 12 Cal.App. 4th 1385, 16 Cal.Rptr.2d 113.

¹⁵³ *Id.* 12 Cal.App. 4th at 1396, 16 Cal.Rptr.2d 113.

¹⁵⁴ *Carpenter v. City of Los Angeles* (1991) 230 Cal.App. 3d 923, 281 Cal.Rptr. 500.

¹⁵⁵ *Id.* 230 Cal.App. 3d at 931, 281 Cal.Rptr. 500.

¹⁵⁶ The author's office handled one confidential informant civil lawsuit that resulted in a jury verdict in favor of the plaintiff of \$5 million against the Ontario (CA) Police Department. New trial on the damage portion of the verdict was granted and the matter ultimately settled for \$1.2 million (*Mancha v. Ontario*, S.B.S.C.. No. SCV 12184). See, Kathy Kinsey, \$ 5 Million Awarded Parents in Informant's Slaying, Daily Journal, Jan. 22, 1999, at 1. Other than this case, the only other significant confidential informant case in Southern California that this author is aware of concerned the death, in August 2003, of a teenager, Chad McDonald, who had purportedly agreed to work as an informant in the course of a plea agreement in juvenile court. Stuart Pfeifer, Trial Ordered for Suspects in Death of Teen Informer, *Orange County Register*, Sept. 10, 1998, at 1. The author is unaware of how that matter was resolved. See also, Charoletta J. Ransom, Notes and Comments: Does the End Justify the Means? Use of Juveniles as Government Informants, Helpful to Society while Harmful to the Child, 20 *J. Juv. L.* 108 (1999).

¹⁵⁷ The "deliberate indifference" standard as it has been applied when government incompetence has led to the deprivation of substantive due process interests in life or liberty was established in *DeShaney v. Winnebago County Dep't of Soc. Servs.* 489 U.S. 189, 191, 109 S.Ct. 998 (1989). Notwithstanding a horrible history of bureaucratic incompetence, including numerous warning signs that a four-

year-old child placed in foster care was being abused, social services continued to place Joshua into a foster hell, where he was abused, tortured, and ultimately beaten into a coma and a lifetime of mental retardation. Writing for the majority, Chief Justice Rehnquist, for the purpose of taking a limited and cautious approach to interpreting constitutional rights, created a doctrine that the plaintiff could not recover when the State has no affirmative obligation to act on the victim's behalf (*Id.* 489 U.S. at 195, 109 S.Ct. 998).

In doing so, the court, rejected the reasonably knew or should have known formulation that typically applies in common law actions in negligence. Further, it rejected the applicability of the special relationship doctrine, a common law doctrine that imposes affirmative obligations when a government official creates a "special relationship." Additionally, it rejected the notion that the "private" acts of the abuser in any way implied, under the circumstances, state action.

In these various ways, the Court retreated to the pre-Douglas model of rights under section 1983. In the process, the Court put its imprimatur on the constitutional toleration of the can't-do bureaucracy. The decision and its consequences has come under too much criticism to thoroughly cite. Two examples are as follows: Carolina D. Watts, "Indifferent [Towards] Indifference:" Post-*DeShaney* Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch, 30 Pepp. L. Rev. 125 (2002); and Brendan P. Kearse, Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children, 29 Colum. J.L. & Soc. Probs. 385 (1996). But the most eloquent comment is found in the famous first two words of the third paragraph of Justice Blackmun's dissent, *DeShaney* 489 U.S. at 213, 109 S.Ct. 998 (Blackmun, J., dissenting): "Poor Joshua!"

¹⁵⁸ *Kennedy, supra* 440 F.3d at 1095.

¹⁵⁹ *Ibid.*

¹⁶⁰ Nixon declared that Lyndon Johnson's War on Poverty was "no substitute for a war on crime." He blamed Johnson for the increase in street crime. He blamed Attorney General Clark, citing the law enforcement officer's opposition to certain provisions of the then-pending omnibus crime bill. But most of all, he blamed the United States Supreme Court majority, whose decisions in *Escobedo* and *Miranda* "have had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces" . . . Liva Baker, *Miranda: Crime, Law and Politics* (1983) p. 211 [as quoted in, John A. MacKerron III, Book Note: *Miranda: Crime, Law and Politics*, by Liva Baker, 35 *Hastings L.J.* 551, 561, fn. 65 (1984).

The cases Nixon referred to are *Escobedo v. State of Illinois* 378 U.S. 478, 84 S.Ct. 1758 (1964) [the defendant, convicted in the Criminal Court, Cook County, Illinois, successfully argued that he was denied effective assistance of counsel in violation of the 6th Amendment, where he, as a suspect in custody, had his request denied to consult with a lawyer. The Court held that the statement elicited by police such during interrogation may not be used against him at criminal trial.]; and *Miranda v. State of Arizona* 384 U.S. 436, 86 S.Ct. 1602 (1966) [holding that statements obtained from defendants during incommunicado interrogation, without full warning of constitutional rights, were inadmissible as having been obtained in violation of 5th Amendment privilege against self-incrimination.].

Such cases establishing rights for criminal defendants joined desegregation cases, school prayer, and abortion cases as typical wedge issues in debate between political parties [Cf. H.W. Perry, Jr and L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 *Const. Commentary* 641, 649 (2004)]. Where conservative judges and scholars, such as Robert Bork and Antonin Scalia, organized their critique around the failure to slavishly follow constitutional text and original intent [see, e.g., note 95, *supra*], no commensurate political critique has ever applied the same intuitions to the court's jurisprudence regarding individual rights and, in particular, slavishly following the intent of the 42nd Congress.

¹⁶¹ The total number of prisoners in state and federal institutions rose from 329,821 in 1980 to 771,243 in 1990, an increase of nearly 134% in the ten-year period [Bureau of Justice Statistics, *Prisoners in 1990*, (1991)]. The population in federal prisons alone nearly doubled from October 1980 to May 1989, growing from 24,162 to 48,017 inmates. United States General Accounting Office, *Briefing Report to Congressional Requesters, Prison Crowding: Issues Facing the Nation's Prison Systems*, p. 9 (1989) [*hereinafter* GAO Report] [as cited in, Russell W. Grey, Note: *Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Condition Law, 41 *Am. U.L. Rev.* 1339, fns. 1 & 2 (1992)].

¹⁶² At year end 2002, 25 states and the federal prison system reported that they were operating above capacity. Paige M. Harrison & Allen J. Beck, PhD, U.S. Department of Justice, *Prisoners in 2002*, at p. 7 (2003). Retrieved May 15, 2006, from www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf. Likewise, in 1990, prisons nationwide were estimated to be operating from 18% to 29% over capacity. GAO Report, *supra*, note 163 [as cited in, Grey, *supra*, note 163, p. 1339, fn. 3].

¹⁶³ These statistics are posted on the CDC's official website at www.corr.ca.gov/Visitors/fac_prison_CIM.html (last visited, May 15, 2006).

¹⁶⁴ *Ibid.*

¹⁶⁵ For a brief history of federal court's varying approaches to prison oversight, see, Michael B. Mushlin, "Rights of Prisoners," 3rd ed. (2002 West Group), §§1:1 through 1:6. Ultimately, the Supreme Court rejected the "hands off" doctrine in *Wolf v. McDonnell* 418 U.S. 539, 555-556, 94 S.Ct. 2963 (1974) ["there is no iron curtain drawn between the Constitution and the prisons of this country."]

¹⁶⁶ See, e.g., *Farmer, supra* 511 U.S. 825, 114 S.Ct. 1970 for an example of a discussion on whether the Supreme Court chose the wrong 8th Amendment standard; see, e.g., Will A. Smith, "Comment: Civil Liability for Sexual Assault in Prison: A Challenge to the 'Deliberate Indifference' Standard," 34 *Cumb. L. Rev.* 289 (2003/2004).

¹⁶⁷ See note 15, *supra*.

¹⁶⁸ See note 17, *supra*.

¹⁶⁹ *Ibid.*

- ¹⁷⁰ Office of the Inspector General, "Special Review into the Death of Correctional Officer Manuel Gonzalez, Jr., on January 10, 2005 at the California Institution for Men," March 16, 2005; Cal. State Board of Corrections, "Independent Operations and Incident Review Panel on the California Institutions for Men," March 2005.
- ¹⁷¹ Rosenblatt, S., & Enriquez, S. (2005, June 11). Chino Warden, two others lose posts: The demotions come after an investigation into the stabbing death of a guard in January. A lawyer for the guard's family plans a lawsuit. *Los Angeles Times*, p. B.1.
- ¹⁷² "Special Review," *supra*, pp. 19-24.
- ¹⁷³ *Ibid.*
- ¹⁷⁴ Winton, R., & Bernstein, S. (2006, February 7). Turnover and a rule that new deputies work in jails are hindering recruiting. A third night of unrest breaks out at Castaic facility. *Los Angeles Times*, p. B.1.
- ¹⁷⁵ *Johnson v. California* 543 U.S. 499, 125 S.Ct. 1141 (2005).
- ¹⁷⁶ See Scott N. Tachiki, Comment, 83 Calif. L. Rev. 1115, 1126 (1995). "In California, prison officials now recognize nine major gangs: (1) the Aryan Brotherhood (AB), (2) the Black Guerilla Family (BGF), (3) the Mexican Mafia (EME), (4) the Mexikanemi, (5) the New Mexico Syndicate, (6) Nuestra Familia (NF), (7) the Northern Structure, (8) the Texas Syndicate, and (9) the Vanguardians. Prison gangs have also spread to other state prison systems, like that of Texas, and are believed to be responsible for much of the violence in prisons. In addition to the violence, gangs smuggle and distribute narcotics throughout the prison system, manufacture and transport weapons, and engage in loan sharking. In short, prison gangs pose a security threat because they influence other inmates to commit crimes while in prison." [footnotes omitted]
- ¹⁷⁷ Phillip Kassel, The Gang Crackdown in Massachusetts' Prisons: Arbitrary and Harsh Treatment Can Only Make Matters Worse, 24 N.E. J. on Crim. & Civ. Con. 37(1998) ["The conclusion set forth is that the DOC gang policy is not merely unfair, or even cruel, it is counterproductive. Labeling and mistreatment actually encourages prisoner self-identification as gang members. Practices that reinforce gang member commitment to the group enhance gang cohesiveness and criminal capacity, undermining both prison security and public safety."]
- ¹⁷⁸ Thom Shanker, "The Reach of War: Detainees, Abu Ghraib Called Incubator for Terrorists," *New York Times*, February 15, 2006, Final, Section A, Page 12; Compare, Megan Garvey and Jack Leonard, "Urgent Appeal for Jail Safety Supervisors want to know why inmates of varying threat levels are placed together, a practice called 'not permissible' a year ago," *Los Angeles Times*; Feb 15, 2006; A.1; David Pierson and Hector Becerra, "Spread of Jail Violence Feared, Some elected officials voice concern that racial tensions will follow released inmates to their neighborhoods," *Los Angeles Times*; February 11, 2006; B.1.
- ¹⁷⁹ "Special Review into the Death . . .", *supra*, note 126, at pp. 49-63.

¹⁸⁰ These statistics were drawn from California Prisoners and Parolees (2004) and California Prisoners and Parolees (2003). They are available at the California Department of Corrections & Rehabilitation website at www.corr.ca.gov/ReportsResearch/OffenderInfoServices/Annual/CalPrisArchive.html (last visited, May 15, 2006).

¹⁸¹ Rather than betray this conversation's confidence, I will point to another public example in support of the proposition. *See, e.g.*, Don Thompson, "Some prison discipline sidestepped, inspector general audit finds," AP, May 17, 2006 ["(U.S. District Court Judge Thelton) Henderson required creation of the bureau after a class-action lawsuit by inmates' alleged abuse by guards and cover-ups by investigators at Pelican Bay State Prison (California). (§) The bureau released its report Wednesday on its first six months in operation. Cooperation is improving, *with most prison managers seeming to welcome the bureau's oversight* and increasingly calling investigators when there are serious allegations of wrongdoing, said Chief Assistant Inspector General David R. Shaw, who heads the bureau." (Emphasis added)]

¹⁸² Cong. Globe, 42d Cong., 1st Sess., 390 (1871), quoted in Shapo, Constitutional Tort: *Monroe v. Pape*, and the Frontiers Beyond, 60 NW. U.L. Rev. 277 (1965) and in Blackmun, *supra*, 60 N.Y.U.L. at 18.

¹⁸³ *Monroe, supra* 365 U.S. at 203, 81 S.Ct. 473.

¹⁸⁴ *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation* February 2004, pp. 7-8.

¹⁸⁵ *Id.* 365 U.S. at 187, 81 S.Ct. 473.

¹⁸⁶ William O. Douglas, *The Anatomy of Liberty, The Rights of Man Without Force* (New York: Trident Press, 1963), p. xxv [quoting, James J. Wadsworth, "Let's Be Adult," *Sat. Rev.*, Dec. 29, 1962, p. 9].

¹⁸⁷ Just how far America fell short in Iraq is suggested by Michael Moss and David Rohde, Misjudgments Marred U.S. Plans for Iraqi Police, *New York Times*, May 21, 2006, A-1 [reporting that a Justice Department proposal to send 6,600 police trainers was ultimately reduced to 500. By contrast, in Kosovo, one-tenth the size of Iraq, the U.N. fielded 4,800 police officers and 2,000 in Bosnia. Two lessons emerged from the Balkans, according to Justice Department police-training expert, Richard Mayer. "'Law and order first,' a warning that failing to create an effective police force and judicial system could stall postwar reconstruction efforts. Second, blanketing local police stations with foreign trainers also helped ensure that cadets applied their training in the field and helped deter brutality, corruption, and infiltration by militias."]

Robert Bastian is a partner in the Law Offices of Bastian & Dini, which he cofounded in 1994. His practice emphasizes plaintiffs' civil rights, including police and prisoner abuse, and unlawful discrimination. Mr. Bastian was co-counsel in two high-profile cases concerning abuse at Corcoran State Prison, which formed the bases of investigative pieces by *60 Minutes* on

CBS. As cocounsel, he obtained a \$5-million judgment against the Ontario Police Department for the department's improper disclosure of a confidential informant's identity. Mr. Bastian is a graduate of the University of Wisconsin (Madison) and Whittier Law School. He lectures on police and prison abuse litigation and frequently writes on the subject of civil rights law. Mr. Bastian's submissions have appeared in the *Los Angeles Times*, the *Los Angeles Daily Journal*, and *Los Angeles Lawyer* magazine. He is the recipient of the Stephen Donaldson Award, presented by Stop Prisoner Rape, "For Helping Raise Awareness to Halt the Sexual Torture of Men, Women, and Children in U.S. Correctional Institutions."

Persons with Mental Illness Post Prison Release

Stephanie W. Hartwell, PhD, Associate Professor, Department of Sociology, Director, Criminal Justice and Forensic Services Programs; University of Massachusetts at Boston

Sarah Kuck Jalbert, Graduate Student, Department of Sociology, University of Massachusetts at Boston; Senior Analyst, Center on Crime, Drugs, and Justice, Abt Associates

Karin Orr, Social Worker, Manager, Massachusetts Department of Mental Health

Introduction

The criminal justice system in the United States is the “default option” or “institution of the last resort” for addressing many social problems that are not necessarily inherently criminal (Durham, 1989; Emerson, 1981). In the 1980s and early 1990s, improved medications for mental illness allowed for shorter hospital stays and easier community placement post hospitalization. Conversely, “tough on crime” criminal justice policies were introduced, including mandatory sentencing and three strikes laws that resulted in longer terms of incarceration. These changes resulted in the exponential growth of the criminal justice system and mass incarceration of individuals with problems such as mental illness. Currently, approximately 10% of male and 18% of female inmates are estimated to have an Axis I major mental disorder of thought or mood (Pinta, 2001).

Given that inmates are eventually released from incarceration into the community, communities and states must be prepared for their release through offering the most efficacious array of services. The organization of these services (voluntary or mandatory) is dependent on the needs of the individuals being released and available resources in the community to which ex-offenders return post release. In many communities, the availability of resources dictates potential service linkages inmates receive based on their profiles and service needs (Lamb & Weinberger, 1998; Lamb, Weinberger, & Gross, 1999; Porporino & Motiuk, 1995; Rice & Harris, 1997). Not all communities have the capacity for mandatory surveillance, and many service linkages are voluntary (Healey, 1999; Piehl, 2002; Travis, 2000). Thus, individuals released from prison often confront a new, less structured environment at release (Hartwell, 2003a, 2003b; Taxman, Young, & Byrne, 2002; Travis, 2000), and at least one-third of ex-inmates are unsuccessful with that process and ultimately recidivate to correctional custody (Bureau of Justice Statistics, 2000; Gendreau, Goggin, & Cullen, 1999).

The research that looks at the intersection of ex-inmates’ service needs and community response to those needs indicates that closer community surveillance (including forms of supervised release-probation, parole) of mentally ill individuals results in technical violations and their return to the criminal justice system (Draine & Solomon, 1994; Solomon & Draine, 1995a, 1995b, 1999; Solomon, Draine, & Meyerson, 1994; Solomon, Draine, & Marcus, 2002). These findings highlight the special circumstances of mentally ill individuals under increased criminal justice or correctional surveillance.

Essentially, we can expect that mentally ill offenders have a distinct set of needs from both ex-inmates and individuals with psychiatric disabilities without a criminal history. Mental health services research has shown that intensive case management can reduce the risk of violence and hospital use and increase housing stability and quality of life for individuals discharged from the hospital (Dvoskin & Steadman, 1994; Mueser, Bond, Drake, & Resnick, 1998; Olsson, 1990; Phillips et al., 2001). These findings establish the efficacy of intensive case management for former patients not involved in the criminal justice system (Mueser et al., 1998; Phillips et al., 2001). In contrast, the growing body of literature that examines the impact of specialized or intensive case management programming for individuals with psychiatric disabilities involved with the criminal justice system does not always support this conclusion of efficacy (Draine & Solomon, 1994; Roskes, Feldman, Arrington, & Leisher, 1999; Solomon & Draine, 1995a, 1995b; Ventura, Cassel, Jacoby, & Huang, 1998; Wilson, Tien, & Eaves, 1995; Wolff, Diamond, & Helminiak, 1997). Wolff and colleagues (1997) found that assertive community treatment does not prevent contacts with law enforcement and that clients with the most intensive mental health service treatment also had the most law enforcement contacts.

The most recent body of research on individuals with mental illness released from correctional custody suggests that specialized rather than mandatory services are indeed warranted to help integrate this population in the community (Hartwell & Orr, 1999; Hartwell, Friedman, & Orr, 2001). Existing service models (e.g., assertive community treatment) and the justice system's post release oversight mechanisms (e.g., probation and parole), however, do not necessarily take into account the unique experience of ex-inmates returning to the community with mental illness. Given the paucity of consistent research and findings in this area, this article identifies a voluntary transition and discharge planning program in Massachusetts for mentally ill offenders being released from correctional custody. It examines the configuration of the program and data from the program and describes factors that influence community re-entry and subsequent community living for individuals with criminal and mental health histories.

Transition and Discharge Planning Programs: Massachusetts FTT

Re-entry services for offenders with mental illness returning to the community from correctional custody are receiving attention for both policy and practical reasons. Discharge planning services, community outreach, specialized probation and parole, and transitional support programs are in place in many states. In Massachusetts, the Department of Mental Health's (DMH) Forensic Transition Team (FTT) program eases the transition of offenders with major mental illness from correctional custody to community living. The goal of the FTT program is to help address the needs of individuals with mental illness being released from correctional custody. Objectives subsumed under this goal include identification and engagement, assessment of needs, service coordination, and monitoring post release. During the past several years, a series of studies have been underway on the FTT that examine the re-entry of offenders with mental illness as they attempt to traverse the divide from correctional custody to the community (see Hartwell, 2003a, 2003b, 2004a, 2004b, 2005; Hartwell & Orr, 1999, Hartwell et al., 2001). This research consists of the analysis of a large secondary data set and qualitative interviews with ex-inmates with psychiatric disabilities and FTT staff.

FTT and correctional staff typically identify individuals with mental illness completing correctional sentences prior to their release from correctional custody. The FTT staff help coordinate their release plans while individuals are still behind prison walls. All DMH eligible individuals are interviewed by FTT staff while still incarcerated. After release, FTT coordinators monitor and support the ex-offenders, providing linkages to services in the community from point of release to three months post release. Since 2002, the FTT program has evolved in response to a shift to a regionalized or localized, as opposed to statewide, administration of the program.

Methods

A major focus of this research program is the identification of factors influencing the community reintegration versus recidivism to correctional custody over time. Study data suggests that identifiable features facilitate and impede re-entry, and these features can underscore practical application and program directions for transition teams and discharge planners. To isolate these features, study data was collected on forms by the FTT staff on their contact with mentally ill offenders in Massachusetts.

Program data was gathered both prior to and post release. Prior to release, demographic, clinical, criminal history, and service need data was collected on program forms created by the research team on all individuals who completed the DMH eligibility process. Prior to regionalization in 2002, after individuals were released from correctional custody, FTT coordinators tracked them for 90 days post release and collected outcome data on termination forms. Ongoing data collection includes information on individual background characteristics on all identified offenders since 1998. Short-term outcome information including community functioning data three months post-release has been collected on the group released prior to 2002. Additionally, qualitative interviews were recently completed with a subset of individuals transitioned by the FTT, and we have just begun to examine the impact of regionalization on FTT staff.

Data on the FTT program includes several categories of mentally ill offenders: those tracked through the FIT who have been arrested and charged but not adjudicated or sentenced, offenders who are incarcerated and identified as FTT eligible but have not been released, and offenders who have been released and tracked by the FTT program. Some clients are recidivists and have several cases on file with the FTT program. For those individuals, this analysis includes only the most recent FTT episode. For this analysis, we focus on offenders who have been released and tracked by the FTT program (n=862). We then look at data from a smaller subset of individuals for whom we have more detailed post-release information prior to program regionalization.

Findings

Outcomes for the 862 FTT clients who have been released for three months or more are generally good particularly when service utilization and hospital stays are considered a normative feature of the community continuum of care for individuals with mental illness. Fifty-six percent (56%) are engaged in treatment services at the close of FTT supervision; 19% have been stepped down directly at prison release to a locked hospital ward. Nearly 6% have been rehospitalized after some time in the community, and 8.5% have been reincarcerated or readjudicated. The remaining

cases have either been lost to follow-up (nearly 11%) or closed due to individuals moving out of state or dying (1%).

The vast majority (81%) of these clients are male. More than half (51%) are white; 52% have been diagnosed with a thought disorder; and 46% have been charged with a violent crime. The mean age is 36, though clients diagnosed with a personality disorder are significantly younger than those diagnosed with thought and mood disorders (32, 37 and 35, respectively; $p=.002$). Almost two-thirds (62%) report recent substance abuse, and nearly 27% have a history of homelessness. Three quarters (72%) have some prior history of services with the Massachusetts DMH, and nearly one-third (28%) have recidivated at least once since tracking of FTT clients began.

Though few FTT clients are diagnosed with a personality disorder ($n=35$), those with the diagnosis were significantly more likely to be reincarcerated after release (20%, $p=.032$) than those with mood (9.2%) or thought (7.3%) disorders. Having a history of homelessness is correlated with self-reports of problematic substance use ($p=.002$) and recidivism ($p=.071$) for FTT clients. Clients who have recidivated at least once are far more likely to have poor outcomes in subsequent FTT supervised transitions: 31% of recidivists are re-incarcerated in subsequent cases, while only 1% of nonrecidivists are ($p<.0001$).

For our analysis, a “positive outcome” is considered continued engagement in treatment; this could be engaged through the FTT, rehospitalization, or stepdown immediately on release. “Poor outcome” refers to a reincarceration or readjudication during or after the three-month period of FTT supervision. Unknown outcomes are for clients who are lost to follow-up. Though these clients may in fact be doing well on their own in the community, they are not included in this analysis. For instance, offenders who report problematic substance use are more likely to have positive outcomes ($p=.033$). This unexpected finding seems to be explained in part by the high correlation of substance users with probation supervision ($p<.0001$); 22% of substance users are on probation compared to 12% of non-users. In addition, a higher proportion of substance abusers are subject to a mandatory forensics review (17%) than non-users (9%, $p=.001$). This suggests, that substance abusers are identified at release as being in higher need of services and galvanize correctional resources in the community. At least in the short term, 90 days post release, this heightened surveillance appears to keep them engaged in the community.

Interestingly, clients with a history of homelessness are significantly more likely to report problematic substance use than those with a stable living situation (30% vs. 21% respectively, $p=.009$), and are more likely to have been arrested on a drug charge (12% vs. 8% respectively), though this difference is not highly significant ($p=.053$). Having a history homelessness is significantly correlated with recidivism ($p=.037$) as is age ($p=.023$), though the mean age for homeless offenders (36) is not much different than those who have a stable home (37). Older offenders, however, are more likely to have a mandatory forensics review ($p=.002$), though they are no more likely to be substance abusers.

Correlators	Positive Outcome at 3 Months	Client Recidivated at Least Once	History of Homelessness	Current Arrest Charge	Positive CAGE Screener	Diagnosis	MFR	Age	Client Under Probation Supervision
Positive Outcome at 3 Months	Pearson Correlation Sig. (2-tailed) 1.00								
Client Recidivated at Least Once	Pearson Correlation Sig. (2-tailed) .463** 0.000	1.000							
History of Homelessness	Pearson Correlation Sig. (2-tailed) 0.271	.071*	1.000						
Current Arrest Charge	Pearson Correlation Sig. (2-tailed) 0.670	0.241	0.009	1.000					
Positive CAGE Screener	Pearson Correlation Sig. (2-tailed) 0.033	0.312	0.002	0.824	1.000				
Diagnosis	Pearson Correlation Sig. (2-tailed) 0.010	0.321	0.038	0.045	0.062	1.000			
Mandatory Forensic Review	Pearson Correlation Sig. (2-tailed) 0.431	0.321	0.038	0.045	0.062	1.000			
Age	Pearson Correlation Sig. (2-tailed) 0.692	0.321	0.038	0.045	0.062	1.000	1.000		
Client Under Probation/Supervision	Pearson Correlation Sig. (2-tailed) 0.490	0.321	0.038	0.045	0.062	1.000	1.000	1.000	

* Correlation is significant at the 0.05 level (2-tailed).

** Correlation is significant at the 0.01 level (2-tailed).

Finally, data on living arrangements at release is only available on the limited number of clients. Termination forms were collected prior to regionalization of FTT services in 2002 (n=296); of those, 21% were in a shelter placement at three months, 22% were in the community under supervision, 39% were living with family or friends, and 18% were in their own home or apartment. Clients living with family or friends or in their own home were slightly more likely to be reincarcerated than those in shelter placement or supervised living environments (8% vs. 0%), though these results were not statistically significant ($p=.069$).

Limitations

These findings are limited by several factors. Information on recidivism by FTT clients is collected by the FTT staff and may not be comprehensive when considering the case identification process and lag time from arrest to incarceration. Additionally, the measurement of known recidivists also impacts the outcome data for FTT clients. Repeat offenders cycle through the program again after release, skewing the outcome figures positively. For example, a person who would otherwise be counted as having a negative outcome (i.e., reincarceration) may have reentered the FTT and be engaged in treatment once again. This measurement issue is in part mitigated by reporting on recidivism statistics but does limit the findings.

Finally, to date we are only able to look at a limited number of termination forms including descriptive information of living arrangements post release. This is primarily due to the administrative shift in 2002 from a centrally administered program to a regional model. When the program became regionalized, centralized and standardized data collection procedures were compromised. This was particularly true for additional forms that the staff felt had little purpose beyond research data collection. Although this limits some of our potential and future analysis, a study of the impact of FTT regionalization is currently underway.

Discussion and Conclusions

When examining outcomes of any social service or supervision program, care must be taken to understand the context of the "outcomes." For instance, for mentally ill ex-offenders, being engaged in services is essential and transcends not being rearrested or reincarcerated to quality of life and health issues. Additionally, given that each individual in the group identified had a major Axis I mental illness, it is not too surprising that 25% have spent some time hospitalized after release from correctional custody. How hospitalization is qualified really depends on the resources of the region or state in assessing program impact and costs. Finally, having a subset of these individuals lost to follow-up is not necessarily a bad thing. Given our data collection strategies and the FTT's close relationship with other community service providers, we can be fairly certain that "lost" individuals have not been hospitalized, rearrested, or reincarcerated in Massachusetts. Thus, the potential scenarios for their post-release experiences include moving out of state to another state (where they may or may not be doing well) or remaining in the state without accessing services or having a threshold level of service-identified problems.

The issue of articulating outcomes is also important when considering our data analysis. Identifying bad outcomes as being readjudicated or reincarcerated and good outcomes as essentially everything else biases our analysis. To address this bias,

fieldwork is needed to begin to define outcomes from different perspectives (service providers or clients) and quality-of-life issues. Nevertheless, there appears to be a cluster of factors that lead to difficulty in re-entry and subsequent recidivism. Being younger, having a history of violent crime, and being personality disordered are all significantly related to being readjudicated or reincarcerated. Additionally, being homeless makes re-entry and community living extremely difficult, the subsequent result being relapse/substance abuse and criminality. Finally, living arrangements factor into community re-entry experience. The qualitative work on this topic suggests that most of these individuals want to live alone or with family post release (Hartwell, 2005). Living alone, however, can be alienating and lonely while living with families can be unhealthy or dysfunctional. The data we presented here suggests that the individuals living in a shelter placement or under some form of community supervision stay in the community longer. In both scenarios, ex-offenders are living among other people, engaged in part of a larger network, and sharing resources and supports. Whether with family or in supportive housing, social networks are a requisite for both housing resources and the maintenance of appropriate social supports that are necessary for successful community engagement post incarceration.

Again, the preponderance of the literature to date suggests that individuals with mental illness often fair poorly under mandated formal supports in the community such as probation because they violate conditions of their release, returning them to the correctional system (Solomon & Drain, 1999). Our research suggests, however, that mentally ill ex-offenders with substance abuse problems are distinct. They appear to succeed more often when they are under mandated community supervision (probation/parole) unless they are homeless. Homelessness compounds difficulties in reintegration post release. Additionally, community services such as the FTT are aware of the complexity substance abuse adds to community re-entry post prison release. Literature on individuals released from psychiatric facilities describes individuals with substance abuse problems as more likely to be violent (Steadman et al., 1998). Thus, it is not too surprising that the DMH requires these individuals to undergo a mandatory forensic review.

These findings are interesting because they begin to add nuances to previous findings that psychiatrically disabled individuals do poorly under mandatory community supervision. While some might, it appears that at least a subsample of substance abusers in Massachusetts need the formal oversight to keep them away from drugs through mandatory testing and conditions of correctional release. Interestingly, substance abuse, similar to medication noncompliance, appears to be a red flag at correctional release. The concern is that substance abuse may decrease re-entry potential, while taking prescribed medications in the community enhances individuals' social networks and community reintegration success by helping them address their illness and manage symptomatology (Hartwell, 2005). To keep their prescription filled, individuals must be in contact with clinicians and social service providers that offer resources and connections to the community. Being a homeless street substance abuser has the opposite effect. For many ex-offenders, using drugs and looking for shelter are priorities taking attention away from other aspects of their lives including social services and prosocial ties (Hartwell, 2005). Future research will focus on examining the complexities of substance abuse and homelessness profiles for this population and services they need at release.

In Massachusetts, as elsewhere, finding a safe place to live after incarceration is difficult. Research has shown that psychiatric symptoms and criminal history are more likely to result in decreased family bonds (Tessler, Gamache, Rossi, Lehman, & Goldman, 1992). This scenario is particularly true in families that are already under strain due to limited resources and is reflected on a societal level with the return of large numbers of individuals with mental illness from the criminal justice system to the community. When individuals are released from correctional custody into environments that lack resources or capital to support them, they have a difficult time making strides toward prosocial connections and activities including work, school, and treatment. This emphasis on the role of contextual characteristics of communities and their ability to ameliorate or perpetuate social problems highlights the importance of re-entry and its relationship to community resources.

Communities with few resources have truncated networks resulting in problems such as limited housing options. Still, the characteristics of the neighborhoods and communities where ex-offenders reside offer important dimensions to understand the complexities of re-entry. For example, many ex-offenders return to communities with institutional resources and supports to ease their transitions. These communities are often poor and disorganized. They have institutional supports in place because they tend to lack less formal social supports and networks. Ex-offenders are not welcome in communities with informal supports and rich social networks of engaged individuals. These more cohesive communities are essentially socially integrated and have the collective efficacy to keep crime and criminals away (Gibson, Jihong, Nicholas, & Gaffney, 2002; Sampson, Raudenbush, & Earls, 1997), while areas lacking social cohesion or collective efficacy are more prone to crime and other types of deviance. Thus, although reintegration appears to be a goal during community re-entry, integrated communities can also be an ecological/contextual barrier for psychiatrically disabled ex-offenders returning to the community. In many scenarios, mentally ill ex-offenders ultimately drift to more disorganized communities where they can be integrated into more formal service systems in lieu of developing more informal community networks.

The Massachusetts FTT program offers a voluntary support service that can function as a bridge for mentally ill ex-offenders returning from correctional custody to the community and navigating new and often disorganized communities. While certain demographic and criminal history characteristics may predict potential difficult cases, the information highlighted also suggests service patterns and responses to best serve this population. The challenge of release from a penal institution and the stigma inevitably encountered in the community includes both public perception/acceptance and the response of the social service system. For instance, high-profile offenders with mental illness (e.g., sex offenders, individuals who have committed homicide) are more often “stepped-down” from prisons directly into locked psychiatric hospitals. That is, individuals with certain personal characteristics are generally kept from the community and are instead networked through a system reliant on formal supports and institutions.

One recent study comparing the criminal histories of individuals with mental illness released from misdemeanor (2.5 years or less averaging 9 months) and felony (2.5 years or more averaging 4 years) sentences suggested that misdemeanants are more likely to move into the community and then to recidivate to correctional custody at rates similar to the general population of ex-inmates; whereas, felons are more

likely to be transferred to psychiatric hospitals after release from correctional custody (Hartwell 2003a, 2003b). These findings highlight the cumulative effects of engagement with the criminal justice system. While, it is possible that ex-felons struggle with living in the community because, due to their longer sentences, they may have grown accustomed to the structured day-to-day life of prison, they may also be stigmatized as “dangerous” and thus a threat to the community. As a result, they garner more attention at release and are labeled “high-profile cases” due to their risk profiles. They are immediately hospitalized at release or are released to live in a highly structured setting in the community where a failure to adapt can result in hospitalization. Put simply, communities usually manage formal controls for offenders with mental illness who have a history of violence, leaving them little chance of overcoming the stigma associated with their criminal charge and integrating into the open community even if they are capable of doing so (Hartwell, 2003a, 2003b).

This article highlights the complexities of re-entry experiences of ex-offenders with mental illness. Personal characteristics and community resources intersect to heighten this complexity. For instance, intensive programming and/or community correctional alternatives might prove to be effective for substance abusers with housing or a “revolving door” back to the criminal justice system for those individuals without housing resources.

References

- Bureau of Justice Statistics, U.S. Department of Justice. (2000). *Mental health treatment in state prisons*. Washington, DC: U.S. Government Printing Office.
- Draine, J., & Solomon, P. (1994). Jail recidivism and the intensity of case management services among homeless persons with mental illness leaving jail. *Journal of Psychiatry and Law*, 22, 245-261.
- Durham, M. L. (1989). The impact of deinstitutionalization on the current treatment of the mentally ill. *International Journal of Law and Psychiatry*, 12, 117-131.
- Dvoskin, J., & Steadman, H. (1994). Using intensive case management to reduce violence by mentally ill persons in the community. *Hospital and Community Psychiatry*, 45(7), 679-684.
- Emerson, R. M. (1981). On last resorts. *American Journal of Sociology*, 87(1), 1-22.
- Gendreau, P., Goggin, C., & Cullen, F. (1999). *The effects of prison sentences on recidivism*. (User Report, No. 24). The Department of the Solicitor General Canada.
- Gibson, C. L., Jihong, Z., Nicholas, L. P., & Gaffney, M. J. (2002). Social integration, individual perceptions of collective efficacy, and fear of crime in three cities. *Justice Quarterly*, 19, 538-563.
- Hartwell, S. W. (2003a). Short-term outcomes for offenders with mental illness released from incarceration. *International Journal of Offender Therapy and Comparative Criminology*, 47, 145-158.

- Hartwell, S. W. (2003b). Prison, hospital or community: Community re-entry and mentally ill offenders. *Research in Community and Mental Health, 12*, 199-220.
- Hartwell, S. W. (2004a). Triple stigma: Persons with mental illness and substance abuse problems in the criminal justice system. *Criminal Justice Policy Review, 15*, 89-99.
- Hartwell, S. W. (2004b). Comparisons of offenders with mental illness only and offenders with dual diagnoses. *Psychiatric Services, 55*, 145-149.
- Hartwell, S. W. (2005). The organizational response to community re-entry. In S.W. Hartwell (Ed.), *The organizational response to persons with mental illness involved with the criminal justice system* (pp. 197-217). Research in Social Problems and Public Policy Series, Volume 12. Elsevier Science.
- Hartwell, S. W., Friedman, D., & Orr, K. (2001). From correctional custody to community: The Massachusetts Forensic Transition Team. *New England Journal of Public Policy, 19*, 73-82.
- Hartwell, S. W., & Orr, K. (1999). The Massachusetts Forensic Transition Program for mentally ill offenders re-entering the community. *Psychiatric Services, 50*, 1220-1222.
- Healey, K. (1999, February). *Case management in the criminal justice system*. Washington, DC: National Institute of Justice.
- Lamb, R. H., & Weinberger, L. E. (1998). Persons with severe mental illness in jails and prisons: A review. *Psychiatric Services, 49*(4), 483-492.
- Lamb, R. H., Weinberger, L. E., & Gross, B. (1999). Community treatment of severely mentally ill offenders under the jurisdiction of the criminal justice system: A review. *Psychiatric Services, 50*(7), 907-913.
- Mueser, K. T., Bond, G. R., Drake, R. E., & Resnick, S. G. (1998). Models of community care for severe mental illness: A review of research on case management. *Schizophrenia Bulletin, 24*, 37-74.
- Olfson, M. (1990). Assertive community treatment: An evaluation of the experimental evidence. *Hospital and Community Psychiatry, 41*, 634-641.
- Phillips, S., Burns, B., Edgar, E., Mueser, K., Linkins, K., Rosenheck, R., et al. (2001). Moving assertive community treatment into standard practice. *Psychiatric Services, 52*, 771-779.
- Piehl, A. M. (2002, January). *From cell to street: A plan to supervise inmates after release*. Cambridge, MA: John F. Kennedy School of Government, National Bureau of Economic Research.
- Pinta, E. (1999). The prevalence of serious mental disorders among U.S. prisoners. *Correctional Mental Health Report, 1*(34), 44-47.

- Porporino, F., & Motiuk, L. (1995). The prison careers of the mentally disordered offenders. *International Journal of Law and Psychiatry*, 18(1), 29-44.
- Rice, M. E., & Harris, G. T. 1997. The treatment of mentally disordered offenders. *Psychology, Public Policy, and Law*, 3(1), 126-183.
- Roskes, E., Feldman, R., Arrington, S., & Leisher, M. (1999). A model program for the treatment of mentally ill offenders in the community. *Community Mental Health Journal*, 35(5), 461-475.
- Sampson, R. J., Raudenbush, S. W., & Earls, F. (1997). Neighborhoods and violent crime: A multilevel study of collective efficacy. *Science*, 277, 918-924.
- Solomon, P., & Draine, J. (1995a). Jail recidivism in forensic case management program. *Health and Social Work*, 20, 167-173.
- Solomon, P., & Draine, J. (1995b). One-year outcomes of a randomized trial of case management with seriously mentally ill clients leaving jail. *Evaluation*, 19, 256-273.
- Solomon, P., & Draine, J. (1999). Explaining lifetime criminal arrests among clients of a psychiatric probation and parole service. *Journal of the American Academy of Psychiatry and Law*, 27(2), 239-251.
- Solomon, P., Draine, J., & Marcus, S. C. (2002). Predicting incarceration of clients of a psychiatric probation and parole service. *Psychiatric Services*, 53, 50-56.
- Solomon, P., Draine, J., & Meyerson, A. (1994). Jail recidivism and receipt of community mental health services. *Hospital and Community Psychiatry*, 45(8), 793-797.
- Steadman, H. J., Mulvey, E. P., Monahan, J., Robbins, P. C., Applebaum, P. S., Grisso, T., et al. (1998). Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods. *Archives of General Psychiatry*, 55, 393-401.
- Taxman, F. S., Young, D., & Byrne, J. (2002). *Offender's views of reentry: Implications for processes, programs and services*. Washington, DC: U.S. Department of Justice.
- Tessler, R. C., Gamache, G., Rossi, P., Lehman, A., & Goldman, H. (1992). The kindred bonds of mentally ill homeless persons. In P. O'Malley (Ed.), *Homelessness: New England and beyond* (pp. 265-280). Amherst: University of Massachusetts Press.
- Travis, J. (2000). But they all come back: Rethinking prisoner re-entry. *Sentencing and Corrections for the 21st Century*. Washington, DC: U.S. Department of Justice.
- Ventura, L. A., Cassel, C. A., Jacoby, J. E., & Huang, B. (1998). Case management and recidivism of mentally ill persons released from jail. *Psychiatric Services*, 49, 1330-1337.

Wilson, D., Tien, G., & Eaves, D. (1995). Increasing the community tenure of mentally disordered offenders: An assertive case management program. *International Journal of Law and Psychiatry*, 18(1), 61-69.

Wolff, N., Diamond, R. J., & Helminiak, T. W. (1997). A new look at an old issue: People with mental illness and the law enforcement system. *The Journal of Mental Health Administration*, 24(2), 152-165.

Stephanie Hartwell, PhD, is an associate professor of sociology and the director of the criminal justice and forensic services programs at the University of Massachusetts at Boston. She received her doctorate from Yale University in 1995 and publishes widely on multi-problem populations and the organization of services and institutions arranged to address their needs.

Sarah Kuck Jalbert is a candidate for a Master of Arts degree in Applied Sociology at the University of Massachusetts at Boston. She is also a Senior Analyst for the Center on Crime, Drugs, and Justice at Abt Associates, Inc. in Cambridge.

Karin Orr is a social worker and manager for the Massachusetts Department of Mental Health's Forensic Division. She also works part time as an Adjunct Professor for Merrimack College in Andover.

Guidelines for Preparing Manuscripts

There are virtually no restrictions on subject matter as long as the material pertains, in the opinion of the editor, to law-enforcement-related areas. Manuscripts should be typed and double-spaced. A résumé or vitae from the author(s) must accompany submissions. Book reviews and research notes will be considered for publication. No submission will be published until recommended by referees, who will review blind copies.

Final manuscripts must be submitted on 3.5" microcomputer diskettes readable on Macintosh or IBM (and true compatible) computers. Please specify word processing program used when submitting diskettes (e.g., *MacWrite* 5.0, *WordPerfect* 5.1, and so on). Also, an ASCII version would be most helpful. Disks will not be returned. Figures and line drawings must be submitted in camera-ready form.

Send three hard-copy manuscripts, vitae(s), and a diskette to . . .

Vladimir A. Sergevnin, PhD, Editor
ILETSBEI *Law Enforcement Executive Forum* Editorial Office
1 University Circle
Macomb, IL 61455
(309) 298-1939; fax (309) 298-2642

Manuscripts should be prepared according to the *Publication Manual of the American Psychological Association* (5th ed.) (2001). *Webster's Third New International Dictionary* (3rd ed.) (1983) is the standard reference for spelling. Contributors are responsible for obtaining permission from copyright owners if they use an illustration, table, or lengthy quote that has been published elsewhere. Contributors should write to both the publisher and author of such material, requesting nonexclusive world rights in all languages for use in the article and in all future editions of it.

New Publications Available!



Chicago Police: An Inside View – The Story of Superintendent Terry Hillard

Authors: Thomas J. Jurkanin, PhD, with Terry G. Hillard

In macro-style, this book examines crime, criminal activity, and police response in the city of Chicago, which has a long history of and association with crime. This book will give the reader an inside view of the Chicago Police Department so that a better understanding might be gained of police operations not only in Chicago but in other major city police agencies.

Critical Issues in Police Discipline

*Authors: Lewis G. Bender, Thomas J. Jurkanin,
Vladimir A. Sergevnin, Jerry L. Dowling*

This book examines the problem of police discipline from the collective perspective of professional law enforcement leaders. It offers the reader practical, not theoretical, solutions in dealing with problem employees and misconduct incidents. It reflects the experience and dedication of a highly experienced group of Illinois police chiefs and sheriffs.

To order, contact the Illinois Law Enforcement Training and Standards Board Executive Institute at (309) 298-2646.

Illinois Law Enforcement Training and Standards Board Executive Institute

Law Enforcement Executive Forum

Back Issues Available (\$10.00 each includes shipping)

	No. Ordered
<i>Racial Profiling: Special Edition</i> – July 2001	_____
<i>Recruitment</i> – August 2001	_____
<i>Retention</i> – December 2001	_____
<i>Terrorism</i> – March 2002	_____
<i>Police Ethics</i> – July 2002	_____
<i>The Impact of Emerging Science and Technology on Law Enforcement Agencies</i> – August 2002	_____
<i>Police Training</i> – November 2002	_____
<i>Police Management and Leadership</i> – February 2003	_____
<i>Use of Force</i> – May 2003	_____
<i>Police-Medical Collaborations: Dealing with Mental Health</i> – July 2003	_____
<i>Law Enforcement Response to Methamphetamine</i> – September 2003	_____
<i>Legal Self-Defense for Law Enforcement Administrators</i> – November 2003	_____
<i>Police Pursuits</i> – January 2004	_____
<i>Personnel Administration: Psychological Landmines</i> – March 2004	_____
<i>Training the Police Trainer</i> – May 2004	_____
<i>Community Policing</i> – July 2004	_____
<i>Patrol Resource Allocation</i> – September 2004	_____
<i>Special Edition</i> – October 2004	_____
<i>Internal Affairs Investigations</i> – November 2004	_____
<i>Law Enforcement Agency Accreditation</i> – January 2005	_____
<i>Law Enforcement Unions</i> – March 2005	_____
<i>Generational Conflict and Diversity</i> – May 2005	_____
<i>Undercover Policing</i> – July 2005	_____
<i>Public Relations, Media and Political Affairs</i> – September 2005	_____
<i>Homeland Security</i> – November 2005	_____
<i>Racial Profiling: Special Edition</i> – January 2006	_____
<i>Best Practices in Recruitment and Retention</i> – February 2006	_____
<i>Gangs, Drugs, and Violence Prevention</i> – March 2006	_____
<i>Mental Health</i> – May 2006	_____
<i>Integrity-Based Policing</i> – July 2006	_____
Total Ordered	_____

Topics for Next Year's Subscribers (Topics Subject to Change)

<i>Police Resource Management: Patrol, Investigation, Scheduling</i>	<i>September 2006</i>
<i>Interagency Cooperation</i>	<i>November 2006</i>
<i>Critical Issues in Police Civil Liability</i>	<i>January 2007</i>
<i>Police Officer Safety</i>	<i>March 2007</i>
<i>Police Administration</i>	<i>May 2007</i>

See reverse side of this page for Ordering Information.

Illinois Law Enforcement Training and Standards Board Executive Institute
Law Enforcement Executive Forum

Ordering Information

Payment can be made by check, money order, or credit card (MasterCard, Visa, or Discover).
No CODs are accepted. Orders may be faxed to (309) 298-2642 or mailed to . . .
ILETSBEI • 1 University Circle • Macomb, IL 61455

For further information, contact the Illinois Law Enforcement Training and
Standards Board Executive Institute at (309) 298-2646.

Shipping Information

First Middle Initial Last

Address

City State Zip

Telephone Fax

E-Mail

\$40.00 Subscription price July 2005-June 2006

Credit Card Information

Name on Credit Card _____ MC Visa Discover

Card Number _____ Expiration Date _____

Signature _____