



Law Enforcement Executive  
**FORUM**

**Critical Issues in Police  
Civil Liability**

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# Table of Contents

<b>Editorial</b> .....	i
Vladimir A. Sergevnin	
<b>Civil Liability</b>	
<b>Liability for Managerial Negligence</b> .....	1
Wayne W. Schmidt	
<b>An Analysis of Civil Liability and Sudden In-Custody Deaths in Policing</b> .....	7
Darrell L. Ross	
<b>Civil Liability and the Police Use of Force in Canada</b> .....	31
Rick Parent	
Simon Verdun-Jones	
<b>Potential Civil Liability for Coercive Interrogations</b> .....	45
James P. Manak	
<b>Police and Civil Liability: A Practical Guide to Avoiding Litigation</b> .....	51
Homer C. Hawkins	
Catherine Montsinger	
<b>Police Liability Incidents that Result in Litigation: An Examination of the Causes and Costs</b> .....	61
Carol A. Archbold	
Daniel J. Lytle	
Jennifer Manis	
Lindsey Bergeron	
<b><i>Castle Rock v. Gonzales: Due Process, Police Discretion, and Mandatory Enforcement of Protective Orders: The Promised Land?</i></b> .....	75
Tom Hughes	
Jeff Magers	
Brian Fell	
<b>Law Enforcement Training: Rhetoric, Liability, and the Certificate</b> .....	89
Brian A. Kinnaird	
Andria L. Cooper	
<b>Minneapolis Police Department Pursuit Study</b> .....	95
Timothy J. Dolan	
Gregory W. Reinhardt	
James R. Kobolt	
Nicholas J. Laurent	
Steven M. Volden	
Kasey A. Tucker	
Candace Wilczynski	

<b>Police Custody as a System and Unified Policy: Best Practices for Reducing Officer and Prisoner Risks of Injury and Death.....</b>	103
R. Paul McCauley	
<b>Risk Assessment and the Police Use of Force: A Social Science Model for Proximate Cause Analysis .....</b>	119
Brian A. Kinnaird	
<b>Sex, Videotapes, the Internet, and Police Misconduct .....</b>	127
Lou Reiter	
<b>Have You Any Fourth Amendment Expectation of Privacy in Your Workplace Computers? The Ninth Circuit Follows Many Other Courts to Hold the Answer Is “No” .....</b>	133
Michael P. Stone	
<b>Ninth Circuit Deals Another Blow to Law Enforcement Use of Force: Federal Appeals Court Expands Basis for Punitive Damage Awards.....</b>	137
Michael P. Stone	
Marc J. Berger	
<b>Police Ethics</b>	
<b>The Demand for Ethical Leadership in Law Enforcement .....</b>	141
Dan Richard Beto	
Ronald P. Corbett, Jr.	
<b>Investigations</b>	
<b>Homicide Solvability Factors in El Salvador: An Initial Exploration .....</b>	151
Carlos Ponce	
C. Gabrielle Salfati	
Shannon M. Barton	
Phillip C. Shon	
<b>Interagency Collaboration</b>	
<b>Regional Centers for Public-Safety Innovation: A Model for Collaboration and Training Delivery Distribution .....</b>	173
Richard Mears	
Robert Boehmer	
Patricia S. Rushing	
<b>Drug Courts: A “Community” Criminal Justice Program .....</b>	179
Deborah Wilkins Newman	
Morenike M. Murphy	
<b>Interagency Offender Reentry Programs Offer “Win-Win” for Communities .....</b>	189
Elizabeth Joyce	
Susan Smith Howley	

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## Editorial

Over the past 25 years, law enforcement has experienced a rapid expansion of police roles and functions in the nation. The social demands of law enforcement officers have become increasingly complex, and even controversial. Police personnel are expected to enforce law and order; prevent crime; and act as social workers, educators, prosecutors, medical doctors, attorneys, etc. The complexity of the job makes the law enforcement profession one of the most vulnerable to civil lawsuits brought by citizens or the department itself.

Since the end of the 1960s, it is increasingly common for lawsuits to be brought against law enforcement agencies and officers. Such lawsuits do not discriminate between negligent performance of assigned duties, violation of citizens' rights, misconduct, brutality, lack of specific training, and honest mistakes in judgment. Police officers and managers are not guaranteed against civil litigation. In many civil liability cases, the financial loss to law enforcement agencies and the induced psychological terror for officers are damaging to professionalism and the ability to carry out everyday duties.

At the same time, civil litigation cases have triggered the development of numerous new policies and procedures, better and more down-to-earth training philosophy and practice, and open dialogue with respective communities, all of which have shaped modern-day policing in this country. Increased attention among law enforcement managers to civil liability phenomena has assisted them in successfully defending agencies and officers from lawsuits. Only by working together can police agencies and legal experts hope to exploit the wisdom of the written law. Cooperation is not easy, but in the spirit of safe and just policing, I believe it is worth the effort.

This issue of the *Law Enforcement Executive Forum* is an attempt to aid law enforcement officers and executives in dealing with civil liability cases and certain social consequences of exercising police powers. Although most of the articles are predominantly legal in nature, authors attempted to address some of the profound civil liability issues confronting present-day law enforcement personnel.

*Vladimir A. Sergevnin, PhD*  
*Editor*  
*Law Enforcement Executive Forum*



# Liability for Managerial Negligence

Wayne W. Schmidt, Executive Director, AELE Law Enforcement Legal Center

Police officers, like other employees, can cause personal and agency liability by their tortious acts and omissions. The conduct can either be intentional, reckless, or negligent. Although officers can be individually sued for damages, the agency and even their supervisors can be found jointly liable.

Often, it is alleged that “but for” a managerial omission, an officer’s misconduct would have been minimized or avoided.

There are a number of reasons that plaintiffs might want to include managers as codefendants:

- If an employing government entity is not required to pay the entire amount of a judgment awarded against errant police officers, city/county officials are more likely to pay voluntarily when the verdict is also against the chief/sheriff or supervisory personnel.
- Jurors are thought to be more generous in awarding damages when they believe that the agency is “out of control” or poorly managed. A large verdict “sends a signal” to city/county officials that the system malfunctioned.
- Jurors who are sympathetic to a police officer’s “understandable” or “good faith” mistake are less reticent to find for the plaintiff when the evidence shows that management was negligent or deliberately indifferent to citizen rights.

Initially, this was called “vicarious liability” because managers did not personally participate in the conduct or omission that gave rise to the claim (Schmidt, 1976). The better term is *managerial negligence*. Vicarious liability implies liability without fault; managerial negligence implies supervisory culpability.

Management has a responsibility to avoid doing things that result in tortious acts or omissions by subordinate officers. The more prevalent theories used to predicate a claim of managerial negligence include the following:

- **Negligent employment:** The hiring of applicants who are unsuited for law enforcement, conducting inadequate background investigations, or not using pre-employment psychological exams
- **Inadequate training:** The failure to teach officers the skills, procedures, and rules they need to know to perform their duties, or inadequate documentation of the training
- **Inadequate supervision:** The failure to monitor officer performance or to provide leadership and counseling, where indicated
- **Negligent entrustment:** The issuance of weapons when superiors knew or should have known an officer should not be armed
- **Negligent assignment:** Allowing problem officers to work in assignments in which their prejudices or predispositions to violence could cause injury to others
- **Failure to discipline:** Not having or following an effective disciplinary process



- **Negligent retention:** Retaining errant officers or promoting them when they clearly should have been disciplined, demoted, or dismissed
- **Maintaining an atmosphere of indifference to citizen rights:** Developing and maintaining indifference to the rights of citizens (Agencies develop a culture ranging from concern to indifference. Management sets the tone.)
- **Failure to direct:** A lack of guidance in policies or operating procedures or a failure to train and test officers in critical directives (Sometimes a lawsuit is lost because of a training or policy failure, and remedial action is ignored.)
- **Failure to plan the defense of critical policies and procedures:** One of the most ignored administrative derelictions (The remainder of this article addresses that failure.)

Everyone is familiar with stories about how expert witnesses supposedly spun or slanted an occurrence for the benefit of the party that hired them. Although juries have sometimes disregarded expert testimony, in many cases, it was a litigation expert that made an officer's conduct seem either reasonable or outrageous.

If what a defense expert says is critical to whether a lawsuit is won or lost, why do so many agencies wait so long before seeking and retaining an expert? Plaintiff's counsel often shops for an expert for weeks before filing the lawsuit. Defense counsel usually waits until the deadline for naming experts approaches.

## How Are Defense Experts Hired?

The AELE Law Enforcement Legal Center has maintained a *Directory of Criminal Justice Experts and Litigation Consultants* since 1986. In recent years, the directory has become entirely electronic and gratis. Over those 20 years, hundreds of defense counsel have called AELE, seeking a referral. Sometimes, the conversation is frightening.

Instead of asking for an experienced and well-educated expert, defense counsel wants to find someone local (to avoid travel costs) or an expert who charges a low fee. In a few cases, counsel has insisted that the expert be a woman or a member of a minority group to satisfy an agency's affirmative hiring goals.

The time to hire an expert is *not* after litigation ensues. It is before a use-of-force or vehicle pursuit policy is published. Unfortunately, this is rarely the case.

In recent years, a few agencies have hired a litigation consultant to review critical policies and vulnerabilities:

- An Idaho police chief, after attending a liability seminar, retained an expert to revise the department's pursuit policy and train the officers in the new procedures.
- A police department in Hawaii retained an expert to review its use-of-force and pursuit policies. That resulted in a revision of their training continuum and the authorization, for the first time, of collapsible batons.

There is an old litigation adage that you can pay now or pay later—but you always pay more when you wait.

## Prologues

Some agencies perceive a need to include language that ameliorates any concern that the police are uncaring. A use of deadly force policy might start out with language about “a recognition of the value of a human life.” It might then say that the agency’s policy is to use deadly force “only as a last resort” when all other methods of control “have been exhausted.”

Plaintiff’s counsel will argue that the agency’s use-of-force policy requires a higher standard of care than required by state law—because an officer in that agency must have due regard for the “value of a human life” *and* be prepared to show that no other methods of control were possible.

Ultimately, it is a jury that will determine whether a shooting or pursuit was justified. Unnecessary language about an agency’s values will cloud the decision-making process.

## How Are Policies and Procedures Written?

In major cities, a sergeant in the directives section of the planning division will often write policies and procedures. More attention may be paid to format and style than to the ways a civil jury is likely to react.

Smaller agencies swap directives with each other, as if “one size fits all.” In more than a few instances, testimony revealed that the agency name on a critical policy had been changed with correction fluid.

Policies must be periodically reviewed and in many cases, re-thought. City/county council members, community advocacy groups, and media representatives will read them with a political perspective. Arbitrators and jurors will read them from a judgmental viewpoint.

Policies that limit officer discretion are easier to enforce with disciplinary action; however, policy violations also allow juries an opportunity to find liability or increase an award.

Vague policies that invite officer discretion also will be attacked by plaintiff’s counsel as evidence of managerial indifference to officer misconduct. They also make it more difficult to impose disciplinary action.

## Are Policies Understood and Well Known?

In a nationally prominent lawsuit challenging an agency’s controversial field interrogation policies, the police chief admitted on the witness stand that he was not familiar with the revised policy, which was under challenge by the NAACP and ACLU.

The chief later told the city attorney that he did not have time to read the policy because he had played handball that morning. A federal judge found the policy was constitutionally deficient, enjoined its use, and awarded attorneys’ fees (*Williams v. Alioto*, 1974).

An agency's directives should be put on a CD-ROM so that officers can access them with their mobile computers; they should also be posted on the Internet—with or without password protection. Because all directives are discoverable during litigation, there is little reason not to allow public access to the website.

Rarely do agencies test veteran officers on their knowledge or understanding of written directives. Plaintiffs' counsel are delighted, and successful litigation is their remedy.

Sadly, many chiefs and sheriffs never learn the true reasons why a jury has punished their agencies and its officers.

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# An Analysis of Civil Liability and Sudden In-Custody Deaths in Policing

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## Introduction

The sudden death of an arrestee in police custody after a violent encounter is an unexpected event that can create a significant impact on the criminal justice system, the community at large, and the medical community (Ross, 1998; Wetli, Mash, & Karch, 1996). For a number of years, the police have undergone sharp public, medical, and legal scrutiny regarding the type and degree of force that was used, as well as the type of restraints that were applied in subduing a resisting person. In a significant percentage of incidents, the resisting person exhibits bizarre behavior and/or combative and violent resistance, requiring multiple police personnel to respond and use higher levels of physical force and varying types of force and restraint equipment. The resisting person's combative behaviors are often related to chemical impairment, symptoms of mental impairment, or both. After restraint has been accomplished, responding personnel notice that the once combative person has become tranquil and unresponsive, requiring medical intervention. Efforts to revive the person by the responding officers or emergency medical personnel are unsuccessful, whereupon it is determined that the individual is dead, all within a short time after the confrontation.

Normally, a resisting person is restrained by officers without sustaining serious medical problems as they use reasonable and legitimate force measures to control the violent person. In a few cases, however, the restrained person suddenly dies for reasons not related directly related to the physical aspects of the force methods applied or restraint. Frequently, the autopsy findings do not demonstrate anatomic or toxicologic results sufficient to explain the death. This does not, however, bring finality to the case, as these incidents most assuredly will culminate in a wrongful death civil action against the responding personnel and their agency.

The following case example is illustrative of a sudden in-custody death scenario: Police responded to a residence as a man in his 30s was physically threatening the home owner and destroying property. The individual was violent, delirious, and verbally uncooperative; appeared to be under the influence of a chemical substance; and charged the four responding officers. The police responded with physical force control measures, forced him to the ground, handcuffed his hands behind his back, and restrained his ankles with a hobble restraint device (independent of the handcuffs) as he began to kick the officers. Within a matter of minutes, an officer noticed that the arrestee had calmed down, begun to lose color in his face, and become unresponsive. The officers began resuscitation efforts and summoned paramedics. When the paramedics arrived, the individual was without vital signs. They began resuscitation efforts and transported him to the hospital, but he died en-route.

An autopsy conducted by the pathologist revealed numerous superficial contusions and abrasions, consistent with a struggle, and fresh injection sites on both arms. The

person had a lengthy history of prior cocaine and methamphetamine use. Toxicology analysis indicated blood levels of cocaine at 0.57 mg/L and benzoylceoginine at 3.8 mg/L. The cause of death was determined to be cocaine intoxication. A civil wrongful death action was brought against the officers and their police department by the decedent's estate. After a lengthy trial, the jury brought a no cause verdict.

The purpose of this article is to examine the civil liability issues commonly associated with wrongful sudden deaths in custody after violent restraint confrontations. Liability issues involving standards of care are examined, as well as the standards for use of force, restraints, and medical care actions filed in accordance with Title 42 U.S. Code, Section 1983. Sudden deaths in police custody after a use-of-force confrontation are emerging as a critical area in police civil litigation. While many of these lawsuits are settled out of court, cases that are decided by trial yield a number of important legal issues that are of concern to police officers and administrators.

Generally, a wrongful civil lawsuit of this nature involves complex legal issues, and normally, the plaintiff will file a multi-million-dollar lawsuit, naming all involved officers and command personnel. While the police and detention personnel have experienced these types of civil lawsuits, this analysis specifically examines 21 years of published §1983 litigation involving incidents in police custody. Besides examining the legal standards of review, this discussion will focus on case examples that address officer tactical concerns, the use of restraints, the use of less-lethal weaponry, transportation concerns, medical/psychological issues, and policy and training issues that emerge from these lawsuits.

## **Nature of the Problem**

Statistics on the annual number of sudden in-custody restraint deaths do not exist (Ross & Chan, 2006). While rare in occurrence, sudden deaths in custody generally occur after a violent confrontation between an individual and the police in varying arrest situations. Several problems emerge from such a death. Sudden in-custody deaths revolve around the use of physical control methods, force equipment, and the types of restraint that responding officers employ to control the resisting person. Police officers have been given legitimate authority to use force to effect an arrest, overcome unlawful resistance, defend themselves, prevent a crime, protect a third party, protect the person from harming him- or herself, and for medical intervention purposes.

Police officers confront a wide variety of situations in the course of performing their duties. They can encounter situations that range from a minor concern to a more serious lethal force incident. With some frequency, they also interact with individuals who exhibit various bizarre behaviors, which may stem from the influence of a chemical substance or a mental impairment. In many jurisdictions, such encounters with substance abusers have increased due to the availability of illicit drugs since the 1980s (Karch, 2002; Wetli, 1987). Moreover, with the deinstitutionalization of the mentally impaired since the late 1960s, calls for service for the police to respond to this population in many jurisdictions have also increased (Weedon, 2005). Individuals from these two groups and/or the psychologically impaired that abuse chemical substances are more likely to exhibit violent behavior (DiMaio & DiMaio, 2006; Ross, 1999; Tardiff, 1966). When dealing with these types of individuals, the probability that an officer will have to use an elevated level of physical force increases.

The problem is more than academic in that the police encounter the mentally impaired or those under the influence of a chemical substance with some frequency. In a content analysis of 43 police use-of-force studies from 1968 to 2003, Ross (2005) reported that 65% of the studies revealed that a significant percentage of the resisting individuals were either under the influence of a chemical substance or mentally impaired in situations in which officers were required to use physical force measures or force equipment. The officer also encountered multiple types of resistance including verbal threats, defensive resistance, active aggression, and lethal force assaults.

In a significant percentage of incidents in which these less lethal force options are employed by officers, the resisting person is controlled and restrained without sustaining a serious injury or death. The Ross analysis on the use-of-force studies revealed that resisting persons sustained a serious injury in about 10% of incidents when less lethal force was employed. Injury, however, does not necessarily equate with the use of excessive force by the officer. Three of the most comprehensive studies on the police use of force, the United States Department of Justice (DOJ) 1997 and 2001 studies and the International Association of Chiefs of Police (IACP) 2001 study, demonstrated that the police used excessive force in less than 1% of the use-of-force incidents.

Researchers for the DOJ analyzed over 44 million police and citizen contacts in both study periods (Greenleaf, Langan, & Smith, 1997; Langan, Greenfield, Smith, Durose, & Levin, 2001). They found that in 1% of the contacts, the police used or threatened to use force measures. The findings showed that officers used handcuffs and physical force techniques in a majority of the force incidents. With less frequency, officers used aerosols, electrical devices, impact weapons, and firearms. The resisting citizen reported sustaining injury in about 15% of the incidents, and alcohol and the use of other drugs were influential in about 30% of the contacts.

The IACP study examined over 45 million police calls for service, which included 177,000 use-of-force incidents and 8,000 use-of-force citizen complaints over 10 years (1991-2000). The police used force methods in 3.61 for every 10,000 calls for service. The prevalence of the use of excessive force was calculated at a rate of less than 1% of the use-of-force incidents. The study showed that officers used physical force techniques and restraints, followed by the use of aerosols, electronic devices, and impact weapons, when confrontations required the use of force. Intoxication of the citizen influenced the types of resistance the officer encountered and the need to use force.

Overall, these studies show that police use of force is rare and that the use of excessive force is statistically insignificant. These studies also show that citizens rarely incur a serious injury (let alone die) from the use of force, indicating that officers routinely use these same techniques and equipment safely. In rare cases, however, the resisting person suddenly dies. What contributed to the death becomes the pivotal nature of the problem and a main question, among many, that will be vigorously debated. Moreover, individuals with the same behaviors and those who abuse recreational drugs who are not in police or detention custody also die at their place of residence, in an ambulance, or in the hospital.

Determining the manner and cause of death poses a central problem for the police, as there are generally a myriad of factors that are involved in the incident. While a sudden in-custody death can comprise innumerable factors, some of the more common features may include the following: bizarre behaviors and the condition



of the decedent, the medical history of the decedent, the type of force and force equipment that the responding officers employed, the methods of restraint used by responding officers, the methods employed for monitoring the person after restraint, the thoroughness of the investigation after the incident, the medical or psychological issues involved, the thoroughness of an autopsy, the influence of chemicals that the decedent may have consumed and toxicology findings, and the determination of the manner and the cause of death by the pathologist. These factors and others can present potential problems and a myriad of questions for responding personnel, their agency, death investigators, and pathologists, as they will more than likely encounter criminal or civil allegations. Clearly, the complexities of these cases require attention from the various personnel and entities that may become involved in the incident.

## **Section 1983 and Wrongful Custodial Death Claims**

When a person suddenly dies in police custody after a violent restraint incident, concerns are created beyond the immediate interests of the law enforcement officials. Even when officers take proper measures to use “objective, reasonable” force methods to control and restrain the person, he or she can still die. Regardless of the specific cause of death, the political fallout for the officers can be immense. A sudden in-custody death can spark community unrest; ignite community protests, disturbances, or riots; intensify polarization between the police and the community; and generate a civil lawsuit.

Wrongful death actions are recognized in all states, therefore, such laws may be used in a §1983 action. Section 1983 authorizes the application of any state remedial law that is consistent with the purposes of §1983 to any situation for which federal civil rights laws do not provide an appropriate remedy (Silver, 2006). Wrongful death claims may be filed under §1983 when the death has resulted from excessive force, failure to attend to medical needs, or any other constitutional violation when the conduct of the defendants was the proximate cause of the death under intentional tort principles (Silver, 2006; *Wright v. Collins*, 1985).

Unexpected custodial death cases filed under §1983 are evaluated within the purview of the Fourth Amendment’s “objective reasonableness” standard and the 14th Amendment’s standard of “deliberate indifference,” and “conduct shocking to the conscience.” Liability concerns regarding citizens who are arrested, restrained, and suddenly die shortly after arrest are analyzed according to the Fourth Amendment’s standard of objectively reasonable force and primarily involve issues of alleged excessive physical force, misuse of restraints, misuse of less-lethal equipment, failure to train, failure to render medical/psychological care, and policy and customs issues that are alleged to have violated the decedents’ constitutional rights. As an arrestee’s status changes to that of a pre-trial detainee, the standard of reviewing claims of excessive force relies on the “conduct shocking to the conscience” standard under the 14th Amendment. Medical, psychological, and failure to protect concerns are generally examined under the Eighth Amendment deliberate indifference standard. Arrestee behaviors that are consistent with the inability to care for themselves, such as the intoxicated or mentally ill, pose a particular dilemma for responding officers.

Legal issues that can emerge from a sudden in-custody death incident can rest on several levels. First, the responding officers, and perhaps their immediate supervisors, may be investigated for potential criminal charges. The local

prosecutor or the states attorney general's office may review the case to determine criminal culpability. The DOJ may also conduct a criminal or civil investigation into the incident. While criminal investigations are not common in these cases, officers and administrators should check their respective state to be aware of the potential investigation or charges that might result from such an incident.

In addition, allegations of a §1983 lawsuit filed against the officers generally claim that . . .

- They used excessive force.
- The officers' use of restraints contributed to the decedent's death.
- The officers were deliberately indifferent to the medical and/or psychological needs of the deceased.
- The officers failed to assess or monitor the medical condition or provide medical assistance for the deceased.
- The officers failed to transport the deceased to the nearest hospital or summon medical assistance at the arrest scene.
- The officers failed to follow department policy and their training.
- The decedent was transported in a maximum restrained position in a police vehicle, which contributed to his or her death.
- The officers violated the decedent's constitutional rights.
- The officers acted outside the scope of their authority.
- The officers conspired to injure or cause the death of the deceased.

In cases of sudden death after force is used, two questions are commonly asked: (1) Was the officer's force excessive? and (2) Did the amount of force used contribute to the detainee's death? Answering these questions is not easy. Excessive force claims stemming from arrests must be examined under the Fourth Amendment's "objective reasonableness" standard based on the United States Supreme Court's decision in *Graham v. Connor* (1989). The "reasonableness" inquiry in an excessive force claim is an objective one. While there is no precise definition for the test of reasonableness, applying the standard requires careful attention to the facts and circumstances confronting the police, without regard to their underlying intent or motivation. Each case must be evaluated from the perspective of a reasonable officer on the scene, based on the following Court-established criteria: severity of the crime at issue, the resistance level of the arrestee, the threat posed by the arrestee, and whether the circumstances were rapidly evolving. Some courts, however, may consider other factors in addition to the *Graham* criteria. For example, the court in *Wheeler et al. v. City of Philadelphia* (2005) examined excessive force allegations lodged against officers for restraining a mentally impaired arrestee who suddenly died after the restraint. In their review of the officers' actions, the court added the following factors to the *Graham* criteria: duration of the struggle with police, whether the person was armed, and the number of suspects that the officer may be contending with at one time. The court awarded summary judgment on behalf of the officers.

The courts recognize that use-of-force incidents can be tense and officers often must respond quickly, with the understanding that there are numerous variables to consider. Using the objective reasonableness standard, the courts determine whether excessive force was used by officers by evaluating the totality of the circumstances, including the unpredictability, danger, and violent behaviors manifested by the arrestee, and whether the force or control tactics used were

reasonable or proportional in light of the behaviors encountered. Objectively reasonable and lawful force is force used at the moment it is needed and in response to the arrestee's behavior, regardless of the outcome.

Plaintiffs will also assert that administrative personnel failed to . . .

- Provide officers with policies that would direct them in responding to "special needs" arrestees (i.e., intoxicated or mentally impaired).
- Provide officers with training in how to properly respond and use control techniques with "special needs" arrestees.
- Provide officers with appropriate equipment to perform their duties.
- Supervise their officers.
- Train supervisors.
- Train or evaluate officers' competency thereby negligently entrusting equipment to officers.
- Stop excessive force measures with arrestees.
- Articulate directives in how to transport "special needs" arrestees.
- Develop a protocol for responding to violent arrestees' medical/psychological needs.
- Conduct an internal investigation.
- Conduct an independent investigation of the death.

Plaintiffs will even assert that administrative personnel conspired to cause the death of the deceased and covered up the death with an inadequate internal investigation. Additionally, since 1990, an emerging trend by a plaintiff is to assert that police administrators failed to comply with Section 12132 of the Americans with Disability Act (ADA) (Silver, 2006). The ADA applies to governmental entities, and the intent is to prevent discrimination against persons with disabilities. In cases of sudden in-custody deaths involving mentally impaired arrestees (or those with other disabilities), the plaintiff may claim that the governmental entity failed to develop policies and practices that would direct officers in properly responding to this population. An allegation may be structured in an attempt to show that police contact mentally impaired persons with high frequency, and such persons are prescribed varying anti-psychotic medications and may exhibit varying behaviors. Hence, policies, practices, and training were lacking or deficient in directing officers in the proper response, thereby contributing to the decedent's death. The ADA is a remedial statute that addresses the lawful exercise of police powers including the proper use of force by officers acting under color of law (Silver, 2006). The question that emerges is whether police administrators have enacted policies and training that prepare their officers to respond to the mentally impaired or other disabled persons in accordance with the ADA.

Finally, each case will have numerous variables for the plaintiff to attack, although in any lawsuit, not all initial allegations will withstand judicial scrutiny. The agency should, however, be prepared to defend each of them. Defending these cases can be problematic, particularly when the investigation has been less than thorough, officers reports are incomplete, pathological findings suggest the officers may have contributed to the death, or there are differing theories between medical personnel on the manner or cause of death. With the innumerable complexities of these cases, many have subsequently been settled out of court.

## Methodology

A total of 215 cases were analyzed in order to review how the courts apply legal principles in a sudden death in custody case. Cases from the LexisNexis and Westlaw databases meeting the following definition were identified for review: the unintentional death of an arrestee who exhibited violent and bizarre behaviors in which physical force measures or equipment were used to subdue the person by police. Further definitional criteria included the following: the arrestee exhibited violent behaviors associated with the influence of a chemical substance or mental illness; the police employed use-of-force measures, restraints, less-lethal weaponry; and the arrestee died on scene, during the transport, in a holding cell, or at the hospital (Krosh, 1992). A descriptive content analysis methodology and a longitudinal approach were used by identifying 215 published §1983 cases from across the United States, ranging from 1985 to 2006. The analysis is narrow in scope, as it does not include cases decided in state court or cases that were settled out of court. The research excludes incidents involving other deaths in custody, such as prisoner suicides, police beatings, lethal force shootings, “suicide by cop,” deaths due to natural causes, and vehicle pursuits resulting in a suspect’s death. The following §1983 case analysis of wrongful deaths in police custody reveals how the courts determine liability.

## Excessive Force Claims

A significant number of sudden death restraint incidents involve the violent behavior of an arrestee, requiring police to use higher levels of physical control measures and less-lethal force equipment or implements. As a result, the primary claims filed against the responding officers are allegations of excessive force that occurred during arrest, at the station, or in a detention cell.

In *East v. City of Chicago* (1989), the court held that officers used excessive force when East died of a drug overdose in their custody. During a drug raid, East swallowed a packet of cocaine. Approximately four hours later, in the interrogation room at the station, he experienced hallucinations, began yelling, and attempted to hide under a table. Several officers removed him from under the table, kicked him in the head and between his legs, and hit him with a nightstick in an attempt to handcuff him. East told the officers that he had ingested cocaine, but they ignored him and responded, “You’re just afraid to go to jail.” He was placed in a cell with another prisoner, who later informed police that East needed medical attention. At an unknown time, paramedics were summoned, responded, and transported East to the hospital, where he later died.

*East* provides an example of excessive force because officers kicked the arrestee in the head and between the legs and then continued to beat him with an impact weapon. After establishing control, officers failed to provide timely medical assistance. In light of the circumstances, these tactics were considered excessive and disproportional. Failure to follow up with necessary medical care amounted to deliberate indifference. Citing the decision in *Graham*, the court acknowledged that the arrestee was in custody at the station when force was applied. They ruled that in post-arrest situations when dealing with a pre-trial detainee, the 14th Amendment “shocks the conscience” standard applies. The officers were found liable for using excessive force measures and being deliberately indifferent to medical needs under *Estelle v. Gamble* (1976). The city was also liable for failing to train officers in the appropriate use of force.

In *Estate of Phillips v. City of Milwaukee* (1996), however, officers used force to subdue a large schizophrenic man with ballpoint pens in each hand. After a lengthy struggle, he was subdued, handcuffed behind his back, and placed in leg restraints (independent of the handcuffs). He was on his stomach for one minute and suddenly stopped breathing. Cardiopulmonary resuscitation (CPR) was initiated, and emergency medical personnel responded, but they were unable to revive him. The arrestee died a day later, and the medical examiner determined that the restraint contributed to his death. The estate filed a §1983 lawsuit for use of excessive force, denial of medical care, and failure to train. The court held that the officers did not use excessive force in controlling the arrestee. Police actions were analyzed based on the totality of circumstances and the resistive behaviors they encountered. Deliberate indifference to the medical needs of the deceased was not established, and officers were shielded from liability under qualified immunity. Moreover, the court noted that “police officers facing unpredictable and oftentimes dangerous situations must be free to perform their duties utilizing their training, experience, and judgment with confidence that courts will not scrutinize their discretionary decisions with microscopic detail.”

## Use of Restraint Claims and Excessive Force

Associated with excessive force allegations is a second level of claims that often assert that the police maximally restrained the deceased, which purportedly contributed to his or her death. The assertion is frequently made that the deceased died as a result of “positional, postural, restraint, compressional, or mechanical asphyxia” because he was placed in the hogtied position or in a maximum restrained position that compromised his breathing ability. The claim may also assert that the individual died from asphyxia due to the weight of the officers on his or her body for an extended period during control and restraint. These allegations may be further supported by results of an autopsy or an independent autopsy conducted by the estate claiming that the method of restraint contributed to asphyxia, which caused death. Moreover, this assertion will attempt to prove excessive force by using restraints without considering the obvious medical needs of the arrestee.

One of the earliest court decisions regarding custodial restraint asphyxia deaths was decided in *Vizbaras v. Prieber* (1985). A psychologically impaired man fought violently with six police officers during an arrest for breaking and entering. He was restrained with handcuffs and began to kick and thrash, so officers placed two pair of nylon cuffs around his ankles, but they broke. The officers placed him in a “cradle cuff” position using leg irons and handcuffs and connecting them together with the chains of the leg irons. He was placed prone on the floor, stopped breathing, and resuscitation efforts failed. The medical examiner reported that he died of positional asphyxiation, and the family filed a §1983 action claiming that the officers used excessive force. The district court granted summary judgment, and the Fourth Circuit Court of Appeals affirmed, holding that restraining a violent person was not excessive force.

In *Owens v. City of Atlanta* (1986), Owens, while intoxicated in a hospital detention cell, became disruptive and was placed in a “stretch position,” known as the “mosses cross.” Officers placed Owens on a bench in the back of the cell and cuffed his wrists with his arms crossed in front of him to holes in the bench. His ankles were placed in leg irons, stretched, and secured into holes in the wall. Losing balance, he slumped over in a further stretched position and died. The medical examiner concluded that the cause of death was postural asphyxia. In a §1983

action, the appellate court upheld the lower court's decision to award a directed verdict to the officers. During testimony, it was learned that the restraint position had been used six times since 1963 without incident. The court ruled that the plaintiff failed to show that the stretch position was unconstitutional.

A federal court found the City of Chicago liable for contributing to the death of an arrestee who was under the influence of cocaine and phencyclidine in *Animashaun v. O'Donnell* (1994). While restrained and lying face down on the ground, the arrestee began experiencing breathing difficulties. He was transported to the hospital in a maximally restrained position, where he was pronounced dead. His estate filed a §1983 action claiming that he had died from positional asphyxia due to the nature of restraint methods used by the police. The city contended that it was unaware of the relationship between restraining an arrestee in this manner and the occurrence of positional asphyxia. The plaintiff attached a memorandum of a similar death in 1988 regarding this problem, and the city deliberately ignored it. The court held that the city was on notice that its officers were responding to recurring situations yet chose to ignore it, and this omission rose to a level of deliberate indifference in training their officers.

As cases of sudden deaths in custody continued to be litigated in the 1980s and 1990s on the basis of positional asphyxia, only one medical research study was conducted by Reay, Howard, Flinger, and Ward (1988). For approximately nine years, the prevailing theory of restraint deaths in police custody was based upon a "flawed" study in which Reay et al. postulated that hogtying (subject prone secured with handcuffs behind the back connected to the ankles bound with restraints and ankles/knees bent toward the secured handcuffs) was responsible for positional asphyxia deaths. In 1997, however, Chan, Vilke, Neuman, and Clausen performed a study that countered the Reay et al. study. Chan et al. (1997) found in their study that Reay's research methods were flawed (which he later acknowledged in court) and that hogtying a person does not compromise the pulmonary function and oxygen levels. Furthermore, Chan et al. (2002) also found that using pepper spray on violently resisting arrestees does not compromise pulmonary functions. Subsequent findings of other medical researchers have found that positional asphyxiation is not a cause of sudden deaths in custody (Chan, Newman, Clausen, Eisele, & Vilke, 2004; DiMaio & DiMaio, 2001; Glatter & Karch, 2004; Laposata, 1993; Parkes, 2000; Schmidt & Snowden, 1999; Vilke, Chan, Neuman, & Clausen, 2000).

The Chan et al. study (1997) assisted in successfully defending the officer's action of hogtying a violent arrestee who was under the influence of methamphetamine and later died in *Price v. County of San Diego* (1998). After fighting the police, Price was restrained in a hogtied position, stopped breathing, and died two days later in the hospital. A §1983 claim for violation of constitutional rights, wrongful death, and excessive force was filed along with state negligence claims. One medical examiner argued in court that restraint asphyxia contributed to the decedent's death, while another medical examiner testified that the hogtied position did not dangerously affect oxygen levels, nor contribute to the arrestee's death based on new medical research concerning restraint asphyxia (Chan et al., 1997). Based on the medical research, the judge ruled that hogtying in and of itself did not cause the arrestee's death and that the deputies did not use excessive force and acknowledged that the consequences of abusing drugs led to a heart attack; that, more than anything else, killed him. The case was dismissed. In a companion case, *Guseman v. Martinez* (1998), a federal district court in Kansas found that the police officers' method of

restraint did not rise to the level of deliberate indifference, despite the arrestee dying in custody, and granted the city's motion for summary judgment.

*Price* can be considered a pivotal decision in cases asserting a death due to positional asphyxia. The court ruled that hogtying in and of itself is not considered excessive force. Medical research has continued to underscore that the prone restraint of a violent arrestee is not associated with sudden death, but rather it is the drugs, mental impairment, and medical history/condition of the arrestee that contributes to the death (DiMaio & DiMaio, 2006; Karch, 2006; Wetli, 2006). Yet, despite the medical research, cases are still litigated in court, and the courts appear to be closely divided on this issue as the table below illustrates.

**Trends in Published Section 1983 Sudden Deaths in Custody Litigation (n=215 cases)**

Year and Number		1985-1998 (n=95)		1999-2006 (n=120)		
Factors	(#)	Police Prevailed (%)	Plaintiff Prevailed (%)	(#)	Police Prevailed (%)	Plaintiff Prevailed (%)
Drugs	(55)	57	33	(70)	59	41
Positional Asphyxia & Restraints	(40)	58	42	(50)	60	40
Mentally Ill	(33)	58	45	(41)	59	41
Mentally Ill & Drugs	(25)	60	40	(38)	59	41
Physical Control	(95)	59	31	(120)	62	37
Pepper Spray	(49)	55	45	(39)	59	41
Baton	(30)	58	42	(9)	59	41
Combination	(95)	55	45	(120)	57	43
Failure to Train	(79)	80	20	(120)	68	32

The table shows the longitudinal time-series dispositions of the 215 Section 1983 cases decided from 1985 to 2006. Cases categorized from 1985 to 1998 were decided prior to the *Price* decision, and cases categorized from 1999 to 2006 are post *Price*. Research revealed 95 case decisions were published prior to the *Price* decision; 55 involved drug-related incidents, and 40 involved positional asphyxia incidents. The outcome of these two factors show that the police prevailed in 57% of the drug-related deaths, and they prevailed in 58% of the positional asphyxia/restraint deaths. When a mentally impaired person was the decedent (n=33), the police prevailed in 58% of the cases, and when the litigation involved mentally impaired individuals who were under the influence of a chemical substance (n=25), the police prevailed in 60% of the decisions. The remaining factors in the table during this period illustrate what force measures were used in controlling the decedent beyond restraints and will not add up to 95, as varying combinations of force are used to control the person. Physical control measures (including restraints) were used in all of the incidents; pepper spray was used in 49 of the incidents; and batons (impact weapons) were used in 30. Combinations of force measures were used in every incident. Police prevailed in about 57% of the total claims. The police prevailed in 80% of the claims, citing a failure to train by command personnel, although such an allegation was asserted in only 79 cases.

Post *Price* decisions (1999 to 2006) involved 120 published cases and show similar results to previous years. Litigation in which illicit drugs caused the death continues

to set the trend in these wrongful death claims. Cases involving the mentally impaired increased slightly as did incidents with the mentally ill under the influence of a chemical substance. Incidents in which the police used an impact weapon declined considerably (n=9), and incidents involving the application of pepper spray declined slightly (n=39). The change in the police prevailing in these published cases was negligible. The combinations of the types of force measures used for which police prevailed increased only slightly. Failures to train claims were impacted the most, as they declined to a prevailing ratio of 2 to 1 and were asserted in every lawsuit.

Several important elements are revealed in the previous table. The police prevail in about 58% of the litigated cases, which has remained stable for the 21-year period. This shows that despite all of the medical research conducted during the past 10 years, indicating that the health conditions and drug abuse of the suspect are more likely to cause the sudden in-custody death, it remains problematic for the police to prevail and defend claims surrounding this topic area. The number of cases involving the abuse of chemical substances, mentally impaired individuals, and mentally impaired individuals who abuse chemical substances increased slightly, and cases in which the police prevailed remained relatively unchanged. The police use of pepper spray declined slightly; whereas, the use of impact weapons has decreased considerably. These factors have perhaps been most affected by the increase of the police using tasers on violent suspects. Since the late 1990s, over 5,400 police agencies (Hougland, Mesloh, & Henych, 2005) have implemented the use of tasers, thereby decreasing the use of other force equipment. While sudden in-custody deaths have occurred after the use of a taser, this research did not yield any published §1983 court decisions alleging that the death was caused by the taser. Since the *Price* decision, allegations of a failure to train by command personnel have been asserted in every case, and the prevailing trend for police has declined slightly. These trends are manifested in the following case examples.

### **Plaintiff Prevailed in Positional Asphyxia Litigation**

In a case that brought national TV coverage for several days, six officers who struggled with a 375-pound arrestee after they struck him with batons and sprayed him with pepper spray were denied summary judgment in *Jones v. City of Cincinnati* (2006). The court found that after the officers finally controlled Jones and handcuffed him, they left him on his stomach and failed to provide him with necessary medical care. The court admonished the officers, commenting that Jones was obese and was a high risk for positional asphyxia and that such notice according to the department's training bulletins amounted to a callous and deliberate disregard to the hazards of positional asphyxiation.

Similarly, the plaintiff in *Lewis v. City of Hayward* (2006) alleged that officers used excessive force in subduing her son. Wearing only boxer shorts, Lewis was seen yelling outside a motel, and the police were summoned. Lewis charged the responding officers and fought with them. The officers applied two baton strikes and deployed pepper spray, which had little effect on him, as Lewis threw several officers off of him as they attempted to control him. Lewis was finally subdued and handcuffed but he continued to kick his legs and thrash. The officers secured his legs with a restraint device known as the "WRAP," which covers the thighs to the ankles and immobilizes the legs. After being placed in the WRAP, his violence subsided, and he was transported by ambulance to the hospital where he later died. An autopsy



revealed that he had an enlarged heart, he incurred 60 blunt injuries to his body, and his blood contained 327 nanograms of PCP and 84 nanograms of cocaine; the cause of death was determined to be from an acute PCP intoxication. Lewis' mother filed a §1983 lawsuit, and a second autopsy by the plaintiff's pathologist claimed that he died of positional asphyxiation. Relying on the second autopsy, the court denied summary judgment for the officers, finding that they used excessive force prior to applying the WRAP and further found that the city did not fail to train the officers.

Police officers from Lebanon, Pennsylvania, attempted to convince a mentally impaired man to exit his house after he had taken his five children hostage in *Brodlic v. City of Lebanon et al.* (2005). He had not taken his medication in weeks and exhibited hallucinations. The officers rushed into the house after they could smell gas as he set the front window curtains on fire. The first officer entering the house sprayed Brodlic with pepper spray, and he fought violently with the other four responding officers. The officers were able to control him and physically removed him to the front yard. While prone, they handcuffed him, noticed that he was unresponsive, and initiated CPR. Emergency medical personnel attempted to revive him. Two days later he died in the hospital, and the autopsy found that he died of an enlarged heart, encephalopathy, and psychiatric disorder. The plaintiff's expert pathologist opined that the encephalopathy was caused by positional asphyxia, which was induced by the police. The court determined that the officers used excessive force by using their weight to keep Brodlic prone on the lawn after handcuffing him, which caused oxygen deficiency (he was prone for about three minutes). The court found that Brodlic was being taken into custody for a mental commitment and had committed no crime. Such action amounted to excessive force, but the court dismissed a claim of failing to train against the city.

In *Cruz v. City of Laramie, Wyoming* (2001), the Tenth Circuit found that hogtying individuals with diminished capacity was excessive force and denied summary judgment for the City of Laramie. Cruz was found by officers to be naked and running wildly. Believing he was on some type of drug, officers summoned an ambulance, and verbal calming attempts were unsuccessful. He fought with the officers, who restrained him with handcuffs, and due to his kicking, a nylon strap was placed on his ankles and connected to the handcuffs. Cruz calmed down, but officers noticed his face had blanched and removed the restraints. Although emergency medical personnel initiated CPR, Cruz died at the hospital. An autopsy revealed a large amount of cocaine in his system. His family filed a civil action claiming he died of restraint asphyxia, which was supported by one medical expert. Another medical expert, however, claimed his death was solely from cocaine abuse.

A dispute emerged over whether Cruz was hogtied or hobbled. The lower court determined that had the officers separated Cruz's ankles further from his restrained hands, by two feet or more, Cruz would have been hobbled. The court reasoned that the hogtied restraint technique does not per se constitute a constitutional right violation; rather, officers may not apply the technique when an individual's diminished capacity is apparent. Such diminished capacity may result from intoxication, the influence of controlled substances, a discernable mental condition, or any other condition apparent to officers. The appellate court ruled that the officers knew Cruz was under the influence, and using the hogtie restraint amounted to excessive force. Liability attached against the city for failing to train officers in the use of hobble restraints.

Likewise, the courts in *Garrett v. Unified Government of Athens Clarke County et al.* (2003), *Johnson v. City of Cincinnati* (1999), *Ramirez v. City of Chicago* (1999), *Gutierrez v. City of San Antonio* (1998), and *Swans v. City of Lansing* (1998) found in favor of the plaintiffs. Each case involved officers hogtying the suspect after a violent restraint incident. Each suspect, however, had an enlarged heart, and each had an extensive drug history. All of the decedents except Swans were under a drug-induced rage manifesting violent behaviors associated with a condition known as “excited delirium.” Swans was a mentally impaired man who had a history of schizophrenia and cocaine abuse. Each court agreed that hogtying the suspects in their condition at the time of the restraint incident constituted excessive force in violation their Fourth Amendment rights.

### **Police Prevailed in Allegations of Positional Asphyxia**

Referring back to the “1983 Sudden Deaths in Custody Litigation” table, the police have prevailed in slightly more §1983 cases than they have lost. The following series of cases serve as examples of the court’s decisions.

In *Tatum v. City and County of San Francisco* (2006), police fought with an arrestee (Fullard) who was under the influence of cocaine. Several officers took Fullard to the ground and placed him in handcuffs. An officer monitored him for about 90 seconds while another officer summoned emergency medical personnel. The officers positioned Fullard on his side and then on his back. When medical personnel arrived, they noticed that he was unresponsive, and they pronounced him dead. The coroner concluded that he died of cocaine intoxication. Fullard’s estate filed a §1983 lawsuit claiming that being restrained on his stomach and remaining prone for 90 seconds contributed to positional asphyxia causing his death. The court found it was not excessive to take Fullard to the ground with an arm-bar control technique. Nor was it improper to keep him on the ground for a period of time while restrained, and being monitored did not constitute excessive force. Ultimately, the court granted summary judgment for the officers. Citing the *Estate of Phillips v. City of Milwaukee* (1996) decision, the court stated that restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest.

Similarly, *Wheeler et al. v. City of Philadelphia* (2005), *Abdullahi v. City of Madison* (2004), *Pliakos v. City of Manchester, New Hampshire* (2003), *McIntire v. City of Boulder* (2003), *Tofano v. Reidel* (1999), *Estate of Abdel-Hak v. City of Dearborn* (1998), *Price v. County of San Diego* (1998), *Guseman v. Martinez* (1998), *Jones v. Board of Police Commissioners of Kansas City, MO* (1997), *Estate of Phillips v. City of Milwaukee* (1996), and *Cottrell v. Caldwell* (1996) all involved claims of positional asphyxia from either being hogtied (five cases) and/or from being restrained prone. The court ruled in favor of the police in all of these cases. *Wheeler*, *Pliakos*, *Guseman*, *Phillips*, and *Tofano* involved the police restraining a mentally impaired person; whereas, the remaining cases involved suspects exhibiting behaviors consistent with chemical substance abuse. In *Guesman*, *McIntire*, *Price*, *Tofano*, and *Pliakos*, the court concluded that hogtying a violent resisting arrestee did not amount to a constitutional violation. Furthermore, the courts reasoned that it is not objectively unreasonable to prone a violent person and restrain him or her.

Likewise, in *Young v. Mount Ranier* (2001), the court awarded summary judgment to the defendant officers despite Young’s dying in restraints. Police officers responded to a call that Young was exhibiting bizarre behaviors and was extremely agitated

and upon initial response found him lying on the ground. The officers attempted to take him into custody, but he struggled with them. The officers used pepper spray and restrained him with handcuffs and leg restraints. He was transported to the hospital, where he died. An autopsy revealed that Young had PCP in his system, and the cause of death was listed as sudden cardiac arrhythmia. Young's parents claimed the officers were deliberately indifferent to his medical needs. The Fourth Circuit determined the officers did not violate Young's rights, as he struggled and the officers were unaware that he had consumed PCP.

The *Graham* standard of using force is also applied to the reasonable use of restraints in controlling a combative arrestee. Liability attaches only when excessive force is used on an individual that proximately causes injury, in this case, death. The use of restraints must be reasonably related to the behavior and safety of the individual, the need to control him or her, and the safety concerns of the responding officers. It is standard practice to handcuff an arrestee after a use-of-force altercation. In combative arrest scenarios (as illustrated by these cases), officers generally need to further restrain the person, as he or she frequently will kick and continue the violent actions. In response to the citizen's behavior, police officers are authorized to graduate their response to the demands of any particular situation. It is reasonable to handcuff and restrain an individual's legs (*Maynard v. Hopwood*, 1997).

The use of restraints may be considered unreasonable force if they are used inappropriately to the need, officers are not trained in their proper use, or officers fail to follow the department's restraint policy. There must be proof that a particular violation of a federal right is a "highly predictable" consequence of the failure to equip police officers with specific tools to handle recurring situations. The question that emerges from these restraint deaths is whether asphyxia deaths are highly foreseeable or a predictable consequence of restraining persons prone in the hogtied position. The *Graham* standard of objectively reasonable force will be applied in restraint cases. The *Price* case is illustrative of this, as the court, relying on scientific evidence regarding "hogtying" found the restraint procedure in and of itself not to be excessive force and not a cause of asphyxia. The court found that drugs caused the individual's death and not the restraint procedure. In analyzing these cases, courts will review the totality of circumstances, cause of death, extent of the person's medical or psychiatric condition, restraints authorized and force methods used, other alternatives available, officer's perception of safety, and the resistive behaviors requiring further immobilization of the person. As evidenced in these cases, the courts are not consistent in their opinions as to whether the hogtied procedure should be considered excessive force. Such inconsistency makes it problematic for the police to defend such claims, which are evidenced in the close prevailing margin trends as indicated in the "1983 Sudden Deaths in Custody Litigation" table. This type of restraint litigation is still emerging, so changes in court interpretations may be forthcoming.

## **Deliberate Indifference to Obvious Medical or Psychological Needs**

Beyond the claims of excessive force and improper use of restraints, allegations for failure to recognize behaviors and medical symptoms commonly associated with sudden custodial deaths will be filed. Moreover, allegations will also be made that the officers and/or department violated the ADA (as previously mentioned). The duty to protect a detainee from harm and provide reasonable medical care is based partially on the notion that the government is responsible for these individuals because it has

deprived them of the ability to look after themselves (Silver, 2006). The duty begins at arrest and continues through the process of detention. The police, however, are not considered absolute insurers of the health and safety of those in their custody. The assertion may be made that officers were deliberately indifferent to the medical or psychological needs of the arrestee. This legal claim may be framed within the context of the 14th Amendment in accordance with the U.S. Supreme Court's decision in *City of Revere v. Massachusetts General Hospital* (1983). This case concluded that municipalities have a constitutional duty to obtain necessary medical care for detainees in their custody. Failing to obtain such care may rise to the level of deliberate indifference.

In *Harris v. District of Columbia* (1991), the estate brought a wrongful death claim under the 14th Amendment, alleging that officers were deliberately indifferent to the decedent's medical needs and misused restraints. Harris was "freaking out" on PCP. He was handcuffed, placed in leg restraints, locked in a police van, and later transported to a hospital. Medical care was initially delayed due to filling out forms (per hospital policy), and then it was delayed again because the forms were incorrectly completed, according to the attending emergency room physician. Harris was pronounced dead two hours and 20 minutes after the arrest, due to a drug overdose. The court held that the police had not entered into a special relationship when they restrained him and locked him in the van, in that he had not been formally committed, either by conviction, involuntary commitment, or arrest. Officers were entitled to qualified immunity because they acted reasonably in light of the circumstances. The court also noted that the officers had not entered into a special relationship requiring a duty to provide medical care because Harris demonstrated a lack of care for himself when he ingested the PCP. The court's reasoning compared the police officers' duty of custody with that of ambulance drivers, stating that "they are not subject to a constitutional obligation every time they pick up a patient."

In *Cottrell v. Caldwell* (1996) police officers responded to a 911 call and arrested a man with a history of mental illness who had stopped taking his medication. The family wanted the officers to transport him to the hospital. After a 20-minute struggle to control the individual, he was subdued, restrained with handcuffs and leg restraints, and placed face-down on the floor of the car. He was transported to the station and during transport died of "positional asphyxiation." The court held that the plaintiff must show a deprivation that is "objectively, sufficiently serious," meaning that the officers' actions resulted in the denial of the minimal civilized measure of "life's necessities." The court found no evidence that the officers knew of, and consciously disregarded, the risk that the arrestee would suffocate, and the plaintiff failed to show a violation of due process. The police did not act with deliberate indifference to the medical and due process rights of the arrestee, nor did they use excessive force in restraining him.

In *Hoyer v. City Southfield and County of Oakland* (2003), five officers responded to contain a mentally impaired man, who was partially clothed and running in traffic. Officers attempted to make verbal contact with him, but he ignored them. An officer attempted to control him, and he violently fought with him and other responding officers. One officer struck him with a baton three times, another officer sprayed him with pepper spray, while another officer applied a brachial stun to the side of his neck and several knee strikes to the outside of this thigh in an effort to control him. All of these attempts were unsuccessful, but the officers were able to place him on the ground and control and handcuff him. Hoyer was transported to the jail,

and three officers received treatment at the hospital for injuries sustained. Within 20 minutes, Hoyer became violent in his jail cell and banging his head on the wall, shouting, and began attempting to destroy the toilet. Paramedics were summoned, and an extraction team forcibly removed him from the cell. During transport in the ambulance, he became unresponsive and later died at the hospital. The family filed a §1983 lawsuit claiming excessive force and deliberate indifference to Hoyer's medical condition. The family claimed that the officers should have transported him directly to the hospital rather than to jail. The pathologist who performed the autopsy reported that Hoyer died due to acute cocaine intoxication, with about four grams of cocaine in his system, and agitated delirium. The court granted summary judgment to the defendants. The defendants were not found to be deliberately indifferent to Hoyer's medical condition, nor did they use excessive force in subduing him.

In *Arnold v. City of New York* (2004), a mentally impaired man fought violently with officers. He was taken to the ground and restrained with handcuffs and hogtied. The officers placed him in the back seat of the patrol car face down and transported him to the hospital. Upon opening the car door at the hospital, the transporting officer noticed that the arrestee was unresponsive, and medical personnel pronounced him dead on arrival. The family filed a §1983 claim, alleging that their son died of positional asphyxia. The officer reported that during the transport, he noticed that the arrestee was breathing irregularly but failed to adjust his position in the backseat. The court concluded that such behavior by the officer supported a viable claim of disability discrimination in accordance with the ADA, and liability attached against the City for failing to train their officers in adequately responding to the mentally impaired.

The courts do not hold police officers to the same level of care as a physician, although officers have a responsibility to determine the medical or psychological well-being of a person in their custody. The plaintiff may attempt, however, to prove that officers failed to provide medical needs under the ruling in *DeShaney v. Winnebago County Department of Social Services* (1989). In this case, the United States Supreme Court recognized that a special relationship can exist between the state and a person, giving rise to a constitutional duty on the state to assume some responsibility for the person's medical needs, only "when the State takes a person into its custody and holds him against his will." Police officers are under no constitutional obligation to protect or provide medical services to the general public, even if they know of a particular person's need and regardless of whether that obligation is imposed by state tort law, unless the government has entered into a "certain special relationship" with the person. There are three primary components that must be considered in determining whether a "special relationship" may exist for medical purposes: (1) the police created the danger to which the plaintiffs were exposed, (2) the police had knowledge of the impending danger, and (3) the police had custody of the plaintiff. Hence, liability for police officers may attach when the need for medical care of an arrestee in their custody was created after a use-of-force situation (e.g., baton strikes, physical control techniques, during restraint, etc.) and when the person sustained an injury, and officers knew that the person needed medical assistance through verbal inquiry, assessment, or requests made by the individual. As illustrated in the Harris case, medical care liability in sudden custodial deaths may not attach because in a significant number of incidents, the police take custody and restrain an individual after they have already consumed drugs or alcohol. With this in mind, police officers should take reasonable precautions to assess and monitor the condition of the arrestee and summon medical care as warranted after a violent use-of-force restraint confrontation.

## Examples of Failure to Train Claims

As indicated in the “1983 Sudden Deaths in Custody Litigation” table, it is common for plaintiffs to file allegations that police supervisors failed to train officers. The assertion is that officers have not been properly instructed or trained by the supervisor or agency and thus lack the skills, knowledge, or competency required in a range of items, such as the following: use of appropriate force measures, including the use of restraints and other equipment; recognizing the hazards of drug-induced violent behavior; deficiency in training to obvious medical or psychiatric behaviors; recognizing the risks of hogtying; and a lack of training in policies and procedures for responding to “special needs” prisoners (those who are intoxicated or mentally impaired).

In *Elmes v. Hart* (1994), a §1983 claim was filed by an estate when an arrestee who was high on LSD and marijuana died in police custody. Officers responded to a disturbance at a party where they observed an individual choking a female guest. Due to an intense struggle, several officers were needed to subdue the violent male. Handcuffs and leg restraints were secured on the kicking arrestee, and he was hogtied with flexcuffs and leg restraints. The medical examiner was summoned to the scene, found the arrestee hogtied, and learned that he had stopped breathing after several minutes of being hogtied. An ambulance was summoned, but there was no attempt to resuscitate because there was no CPR mask available, and officers were fearful of contracting AIDS. They had felt for a pulse and, finding none, thought CPR would be futile. Death was caused by “mechanical asphyxiation.” The court ruled that the officers did not “intentionally kill the arrestee.” An excessive force claim was made against the officers in which the court found that the officers used excessive force in arresting the deceased. The city, however, was not found to be deliberately indifferent for failing to train its officers.

In *Swans v. City of Lansing* (1998), the jury found in favor of the plaintiff who died in a police holding cell. Upon being admitted into the detention facility, Swans kicked the booking sergeant in the head and fought with officers. He was restrained with handcuffs, but the officers were unable to secure him in a restraint chair. He was forcibly moved to a cell where he continued to violently fight with the officers. In the cell, five officers and a lieutenant attempted to further restrain him with a Kick-Stop restraint strap, like they had used in numerous other situations with violent detainees. The strap broke, and the officers restrained Swans with additional handcuffs and leg-irons connected to his ankles. The officers left Swans on his side/stomach, monitored him by closed circuit television, and returned to the cell within ten minutes. The officers found Swans lying in urine and unresponsive. They moved him to the hallway, removed the restraints, initiated CPR, and summoned medical personnel. Medical personnel found him pulseless; continued life saving efforts; and transported him to the hospital, where he was pronounced dead. An autopsy revealed that he died from cardiac dysrhythmia caused by postural asphyxia, during custodial restraint. The jury determined that officers used excessive force; misused the restraints; and administrative personnel had failed to train, supervise, and direct officers in how to properly respond and restrain mentally impaired detainees. The jury awarded \$10 million to Swans’ estate.

The court in *Pliakos v. City of Manchester, New Hampshire* (2003) held that physically controlling a combative subject who twice kicked and beat off a police dog, fought with several officers, and fought through a two-second burst of pepper spray, was not unreasonable nor excessive force. After Pliakos was restrained, he remained on his stomach for approximately three minutes, became unresponsive, and later

died. Pliakos suffered from bipolar affective disorder, an enlarged heart, and was under the influence of cocaine during the confrontation. Pliakos' estate claimed that the chief failed to train officers in properly restraining agitated persons and monitoring them while in restraints. The court reasoned that in light of the circumstances, the officers did not violate their training, and it was reasonable to keep Pliakos on his stomach restrained for his and the officers' safety.

The court found in *Watkins v. New Castle County* (2005) that the department was not deliberately indifferent to the training needs of their officers regarding factors pertinent to positional asphyxia. Officers responded to a domestic call to remove a man from the residence. A person at the scene informed the officers that he had a long history of cocaine abuse. The officers met the man and noticed that he had a dazed look on his face, spoke incoherently, and complained of feeling sick. The man engaged in a struggle with them, and then he tensed up. The officers struck him in the face several times, struck him on the wrist with a collapsible baton, and sprayed pepper spray in his eyes. He fell to the floor, and an officer dropped his weight on his back to handcuff him. The officers held him down on his chest and secured his wrists and ankles together. Within several minutes, he became unresponsive and died. The court denied summary judgment for the officers and found that the evidence revealed that the officers used excessive force and disregarded the decedent's potential serious health consequences during restraint.

Section 1983 claims of this nature will focus on the U.S. Supreme Court case of *City of Canton v. Harris* (1989). The Court established that the inadequacy of police training may serve as a basis for §1983 liability only when the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. The plaintiff must show that the custom or policy of the department was to ignore officer training and that this was the moving force behind a constitutional violation. In custodial death cases, the plaintiff must show that the alleged lack of training with regard to the use of force and restraints and the alleged lack of medical or psychiatric care for "special needs" prisoners is closely related and actually caused the officers' deliberate indifference to the serious medical needs of the arrestee.

In 32% of the post *Price* decisions (see the "1983 Sudden Deaths in Custody Litigation" table), the courts have found command personnel liability for failure to train. Police administrators should review their training programs to ensure that training is designed to address the use of force concerns related to these incidents. For example, in *Swans v. City of Lansing* (1998), *Johnson v. Cincinnati* (1999), and *Cruz v. City of Laramie, Wyoming* (2001), the courts denied summary judgment on claims of failing to train. The courts noted that administrators were deliberately indifferent to the training needs of their officers when they contact and intervene with the mentally ill and/or who are experiencing a drug-induced psychosis. In the *Cruz* case, the court specifically held that there must be more than 14 inches separating the restraints between the ankles and wrists when restraining a violent arrestee who appears to be under the influence of drugs. Moreover, the *Swans* case is illustrative of how a jury may view restraining a mentally impaired person who suddenly dies in police custody.

Conversely, in the decisions of *Watkins v. New Castle County* (2005), *Wheeler v. City of Philadelphia* (2005), *Hoyer v. City of Southfield* (2003), *Pliakos v. City of Manchester, New Hampshire* (2003), and *Elmes v. Hart* (1994), the courts held that administrators of the litigated police agencies provided adequate policy and training, awarding

them summary judgment. These cases are instructive, as the officers had received training on responding to the mentally impaired, substance abuse, use-of-force techniques, multiple officer response, and restraint. As evidenced in these case examples, the courts are more likely to grant summary judgment to the agencies when they can show documented evidence that officers have been provided with proper training and guided by policy.

## Recommendations

Sudden deaths in police custody are a rare occurrence after a use-of-force confrontation, but the liability potential for a wrongful death can be critical. Law enforcement officers and administrators have many responsibilities for individuals in their custody. The police are not absolute guarantors of health, but they do owe a duty of care to arrestees in their custody who otherwise cannot care for themselves.

Based on the case analysis, police agencies can insulate their officers and themselves from liability by taking a proactive stance in considering the following policy and training recommendations. Because these arrest situations allege excessive force, administrators are encouraged to first review and revise their use-of-force policy to ensure that officers are directed in using “objectively reasonable” force in accordance with the *Graham* standard. It should direct officers in the proper escalation and de-escalation of a variety of physical force techniques and equipment based on the arrestee’s behavior. There should be a section devoted to the use of authorized restraints. This section should direct officers in using department-issued restraint devices that specify how to further restrain combative and “special needs” detainees. In a significant number of these incidents, more than three officers respond, and officers should receive training in “multiple officer response” or “team-takedown response.” Such training can assist officers in using physical control techniques and force equipment more efficiently when faced with a violent encounter (Ross & Chan, 2006).

A second area of concern is transportation. Preliminary questions that need to be addressed include the following:

- Under what circumstances will police transport a maximally restrained person?
- How many officers should be involved?
- What type of vehicle will be used?
- If police do not transport, who will?

These issues need to be examined and addressed pursuant to policy prior to the need arising. Procedures that direct officers in responding to the mentally or chemically impaired (special needs detainees) need to be revised or developed in accordance with the ADA. This policy should be structured within state standards for dealing with detainees who require medical or psychiatric treatment or hospitalization. Procedures for executing court or voluntary commitment orders should also be examined and modified as warranted. The policy should direct officers in how to respond to this population, when to summon backup or a supervisor, when to summon medical or psychological assistance, and to what facility detainees should be transported. Taking proper precautions with at-risk detainees begins with policies that direct officers in justifiable decisions when encountering such persons.



In compliance with the *Canton* decision, administrators are also encouraged to provide officers with regular training relevant to the policies identified. In many jurisdictions, police frequently encounter “special needs” individuals. As shown in these case examples, regular training should be provided in assisting officers in responding to “special needs” individuals, in recognizing behaviors and symptoms associated with in-custody deaths, such as the mentally ill and intoxicated. Officers should routinely receive realistic training that addresses skill competency and use-of-force decisionmaking in all authorized physical control tactics and restraint equipment (Ross & Siddle, 2003). Further training should be regularly provided to officers in how to assess the medical/psychiatric condition of detainees, monitoring needs of detainees in restraints, and when to summon medical assistance for detainees involved in a violent force confrontation. Administrators are encouraged to require officers to maintain certification in first aid and CPR in order to help them recognize and respond to medical emergencies. Finally, periodic training that addresses the critical issues to be contained in an incident report should be provided.

If an agency experiences an in-custody death, the administrator should immediately contact his or her legal counsel and risk manager and ensure that a thorough internal investigation is conducted. Using an independent agency to conduct the investigation should be considered. Moreover, the administrator is encouraged to immediately initiate an ongoing file by compiling all relevant policies, officer incident reports, training files of personnel involved, autopsy report, attending physician reports, emergency medical personnel reports, investigation reports, statements of all witnesses, photos and video of the incident scene, all taped radio communications throughout the incident, and a timeline of the incident. Adhering to these recommendations can assist police administrators in placing their agency in the best position to defend such a claim.

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# Civil Liability and the Police Use of Force in Canada

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In Canada, the use of force by police must occur only within the parameters of federal laws, provincial regulations, and organizational policies. There is no obligation on the part of the police to use force in every situation, for which it would be legally justifiable to do so (Sec. 25, CCC). The use of force is dependent upon both the unique circumstances of the incident and the particular decision-making strategies of the individual officer.

Statutory provisions serve to govern the powers, status, and liability of police officers within Canada. This legislative framework also provides a means for determining when and by whom liability for the tortuous acts of police officers will be borne. Liability may flow from the breach of a direct duty of care (primary liability) or vicariously from a legally recognized responsibility for the actions of another (secondary liability). In either case, negligence will only lie where there is a duty, breach of the standard of care, and resulting losses.

## Vicarious Liability

In common law, the test for determining whether a police officer is negligent is based upon whether there existed a reasonable and foreseeable risk of harm. This will vary, however, with the power and duties being exercised by the police officer at the time that the alleged act of negligence was committed. The Supreme Court of Canada in *Priestman v. Colangelo* (1959) cited the following statement from the English case, *Fisher v. Ruislip - Northwood Urban District Council* (1944):

The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorizes the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons. So to hold would make nonsense of the statute.

The Supreme Court of Canada in *Priestman* went on to state . . .

In deciding whether in any particular case a police officer had used more force than is reasonably necessary to prevent an escape by flight within the meaning of §§(4) of §25 of the Code, general statements as to the duty to take care to avoid injury to others made in negligence cases . . . cannot be accepted as applicable without reservation unless full weight is given to the fact that the act complained of is one done under statutory powers and in pursuance

of a statutory duty. The causes of action asserted in these cases were of a different nature.

The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is, in my opinion, *damnum sine injuria* (*Priestman v. Colangelo*, 1959).

In *Priestman*, the Supreme Court of Canada notes that general statements regarding negligence may not necessarily apply in instances involving authorized use of force. In *McIndoe v. Pasmén* (1991), the B.C. Supreme Court concluded that there was a reasonable and foreseeable risk that an officer running with his finger on the trigger of his gun would stumble and cause it to discharge. The Court indicated that the reasonableness of the action was dependent on the duty being executed by the officer at the relevant time:

Therefore, in my opinion, it was negligent for Kirkpatrick to have his finger on the trigger of the potentially dangerous weapon in these circumstances. There were no urgent or dangerous conditions evident to him, which indicated a risk of possible danger to his safety at that time. Nor was the action necessary for the purpose of the execution of his duty, which was to carry out a counter-attack road block and search for liquor. (*McIndoe v. Pasmén*, 1991)

The B.C. Supreme Court then went so far as to suggest that the burden shifts to the defendant to disprove negligence, on a balance of probabilities, in the situation in which the plaintiff is injured by force applied directly to him by the defendant. The Court quotes from a Supreme Court of Canada case, *Cook v. Lewis* (1951):

Where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact, and the onus falls upon the defendant to prove "that such trespass was utterly without his fault." In my opinion, *Stanley v. Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part. (*Cook v. Lewis*, 1951)

In summary, these rulings indicate that vicarious liability will vary with the powers and duties being exercised by the police officer at the time the allegedly negligent act was committed. The acceptable level of force, therefore, will likely vary with each unique situation based upon the noted principles outlined by the courts.

Nonetheless, there are numerous cases in which a party has brought an action against the police on the basis that excessive force has been used in the performance of duties. Generally, the courts have been resistant to finding liability against the police. This is reflected in the following cases, which generally raise Section 25 of the Criminal Code as a defence.

In *Davidson v. City of Vancouver* (1986), the police removed a child from the custody of the plaintiff's sister as per an Ontario Court Order. The plaintiff responded by launching a civil action against the police agency, alleging that it was not authorized

to do so and had acted excessively. At trial, the Court held that Section 25(2) of the Criminal Code applied and provided the police with immunity in these specific circumstances (*Davidson v. City of Vancouver*, 1986).

In *Goulet v. R. and Gosselin* (1987), a police officer arrived at the residence of the plaintiff to investigate a reported theft of automobile. During the investigation, the plaintiff and the police officer became involved in an altercation resulting in the plaintiff's arrest. While the arrest was taking place, a scuffle ensued, which resulted in the police officer striking the plaintiff in the face. The plaintiff suffered personal injury and subsequently sued the officer. At trial, the judge dismissed the action ruling that the force used by the officer was reasonable (*Goulet v. R. and Gosselin*, 1987).

In *Allarie v. Victoria City* (1993), two police officers were dispatched to a house where an intoxicated individual was threatening others with a knife. As the police attempted to arrest the individual, a struggle ensued with one police officer using a baton to strike two quick blows to the suspect's arm. As the police officer was about to strike the suspect a third time, the individual suddenly moved resulting in the baton striking the suspect's head. As a result of the blow, the police were able to effect the arrest and subsequently transported the suspect to a nearby hospital for treatment. Unfortunately, at the hospital, it was learned that the suspect (plaintiff) had suffered brain injury from the police officer's baton strike and was required to undergo surgery.

At trial, the judge dismissed the action, citing that the force used by the police officers was reasonable under the circumstances. The trial judge also ruled that the police were immune from the action pursuant to Section 25(1) of the Criminal Code (*Allarie v. Victoria City*, 1993).

In *Christopaterston v. Saanich* (District) (1994), the police were summoned to deal with two individuals who were intoxicated, refusing to leave a nearby hotel. When the police arrived, the plaintiff and her friend still refused to leave, kicking one of the four police officers that had responded to the call. As a result, pepper spray was deployed, and the plaintiff was subsequently arrested.

The plaintiff sued the police on the basis that the force used was excessive. At trial, the judge dismissed the action, citing that the force used was not excessive and therefore justified under Section 25(1) of the Criminal Code, thereby exempting the police from criminal and civil liability [*Christopaterston v. Saanich* (District), 1994].

In *Nault v. Tromblev* (1995), a police officer stopped a vehicle, suspecting that the driver's ability to operate the motor vehicle was impaired. Upon further investigation, the driver of the vehicle was subsequently detained and placed in the rear of the police vehicle. After being placed in the police vehicle, the suspect began to act violently, kicking out the rear window of the vehicle. The suspect (plaintiff) then stuck his head and shoulders out of the vehicle.

In response, the police officer struck the suspect on the nose with a flashlight. When the suspect attempted to stick his head and shoulders out a second time, he was struck once again by the officer. At trial, the judge dismissed the action, ruling



that the police officer's use of force was not excessive under the circumstances (*Nault v. Tromblev*, 1995).

In *Anderson v. Port Moody (City) Police Department* (2000), a police officer entered the subject's property in a marked vehicle in order to pursue a suspect. The subject blocked the police officer's exit with his backhoe, as he ordinarily did to prevent persons from accessing his property or from leaving at once. The police officer advised the subject that if he did not move the backhoe, he would be arrested. The subject walked away. The police officer radioed for back-up but did not know how long it would take to arrive. He exited his police vehicle and one of several aggressive dogs came charging at him at which time he used pepper-spray to stop the dog.

The police officer then received instructions from his superior to arrest the subject. The subject resisted and was pepper-sprayed twice in the course of being handcuffed. The subject was charged with and convicted of resisting a police officer. A public inquiry exonerated the constable. At trial, each side agreed that the subject's behaviour was bizarre and that dogs were a factor in assessing risk. The only difference in view was whether the officer should have used an empty hands technique or retreated instead of using pepper spray. The officer and the City argued that appropriate necessary force was used to effect a lawful arrest.

At trial the action was dismissed. The court ruled that the police officer was entitled to be on the subject's property in order to investigate a crime. The subject's conduct gave reasonable and probable grounds for an arrest. It was not safe for the officer to retreat to a locked car in unknown territory with an actively resisting subject who was acting in a bizarre manner, nor was it reasonable for him to attempt an empty hands technique first, given the exigencies of the situation. The officer did not know how soon back-up officers would arrive. Use of pepper spray was within the options in the police force's policy. His conduct was not negligent or grossly negligent. The court stated that even if it was, the subject would have been found to be 80% contributory negligent, and his damages would have been limited to \$2,500. (*Anderson v. Port Moody (City) Police Department*, 2000).

In the case of *Thomson v. Ontario* (2001), the plaintiff police officers boxed in a motor vehicle; however, the driver manoeuvred his vehicle in an attempt to escape. As a result, the officers had to jump out of the way, discharging their firearms at the vehicle. The driver was hit by two shots but not seriously injured. At the time of the investigation by the Ontario Special Investigations Unit (SIU), the plaintiffs declined to give statements. The director of the SIU then laid charges of unlawful use of a firearm and aggravated assault. The plaintiffs were discharged. The plaintiffs claimed malicious prosecution and breaches of their rights under the Charter of Rights and Freedoms. The Charter claims were based on the Crown's failure to disclose certain information during the criminal proceedings.

In court, the motion was allowed in part. The plaintiffs' claims based on the breaches of Charter rights were dismissed, as the plaintiffs could not have obtained a better result than dismissal of the charges. The motion for summary judgment of the claims for malicious prosecution was also dismissed; however, the synopsis relied on by the director of the SIU should have set out why the SIU investigators concluded that no one at the scene was in danger (*Thomson v. Ontario*, 2001).

While the courts have been generally resistant to finding liability against the police, there have been exceptions. Judgments concerning the issue of liability and police use of force are additionally reflected in the following cases.

In the case of *Odhavji Estate v. Woodhouse* (2003), Odhavji was fatally shot by police officers. As a result, the Ontario Special Investigations Unit began an investigation. The police officers involved in the incident did not comply with SIU requests that they remain segregated; that they attend interviews on the same day as the shooting; and that they provide shift notes, on-duty clothing, and blood samples in a timely manner. Under Section 113(9) of the Ontario Police Services Act, members of police forces are under a statutory obligation to cooperate with SIU investigations and, under Section 41(1), a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act. The SIU cleared the officers of any wrongdoing.

Odhavji's estate and family, however, commenced a variety of actions. The statement of claim alleged that the lack of a thorough investigation into the shooting incident had caused them to suffer mental distress, anger, depression, and anxiety. They claimed that the officer's failure to cooperate with the SIU gave rise to actions for misfeasance in a public office against the officers and the chief of police and to actions for negligence against the chief, the Metropolitan Toronto Police Service Board, and the Province of Ontario. The defendants brought motions under rule 21.01 (1) (b) of the Ontario Rules of Civil Procedure to strike out the claims on the ground that they disclose no reasonable cause of action. The motions judge and the Court of Appeal struck out portions of the statement of claim.

The Supreme Court of Canada ruled that the appeal should be allowed in part and the cross-appeal dismissed. The actions in misfeasance in a public office against the police officers and the chief and the action in negligence against the chief should be allowed to proceed. The actions in negligence against the Province should be struck from the statement of claim (*Odhavji Estate v. Woodhouse*, 2003).

In *Keeling v. Insurance Corporation of British Columbia* (1997), two police officers were on patrol when they observed a vehicle stopped at a red light. When the officers ran a computer check of the licence plate, they discovered that the vehicle was reported as stolen. In an attempt to ensure that the vehicle could not flee from its position, the police suddenly manoeuvred their police vehicle in front of the stopped vehicle. As this occurred, one of the police officers quickly exited the vehicle and approached the driver with his gun drawn.

During his rapid approach, the officer accidentally discharged his firearm causing a bullet to enter into the neck area of the seated driver. The injuries resulted in the plaintiff being a quadriplegic for life. In addition, it was later learned that the vehicle in fact was not stolen. The owner of the vehicle, a friend of the plaintiff, had erroneously reported it as stolen in an attempt to have the vehicle returned earlier than the date to which he had agreed.

At trial, the judge ruled that the police officers were jointly liable for the plaintiff's injuries that resulted during their bungled "take-down manoeuvre." The judge added that it was reasonably foreseeable, to both Smitas and Oleskiw, that a gun could accidentally discharge during the manoeuvre and injure Keeling, but

neither addressed his mind to the risk of accidental discharge. Both police officers, therefore, were jointly liable for the injuries sustained by the plaintiff (*Keeling v. Insurance Corporation of British Columbia*, 1997).

In *Berntt v. City of Vancouver* (1997), a police officer shot a teenager in the head with a plastic bullet during a riot that occurred shortly after the 1994 Stanley Cup hockey game. The Stanley Cup riot began after a crowd of over 50,000 individuals gathered in downtown Vancouver. The mood of the crowd was upbeat early in the evening, but the event quickly turned into a drunken brawl. Windows were smashed, and stores were being looted. As a result, riot control officers were summoned to quell the unruly crowd.

The plaintiff, Berntt, was one of the key participants in the riot. Berntt was observed throwing objects at the police as well as trying to obstruct an officer who was attempting an arrest. As a result, Berntt was shot in the back with a plastic bullet fired from an anti-riot weapon known as an Arwen gun. Berntt was treated for his injuries at the scene and released. Upon release, Berntt returned to the front of the unruly crowd and began to once again taunt the police.

As Berntt was walking away from the front of the crowd, he was shot once again with the Arwen gun. Berntt observed the shot being fired by the police and ducked. Unfortunately Berntt's action caused the plastic projectile to strike the head portion of his body. As a result, Berntt suffered serious head injuries and was in a coma for more than a month.

At trial, Berntt stated that he continues to suffer memory and speech difficulties as a direct result of the injuries that he sustained on the night of the riot. The trial judge ruled that the police officer was justified when he fired the first shot at the plaintiff; however, the officer committed assault and battery when he fired the second shot as the plaintiff did not now pose a threat. As a result, the police were found to be 25% at fault for the injuries that resulted to the plaintiff. The plaintiff was found to be 75% at fault, as he returned to the front line of the riot, after being shot by the police (*Berntt v. City of Vancouver*, 1997).

Interestingly, the initial decision rendered in the case of *Berntt v. City of Vancouver* (1997) was appealed to the Supreme Court of B.C. Upon appeal, the initial decision against the Vancouver Police Department was reversed with the presiding judge noting that the articulation of the police officer is critical in determining the evidentiary impact of the decision to use force.

In the 1997 ruling, the presiding judge largely based his determination of the police officer's decision to use force on the video footage of the riotous scene; however, upon appeal, the judge in the 2001 ruling based his determination of the police officer's decision to use force upon what the officer experienced:

. . . the trial judge must proceed to the third and fourth questions. In so proceeding, he or she should be a doppelganger to the peace officer whose conduct is in issue.

. . . that the issue is whether a reasonable person standing in the position of the constable, who had the same responsibility as the officer to bring the

riot to an end, and who was operating on the same database as the officer acquired both in previous training and experience and from the dynamics of that evening including the need to rescue other officers, the need to use gas and other anti-riot devices, and who had previously shot a number of rioters without causing serious injury, could reasonably have concluded that it was part of his responsibility to shoot the plaintiff with an Arwen gun.

. . . His choice to fire on the plaintiff was neither unnecessary nor lacking in reason. It follows that the constable's actions were justified pursuant to §32. This is a complete defence, and accordingly, the plaintiff's action must be dismissed. (*Berntt v. The City of Vancouver et al.*, 2001).

## **Liability in Regard to Failure to Train**

In addition to vicarious liability, police agencies are also vulnerable to liability for inadequate training of police officers. For example, an injured third party can, in addition to pursuing the appropriate level of government for vicarious liability, pursue a direct cause of action for inadequate training of the police officer in the use of force. It is also interesting to note that the police officer may have a cause of action for personal injury and losses attributable to inadequate training in the use of force against his or her police agency.

## **Third Party Action in Relation to Inadequate Police Training**

As stated, the government may also be liable for third party injuries that occur as a direct result of the police officer's use of force. The public has a reasonable expectation to believe that police officers authorized to use weapons are adequately trained for the responsibility. Included within this concept is the government's common law duty of care to the injured party. In the case of *Just v. B.C.* (1989), the Honourable Mr. Justice Cory speaking for the majority ruled as follows:

As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists, the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations, which arise from its pure policy decisions. (*Just v. B.C.*, 1989)

In the case of the British Columbia, there is no explicit statutory exemption making the government liable in those instances that indicate a failure to train. This would be in addition to the issue of vicarious liability, which may be imposed under Section 11 of the Police Act.

## **The Police Officer's Cause of Action for Inadequate Training**

A police officer injured while in the course of performing his or her duties may allege that the government agency is negligent for failure to adequately train

him or her in the use of force. It is important to emphasize that the government agency has a responsibility to ensure that use of force is effectively authorized by regulating the qualifications of those individuals who are granted this authority.

It is also within the public interest to ensure that police officers receive reasonable training in the use of force. In fact, a lack of policy, procedures, or training may serve to expose both the police officer and the government agency to liability as the public stakeholder is placed in an unreasonable risk of accidental harm.

As a result of these factors, it is no longer sufficient to simply document that an individual attended a training session. Importantly, police agencies must also be able to demonstrate that . . .

- The training was necessary as validated by a task analysis.
- The persons conducting the training were, in fact, qualified to conduct such training.
- The training did, in fact, take place and was properly conducted and documented.
- The training was “state-of-the-art” and up-to-date.
- Adequate measures of mastery of the subject matter can be documented.
- Those who did not satisfactorily “learn” in the training session have received additional training and now have mastery of the subject matter.
- Close supervision exists to monitor and continually evaluate the trainee’s progress.

## **Liability and General Duty of Care**

In addition to the specific issue of liability regarding police use of force, there may also be allegations of negligence concerning other operations of the police agency. In this regard, there appears to be a growing trend towards the number of litigated matters concerning the conduct of policing in general. This trend is reflected in the following cases.

### **Failure to Protect the Public**

In this case, the plaintiff was an infant who had been shot by his school teacher. As a result of the injury, civil action was launched against the police agency as it had knowledge that the school teacher had made several previous attempts to injure the infant but had not acted. The argument was made that the police were negligent as they had not apprehended the school teacher before he could inflict injury upon the infant. Secondly, the police were also negligent as they had failed to guard the safety of the infant. The case eventually was heard by the Court of Appeal, which ruled that there was no duty of care owed by the police on public policy considerations in this specific instance (*Osman v. Ferguson*, 1993).

During this case, in the early morning hours of August 24, 1986, the plaintiff, who lived in a second-floor apartment in the Church and Wellesley area of Toronto, was raped at knifepoint by Paul Douglas Callow, who had broken into her apartment from a balcony. At the time, the plaintiff was the fifth victim of similar crimes by Callow, who would become known as the “balcony rapist.”

In this action, the plaintiff sued the Metropolitan Toronto Police Force for damages on the grounds that it had conducted a negligent investigation and failed to warn women of the risk of an attack by Callow and the police force had violated her rights under §7 and §15 of the Canadian Charter of Rights and Freedoms.

The evidence at trial established that, before the rape of the plaintiff, Callow had committed similar crimes on December 31, 1985; January 10, 1986; and July 25, 1986. All the crimes took place in apartment residences in the Church and Wellesley area of the City of Toronto.

The Ontario Court, General Division, ruled that there should be judgment for the plaintiff. The Court stated that the police are statutorily obligated to prevent crime, and they owe a duty to protect life and property. The police force failed in its duty to protect the plaintiff and the other victims from a serial rapist known to be in their midst by failing to warn them so that they might have had the opportunity to take steps to protect themselves. A meaningful warning could and should have been given to the women who were at particular risk. This warning would not have compromised the investigation.

The professed reason for the police not providing a warning (i.e., that the assailant might flee) was not genuine. The real reason was that police officers assigned to the case believed that women living in the area would become hysterical and scare off the offender, jeopardizing the investigation. In addition, police were not motivated by any sense of urgency because the balcony rapist crimes were regarded as not as serious as other rapist crimes that were distinguished by more violence.

The police were aware of the risk but deliberately failed to inform her of it. The defendants exercised their discretion in the investigation in a discriminatory and negligent way, and their exercise of discretion was contrary to the principle of fundamental justice. The plaintiff was entitled to an award of damage as a remedy under §24 of the Charter.

Damages should be assessed in the following amounts: general damages, \$175,000; special damages to date, \$37,301.58; and future costs, \$8,062.74. The plaintiff was also entitled to an amount that equalled the present value of the sum required to produce \$2,000 annually for 15 years for transportation costs and to a declaration that the defendants violated her right under the Canadian Charter of Rights and Freedoms (*Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.*, 1998).

## **Duty of Care to Prisoners**

Police officers also have an obligation to protect the individuals that they arrest or incarcerate while awaiting disposition. In the case of *Funk v. Clapp* (1988) a prisoner had been arrested for impaired driving. As per procedure, the arresting officer conducted a physical search of the suspect but failed to locate a belt that the individual had hidden on his person. Eventually, the individual was lodged in a cell in possession of his hidden belt. While in custody, the individual committed suicide by hanging himself.

When the incident went to trial, it was determined that the arresting officer had not conducted the physical search in accordance with the requirements set out in the police agency's policy. In addition, it was also revealed that the prison custodian did not regularly check on the prisoner as was required within policy. Nonetheless, the Court dismissed the action finding that while these omissions did occur they did not result in a breach of duty to take reasonable care for the safety of the prisoner (*Funk v. Clapp*, 1988).

In the case of *Gerstel v. Penticton City* (1995), the plaintiff was arrested and placed in custody, awaiting trial on criminal charges. The plaintiff had a history of mental illness that included being diagnosed as suffering from schizophrenia with symptoms of depression, illusions, and paranoia. Nonetheless, he was transferred to a regular police holding cell with provisions made for frequent observational checks.

Unfortunately, between two of the scheduled checks, the plaintiff became delusional and climbed to the top of the cell bars. The plaintiff then dove head first onto the concrete floor of the cell block sustaining injuries that rendered him a quadriplegic. A subsequent civil action was launched against the police agency, alleging negligence in regards to the duty imposed.

At trial, the judge dismissed the action against the agency stating that although there is a duty of care to all prisoners in custody, that includes the use of reasonable care to protect them from foreseeable risk; in this instance, the police did not depart from the standard of care expected of them (*Gerstel v. Penticton City*, 1995).

## **Conclusion**

In summary, it appears that Canadian courts have generally resisted finding that police agencies have breached the expected standard of care owed to members of the public. The reason for this may be due in part to the rapid and complex sequence of events in which police personnel frequently find themselves. In many of these precarious situations, it would be unreasonable to expect flawless decisionmaking on the part of the police agency in regards to all of the circumstances at hand.

While the police have an expected duty of care to protect all individuals, their duty is limited to protection from reasonable and foreseeable risk. By virtue of their rulings, the courts have indicated that the plaintiff must demonstrate the following:

- That the police owed a duty of care to the plaintiff
- That the police should have observed a particular standard of care in order to perform or fulfill that duty
- That the police breached their duty of care by failing to fulfill or observe their standard of care
- That such breach of duty caused damage or loss to the plaintiff
- That such damage was not too remote a consequence of the breach so as to render the police not liable for its occurrence

Importantly, there is a noticeable lack of judgments against Canadian police agencies in both criminal and civil domains. In this regard, John Westwood, Director of the Civil Liberties Association of British Columbia writes, . . .

. . . the police in Canada, by and large, see themselves as public servants, as crime fighters answerable to the citizenry . . . public prosecutors are not afraid to lay charges against the police when the evidence is there . . . the courts are willing to find against the police. Of course, it is more difficult to convict a police officer than it is an ordinary citizen or to get a civil judgment against the police: When we allow the police to use force against us, we must allow them some freedom from being second-guessed about their split-second judgments. (Westwood, 1997, p. A23)

Noteworthy is that police officers in Canada and the United States are receiving better training and more precise guidance by departmental policy and appear to be making better decisions in the field regarding the usage of force than in the past. In addition, both Canadian and U.S. police have more equipment options at their disposal than in former years, which give them viable ranges of force to utilize when encountering resistance.

In addition to these developments, the concern regarding negligence and liability appears to have intensified professionalism within policing. As a result, Canadian police agencies appear to have become more proactive in meeting the demands and expectations of both the courts and the public. This approach is a departure from past practices, which were largely reactive, often taking the form of policy changes.

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# Potential Civil Liability for Coercive Interrogations

James P. Manak, Publisher, *Law Enforcement Legal Review*

U.S. Supreme Court interrogation cases set the federal constitutional minimum standards for law enforcement conduct. The states, through decisions of their highest courts of review, can interpret state constitutional provisions in a manner further restricting law enforcement conduct on the subject. They can do this by ruling that state constitutional provisions give defendants greater rights than those that exist under federal constitutional provisions. Therefore, interrogators, whether in the public or private sectors, must always be aware of cases in their state that have this effect.

In addition, there are various state statutes and department and local prosecution policies that may be more restrictive on law enforcement conduct than the United States Supreme Court. Consultation with your legal advisor is necessary to be aware of any state law provisions or court cases that might apply to interrogation in your jurisdiction and that might apply to the type of situations described in the cases covered in this article. Remember, too, that decisions affecting law enforcement may also affect the private sector when acting in conjunction with law enforcement agencies.

Few interrogators think about the possibility of civil liability when going about their work. The focus of their activity is rightly about the admissibility in a criminal trial or disciplinary proceeding of any confession or incriminating statements they may obtain from a subject. This means adherence to the often-complex rules of Fifth and Sixth Amendment rights of suspects or those subject to administrative discipline.

Understandably overlooked is the possibility of civil litigation over the techniques employed to obtain statements. Two recent cases illustrate this issue in the context of civil rights actions. They point out that while the potential for civil liability exists, the courts have placed the standard for plaintiffs in civil rights cases at a high level. Basically, the courts have held that unless improper interrogation conduct is “shocking to the conscience,” liability will not result under the federal civil rights act, 42 U.S.C. §1983. This is a fact-driven inquiry in each case.

In *Tinker v. Beasley* [429 F.3d 1324 (11th Cir. 2005)], an arrestee brought an action against police officers, alleging that their questioning of her concerning a murder violated her substantive due process rights and constituted the Alabama tort of outrage.

The court held that the interrogating officers’ conduct in falsely informing a suspect about the status of her legal representation in the context of an otherwise coercive interrogation that did not produce a confession did not shock the conscience so as to violate the suspect’s substantive due process rights. It also held that the officer’s conduct, falsely informing a suspect about the status of her legal representation, though generally reprehensible, was not sufficiently outrageous to meet Alabama’s standards for the tort of outrage.

The court in *Tinker* stated, . . .

This action arises out of Tinker's arrest, incarceration, and questioning on suspicion of murder. At the time of her arrest, Tinker was a 24-year-old mother of three young children. She worked in a hospital kitchen in Greensboro, Alabama. Beasley and Watson were agents of the Alabama Bureau of Investigation (ABI) who questioned Tinker in relation to the shooting of a bank teller in the course of a robbery. Before the bank teller died at the scene, she had identified Tinker as the shooter.

Tinker was arrested at her home the same afternoon and taken to the "old jailhouse" in Greensboro, where she was kept in a holding area. . . . Later that evening, she was taken to the Hale County Jail. Patrick Arrington, an attorney called upon by her family to represent her, came to see her at some point that evening. With Arrington present, Tinker was then interviewed by Beasley. Beasley has alleged that Arrington informed him after this first interview that he was no longer representing Tinker. Beasley told Watson that Tinker was no longer represented. Arrington asserts that he never said he no longer represented Tinker, and that, to the contrary, he had instructed the investigators specifically that Tinker should not be questioned in his absence.

The next day, Tinker made an initial appearance. After she returned from the courthouse, Tinker was fingerprinted by Watson. Arrington was not present at the courthouse or later at the jail. Watson asserts that Tinker began asking him questions about her case and appeared to want to make a statement. When Tinker asked for her lawyer, Watson told her that her lawyer no longer represented her. . . . Tinker then signed a waiver-of-rights form and gave a statement in which she described how she knew the victim of the shooting and admitted that she had been at the bank on the day of the shooting.

Tinker asserts that throughout this and the following days of her incarceration, Beasley and Watson interviewed her repeatedly, telling her that her lawyer had "bailed out" on her, that they were all she had to get her out of trouble, that she would never see her children again unless she confessed, and that she had two options: the electric chair or life in prison. . . . She says that they referred to her "sizzling" and "frying" in the electric chair and that they further pressured her through references to her recently deceased mother. . . . Tinker also asserts that at some point during one of the interviews, Beasley told her that if her father or any other family members went to a lawyer on her behalf "they would fuck it up for [her]."

Two days after the shooting, Tinker agreed to a polygraph exam in the absence of Arrington. Sometime later that day, Arrington learned about the polygraph and the interviews and complained to Beasley and Watson about both. Tinker was finally released late on the evening of the fourth day because she had been eliminated as a suspect by the authorities' capture of the actual perpetrator of the crimes. Tinker never confessed to any crime or otherwise incriminated herself. . . .

A civil rights action with an additional state tort claim was then filed.

The court said, “In the context of involuntary confessions, the Supreme Court has observed that ‘certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the 14th Amendment.’” [*Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 449 (1985)].

The Court more explicitly identified the liberty interest here at issue in *Chavez v. Martinez*, confirming that, under some circumstances, coercive interrogation alone may violate a suspect’s right to substantive due process, even when no self-incriminating statement is used against the person interrogated [See 538 U.S. 760, 780, 123 S.Ct. 1994, 2008 (2003)]. Such a violation will be recognized, however, only where the specific conduct alleged rises to a level of coercive interrogation that “shocks the conscience” [*County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 1717 (1998)].

The Supreme Court found a conscience-shocking violation of substantive due process when police directed an emergency room doctor to extract against a suspect’s will his stomach contents, which included heroin-filled capsules [*Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952)].

On the other hand, in *Moran v. Burbine*, the Court found that failure of police to inform a murder suspect of telephone calls from an attorney, who had been contacted by his sister, before continuing an interrogation, did not undermine the validity of the suspect’s waiver of his Miranda rights or shock the conscience when that suspect had never asked for an attorney, was unaware that his sister had called one, and had not been formally charged [475 U.S. 412, 415, 428, 432-33, 106 S.Ct. 1135, 1138, 1145, 1147 (1986)].

The Court in *Moran* concluded, . . .

We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation (Id. at 432, 106 S.Ct. at 1147)

Tinker argues that, because the conduct of which she complains would be a constitutional violation in a criminal procedure context, it is also necessarily a conscience-shocking constitutional violation in the context of substantive due process. Beasley and Watson correctly respond that the two inquiries focus on different questions. The coerced-confession inquiry looks at the state of mind of the suspect—“whether [a suspect’s] will was overborne” by the totality of the circumstances surrounding the giving of a confession [*Schneekloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 204 (1973)]. The shocks-the-conscience inquiry, in contrast, looks at the objective unreasonableness of the officers’ conduct. Because we are making the second of the two inquiries, we must focus on Beasley and Watson’s conduct asking only whether this particular conduct—falsely informing a suspect about the status of her legal representation in the context of an otherwise already coercive interrogation—shocks the conscience.

Although this is arguably a close case in that it implicates Tinker's right to counsel, Beasley and Watson were trying to solve a murder and bank robbery case in which Tinker had been named by a deceased victim as a shooter. When Tinker asked for her attorney, the officers falsely told her that he had abandoned her, convinced her to sign a waiver-of-rights form, and proceeded to interrogate her multiple times over the course of three days. Although the bank teller's identification of Tinker later proved to have been made in error, the officers were justified in believing they had the right person in custody at the time of the interrogation. Accordingly, although this situation presents slightly "more egregious" circumstances than those described in *Moran*, we are not prepared to find the officers' conduct "sufficiently arbitrary for constitutional recognition as a potentially viable substantive due process claim" [See *Moran*, 475 U.S. at 432, 106 S.Ct. at 1147' Carr, 338 F.3d at 1271].

"This case falls more in line with those cases in which police misconduct is untoward and upsetting, and yet does not rise to a level that shocks the conscience [See *Lewis*, 523 U.S. at 855, 118 S.Ct. at 1721] (concluding that '[r]egardless whether [initiating a high-speed automobile chase in heavy traffic] 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 [defendants] are not called upon to answer for it under § 1983'); . . . Accordingly, we reverse the order of the district court and find officers Beasley and Watson are entitled to qualified immunity as to Tinker's §1983 substantive due process claim.

[We next examine] whether Tinker established outrage under Alabama law . . .

To establish outrage, Tinker must show that (1) Beasley and Watson "either intended to inflict emotional distress, or knew or should have known that emotional distress was likely to result from their conduct"; (2) the conduct in question "was extreme and outrageous," and (3) the "conduct caused emotional distress so severe that no reasonable person could be expected to endure it" [*Stabler v. City of Mobile*, 844 So.2d 555, 560 (Ala. 2002)]. "By extreme, we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society," [*American Road Service Co. v. Inmon*, 394 So.2d 361, 365 (Ala. 1980)]. Thus, "outrage is a very limited cause of action that is available only in the most egregious circumstances" [*Thomas v. BSE Indus. Contractors, Inc.*, 624 So.2d 1041, 1044 (Ala. 1993)].

We find the officers' conduct, though generally reprehensible, not outrageous enough to meet Alabama's standards for this tort. Having found no tort sufficiently alleged, there is no need to consider the applicability of state-agent immunity.

In the second recent decision on this same issue, *McConkie v. Nichols*, 392 F.Supp.2d 1 (D.Me. 2005), after a reversal of his conviction for unlawful sexual contact with a minor and acquittal upon retrial, the former defendant brought a civil rights action against a police detective, alleging that the detective's lie during interrogation had induced the inmate's false confession.

The court held that evidence that the detective may have misled the suspect, during an allegedly coercive interrogation, by telling him that his statements would remain confidential, that the charges were not serious, and that they would lead to little or no consequences, did not “shock the conscience” as a basis for a substantive due process claim under the federal civil rights act, relating to the elicitation of a false confession.

## Practice Pointers

The United States Supreme Court has in the past permitted a degree of trickery and deceit in interrogation cases so long as such techniques do not overbear the will of the suspect and result in an involuntary confession.

To avoid the result of suppression and the possibility of subsequent civil litigation (which itself is costly even if the plaintiff does not prevail), a few common-sense rules should be followed:

- Misrepresentations to a suspect may be permissible but should not involve untrue statements relating to the constitutional right to counsel and the privilege against self-incrimination.
- The use of manufactured (false) physical evidence, such as a purported but fabricated written statement of a witness incriminating the defendant or a fabricated DNA lab report, should be avoided, in part because it may find its way into the judicial process and thus involve the court in a falsehood (judicial integrity doctrine requires suppression of confession).
- Physically abusive or coercive actions by the police (as opposed to psychological ploys) will come close to, or establish, the “shocks the conscience” test in civil litigation as well as lead to a finding of involuntariness in criminal proceedings.

It would be desirable if a single rule could be devised to govern the admissibility of evidence in the criminal context and a defense to all civil litigation. Unfortunately, these cases are always fact-bound. Seasoned and well-trained interrogators know where the line between acceptable and unacceptable conduct lies. A review of decided cases is the best approach to training in this area, but as to the officer actively involved in the heat of an actual interrogation who is trying to avoid potential problems, one is reminded of the words of Supreme Court Justice Potter Stewart on the definition of obscenity under the First Amendment, “. . . I know it when I see it.”

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# Police and Civil Liability: A Practical Guide to Avoiding Litigation

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## Introduction

The issue of police liability affects agencies across the jurisdictional range whether they are patrol operations or correctional facilities. In 2002, coming out of large municipal agencies alone, there were 26,556 citizen complaints for police use of force (U.S. Department of Justice, 2002). Even with only 8% of these complaints being sustained, it still presents a huge burden to the agencies. Civil liability suits have increased from approximately 6,000 annually in the 1960s to over 30,000 in the 1990s (Kappeler, 2001).

The potential for police liability suits is advancing on several fronts. They include the emergence of increased weaponry and force response options, nonlethal weapons, more aggressive enforcement teams such as SWAT, and the increased number of sworn police officers interacting with the community. Within the community, the emergence of “super predators” and more sophisticated forms of gang violence have created “mean streets” that demand officers be constantly on defense. This necessary defensiveness, however, must be tempered by the directives of Community Oriented Policing (COP). The COP imperative alone has drawn a tough line for officers to walk. Additionally, citizens are savvier than ever when it comes to litigation, and there is always a ready pool of attorneys willing to pursue claims against the state. This mix of agency, community, and citizens has created an environment ripe for litigation against officers and agencies. This article reviews the literature on this issue and suggests policy implications and strategies to reduce incidents of civil liability suits.

## Literature Review

Under Title 42 U.S. Code, Section 1983, of the Federal Civil Rights Act, anyone acting “under the color of law” who deprives a citizen of his or her rights as guaranteed by the Constitution, shall be liable for injuries sustained by the offended party. Barring the actions of the responsible party being of a personal or individual nature, the liability falls upon the state as the “persons” responsible. This creates a considerable burden on agencies in a number of ways, not the least of which is compensation to victims (Worrall, 2001). Through vicarious liability and under the doctrine of *respondere superior*,<sup>\*</sup> agencies bear the consequences of such suits (Vaughn, 1999). The court’s intent in pursuing public entities rather than private parties (individual officers) is to allow victims to be adequately compensated and ensure that agencies, which hold the overwhelming responsibility of prevention, take all due measures to halt further violations (Vaughn, 1999).

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\* A key doctrine in the law of agency that provides that a principle, being the employer, is responsible for the action of its agent, the employee.

The statistical information on this issue gives us a profile of agencies and officers that are more subject to litigation of this type. The Bureau of Justice Statistics (BJS) reports that agencies with internal and/or external controls, such as Citizen Complaint Review Boards, experience higher citizen complaints of police force (Hickman, 2006). In the BJS report, it is unclear as to whether these agencies instituted these controls as a response to increased complaints or the controls gave citizens the impression that there was a readily available forum where their grievances could be heard. Of cases occurring in 2002, only 8% of complaints were sustained as valid by the agencies or review boards receiving them. The remaining cases were resolved as follows: unsustained due to lack of evidence (34%), unsustained due to insufficient evidence of fact (25%), the officer exonerated (23%), and other dispositions (e.g., being withdrawn) (9%) (Hickman, 2006).

There is a variety of internal and external controls that agencies employ that prove to elicit more citizen complaints. Agency controls eliciting more citizen complaints were Civilian Complaint Review Boards (CCRB), which according to the BJS in 2003 were found in 19% of large city police agencies; Internal Affairs Divisions (IAD) found in 82% of large city agencies; personnel monitoring systems such as the Early Warning System model (to be discussed later) found in 33% of large city agencies; and agencies with collective bargaining groups found in 73% of large city agencies. The only control that produced fewer citizen complaints per agency was that of internal administrative appeal, which was available in 37% of large city agencies. Those agencies received fewer complaints but had a rate of sustained complaints that was twice as high as agencies without such an option. Thus, large municipal agencies with CCRBs, IADs, personnel monitoring systems, and collective bargaining groups received more complaints compared to agencies that did not have such controls. Only administrative appeal boards elicited fewer complaints than those not offering such an option, but their rate of sustained complaints was higher (Hickman, 2006).

When comparing individual officers and the likelihood of being sued, two characteristics became apparent. First, police officers were more likely to be sued than correctional officers were, and the longer either type of officer served, the more likely it was that they were sued (Hall, Ventura, Lee, & Lambert, 2003). In addition, this study further showed that an officer's rank or level of education was not a significant factor in the likelihood of being sued. Hughes (2001) found that 18.5% of his sample reported having been sued for a job-related matter. Hickman (2006) reports that there are 10.9 complaints of police use of force for every 100 full-time sworn officers who respond to calls.

Community policing poses another set of concerns regarding civil liability. The philosophy of community policing draws officers even closer to citizens as they partner to prevent crime and improve communities. Policing is no longer reactive but rather proactive and involved. This increased interaction can create more opportunities for liability due to the heightened expectations the community holds for their community police officer (Worrall & Marenin, 1998). Indeed, this study suggests that increased liability claims will be made against police as their role changes from detached law enforcer to the role of community-oriented police officer. In fact, it has been shown that when compared to traditional beat cops, community-oriented police are more likely to have been sued (Hughes, 2001).

Considering that departments that practice community policing are more subject to complaints, it would behoove such departments not to promote COP to the

community or to its officers as a panacea of crime prevention and harmony between law enforcement and the community (Worrall & Marenin, 1998). Officers and citizens must expect that there will be friction when officers delve into problems within the community. Crime prevention is an uphill battle for all parties involved.

Trojanowicz and Bucqueroux (1990) claim the inherent dynamic of Problem-Oriented Policing (POP) calls for officers to be creative in troubleshooting community problems. This exposes officers to the risk of error. For example, an officer committed to responding proactively to a community's request to control vagrants may find himself faced with a harassment or improper use-of-force complaint. The ultimate effect of these complaints can chill an officer's response to citizens' needs and lead to litigaphobia (Hall et al., 2003).

Litigaphobia, also referred to as Police Liability Syndrome, creates a certain paralysis in officers who fear that their actions will draw a liability suit. Nearly 22% of officers in a study reported that when they stop a citizen, one of the things that goes through their mind is the potential for being sued (Hughes, 2001). Hall et al. (2003) in a similar study report that 46% of officers agreed that the threat of being sued was one of the top ten thoughts considered when responding to an emergency. In the Hall et al. study, 48% felt the threat of civil liability deterred misconduct among criminal justice employees. Thirty-seven percent said liability influenced their decisionmaking during police emergencies, yet the majority, 62%, said the potential for liability did not hinder them in performing their duties. Garrison (1995) claims that officers in his study overwhelmingly reported not being consumed by a fear of litigation (litigaphobia); however, most felt that it was a deterrent to police misconduct.

It could be argued that even if less than overwhelming, the fear of litigation could hamper an officer's full commitment to engaging a citizen. With looming expensive pay-outs or even the threat of a simple reprimand, an officer may think twice. The courts add to officers' trepidation on this issue in that they have denied officers immunity from prosecution because of their concern with the potential for physical misconduct that could occur in the line of duty. They have held that the high potential for physical misconduct warrants a stricter liability for police behaviors (Littlejohn, 1981). Thus, officers must become trained to avoid the "chill effect" that litigation may present.

Beyond judicial remedies, there are administrative measures that an agency can employ to ensure that misconduct does not occur. Recruiting, training, strategic policies, rules for conduct, and proper supervision are integral (Hughes, 2001). While these measures require expenditures and commitment on the part of the department administration, they are well worth the effort. Not to implement such strategies would cost departments far more than the cost of defending a single case before the court. One must also consider the emotional cost of such charges upon the individual officer, especially if innocent. It is demoralizing to one's self esteem to be labeled as "out of line" or "abusive." One can only imagine the loss of pride in one's occupation, even if the suit is unsuccessful. We hypothesize that it would create extreme cynicism in the officer, coupled with hypervigilance and a certain paralysis in the performance of his or her duties.

Archbold (2005) presents a business model heretofore overlooked by law enforcement. For many years, business organizations have used risk management as a means of controlling loss through the assessment and containment of risk. This process can be adapted to law enforcement. It involves identification of risks,

reduction of exposure to risks, response when exposure occurs, the implementation of risk treatment, and continuous evaluation of risk treatments. Archbold warns that there is a dearth of training in this area within the field of law enforcement. Agencies will have to play catch-up if they wish to implement such a program.

## **Practical Considerations**

In the investigation of police and correctional officers in the Charlotte-Mecklenburg, North Carolina, jurisdiction, it was noted that officers considered numerous practical issues that governed their dealings with citizens. Primarily, they were mindful of what was lawful. The measure of this was what they felt would be articulable in a court setting. Officers must be able to articulate a rationale for their actions. If in justifying their actions they have to “over explain” a situation, they may choose not to engage in the behavior altogether. This is probably prudent, too, because if officers have to work overly hard at convincing themselves that the action is defensible, it probably isn't.

Department policy also factored strongly into officers' actions. High-speed chases have recently received a lot of attention in the media, and departments have generated policies that address this high-risk action. Both the Mecklenburg County Sheriff's Office and the Charlotte-Mecklenburg Police Department have adopted strict policies on when to chase and when to terminate a chase. The supervisor and the officer in pursuit assess risk based on potential for injury to innocent people and the threat posed by the fleeing felon. This risk is continually reassessed until either the felon is in custody or the chase has been terminated. Civil liability is a consequence if a department chooses to pursue and persons are injured or killed. Many departments have chosen to err on the side of caution when these situations arise. After all, there is usually an opportunity to apprehend the felon at a later time, but a lost life cannot be recovered.

Another consideration is media exposure. Educated viewers are aware that there is usually more to the video clip on the 6:00 news than what is shown. There is also little doubt that the media is concerned with entertainment value and sometimes shock appeal. The danger is that a large segment of the population is willing to jump to negative conclusions when viewing scenes of officers using force. Furthermore, officers must be mindful that in addition to their own dashboard video cams, their actions may be videotaped by citizens. A case in point, is an account of an incident at a nightclub. When the officers attempted to control some unruly citizens in a parking lot, they were immediately assailed with a barrage of cell phone cameras recording their actions. This not only has a chilling effect upon their actions but creates unease in the officers when they see a crowd pulling out devices, any one of which could be a weapon, from their purses and belts and raising them in the air to capture the event (McLaughlin, 2006).

The media is generally not held to be a friend of law enforcement. High-profile media cases such as the Rodney King case, have heightened citizens' awareness of the potential for successful litigation. As Garrison (1995) noted, litigaphobia results when officers feel they are targets for civil litigation, even if the allegations are without merit. It was stated that dashboard video cams were a welcome addition to officers' equipment as they provide an unedited audiovisual record of the entire event, unlike amateur videos that could be misconstrued when they do not capture the event in its entirety. Officers also felt that the media seldom

showed officers being abused and assaulted by citizens even though the BJS reported 59,373 assaults upon officers in 2004 (U.S. Department of Justice, 2004).

## **Techniques to Avoid Civil Liability Suits**

There are a number of practical remedies for civil liability suits against agencies and officers. Both agencies interviewed agreed that officers' ability to communicate with those whom they came in contact made a critical difference in the outcome of those encounters. The Mecklenburg County Sheriff's Office employed the art of verbal judo as a means to avert conflict (Smith, 2006). Verbal judo applies principles and tactics to calm and redirect difficult or hostile people under severe emotional stress. It diffuses potentially dangerous situations in a professional manner (Manley, 2004). Additionally, officers were cautioned not to take their citizen encounters personally. If officers considered themselves representatives of the community and its laws rather than individuals requesting compliance, they were less likely to use unnecessary force towards citizens who were confrontational.

The Charlotte-Mecklenburg Police Department (CMPD) relied on community policing techniques (Baker, 2006). By adopting an attitude that citizens are largely not out to sue, officers were more comfortable in collaborating with citizens to prevent crimes and solve problems. CMPD's commitment to community policing is so complete that it has become their mission statement:

The Charlotte-Mecklenburg Police Department will build problem-solving partnerships with our citizens to prevent the next crime and enhance the quality of life throughout our community, always treating people with fairness and respect. (Charlotte-Mecklenburg Police, 2006)

Though studies note that community policing organizations are more subject to civil suits from citizens (Trojanowicz & Bucqueroux, 1990; Worrall & Marenin, 1998), this should not dampen a department's commitment to partner with its citizens.

One means by which a department can demonstrate its commitment to community policing is by its openness to the media. While they may be unhappy bedfellows, law enforcement must accept that the media is often their only conduit to citizens. By supplying the media with ready access to police videos, liability suits may be averted when citizens see a full account of the actual events. The best defense is the truth. Secrecy is perceived as a cover up and begs the public to assume the worst. An audiovisual record is hard to dispute. It is recommended that departments be as open with the media as the law permits.

Both the Charlotte-Mecklenburg Police Department (Baker, 2006) and the Mecklenburg County Sheriff's Office (Plummer, 2006) emphasized the necessity of training officers to be skilled observers. While much of this is gained by experience, it is an integral part of academy and inservice training. Situational awareness training prepares officers for encounters of all sorts. Firearms training scenarios ("shoot-don't shoot"), for example, allow officers to test their ability to distinguish hostile citizens from innocent citizens. Officers are trained to observe body language to recognize hostile actions (e.g., persons with their fists balled, persons who have angled their stance to imply an eminent attack). Mock building searches, "shoot houses," and confrontation drills add the element of real human

interaction that is not part of simulation programs. In these, officers can practice verbal communication as a means of defusing volatile encounters. Repetitive training of this sort teaches officers not to overreact to benign situations and how to employ means other than force to quell situations. The result is that this reduces the inappropriate use of force, thereby controlling exposure to liability claims.

Repetitive training also serves to instill confidence in officers who are faced with the use of legally defensible force against a hostile subject. Officers who hesitate to use force against a citizen, even when they are convinced the subject's actions warrant it, can expose the officer and citizens to danger. Officers weighing the potential for liability against their own judgment that force is necessary creates a dangerous situation. A foundation of solid training engenders the necessary confidence to act with deliberation when the law dictates such actions to be legal.

Knowledge of the law and the agency's policies is essential to good decisionmaking in the field. Training on these should be a continuous part of inservice requirements. Officers need to be reminded of department expectations and apprised of the fact that when they adhere to these policies, they can count on the support of the agency. Likewise, when officers demonstrate behavior that warns of an impending civil suit, departments need to intervene to correct their behavior. The Early Warning System model offers a set of criteria to evaluate an officer's potential for problematic behavior (Walker, Alpert, & Kenney, 2001). Criteria for identifying problematic behavior includes firearm-discharge, citizen complaints, use-of-force reports, civil litigations, incidents of resisting arrest, vehicle pursuits, vehicle damage, and use of sick leave (Walker et al., 2001; Walker & Katz, 2005). Intervention models such as this have proven to reduce citizen complaints by 50% to 67% as evidenced in three municipal case studies (Walker et al.), but this finding is somewhat contradicted by the BJS, which reports that such personnel monitoring systems increase citizen complaints per agency but prove to have a slight reduction in the complaint rate per officer and per resident (U.S. Department of Justice, 2002). Walker et al. (2001) state that having such systems in place provides a department shield against liability. These systems explicitly demonstrate the department's commitment to control officers' misuse of authority.

Interviews supported the belief that the best strategy against litigation is to have a "no settlement" policy (Baker, 2006). Some departments, however, may feel it is more efficacious to simply payout suits to avoid negative publicity and the burden of expensive and time-consuming litigation. This undermines a department's morale and sends the message that frivolous or baseless allegations will be rewarded. This could set off a feeding frenzy of suits. If members of a department are liable, they will justly pay; if not, they will not allow themselves to be held hostage by litigious threats based in false allegations.

A "no settlement" policy builds confidence in officers that if they act appropriately in keeping with the law and department policy, the department will stand squarely behind them. It assures the citizenry that their tax dollars will not be wasted to appease a segment of the population who seek to work the system to their advantage. It is also a legally prudent tactic. CMPD reports that they seldom lose cases when they allow the courts to review their actions. Trusting the courts to decide whether misconduct has occurred supports our Constitutional mandate of checks and balances and validates the American judicial process. Again, the truth is always the best defense.

## Conclusion

While suits are a real threat to law enforcement agencies, we are of the opinion that it is important to defend oneself against unjustifiable litigation. Police departments can continue to apply community policing techniques, even when they expose them to liability, if they equip their officers with training that will thwart civilian complaints. Officers who employ communication skills that are sensitive to the citizenry and learn to read body language to know when to use force and when not to use force, will face fewer allegations of misconduct. Having an attitude of partnership with citizens rather than an “us versus them” mentality also sets the stage for more effective communications with the community.

Openness with the media allows citizens to feel more participative in their local law enforcement rather than victims of their vested authority. Democratic societies value full disclosure from their civil servants. Truth in fact does set us free from potential abuse.

The Early Warning System model has proven to help identify officers with problematic behavior. It also allows these officers to correct their behavior and become good officers that the community can count on. These personnel monitoring systems require funding and administrative effort, but they go a long way in assuring the citizenry that the police are willing to monitor their own because they value the trust that the community has placed in them.

A “no settlement” policy is extremely effective in curtailing those who would seek to abuse the system. It makes law enforcement not only a good steward of taxpayers’ money, but it allows the judicial system to apply the rule of law to police actions. Honest officers should welcome the scrutiny of the court, as it will surely vindicate them.

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# Police Liability Incidents That Result in Litigation: An Examination of the Causes and Costs

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Police liability has been a concern of police executives dating back several decades. In part, this concern stems from a proliferation of lawsuits involving the police as a result of officer involvement in liability incidents (Franklin, 1993; Kappeler, 2001; McCoy, 1987). The surge in litigation resulting from police liability incidents can be traced back in time by examining the manner in which case law has helped determine legal responsibility for the actions of individual police officers that result in litigation. Stafford (1986) identified several historical court cases that have helped define legal liability involving the police: *Monroe v. Pape* (1961), *Monell v. Department of Social Services* (1978), and *Owen v. City of Independence* (1980).

The case of *Monroe v. Pape* (1961) determined that individual police employees could be sued under Section 1983<sup>1</sup> but excluded the municipalities that employed them from being named in the lawsuits. Police agencies and local municipalities enjoyed this lack of legal responsibility for their employees until 1978 when the case of *Monell v. Department of Social Services* determined that counties and municipalities were vicariously liable for the actions of their employees that resulted in litigation. Municipalities and counties were also stripped of their qualified good faith immunity defense with the outcome of *Owen v. City of Independence* (1980). *Owen* resulted in a decision that would not allow police agencies and municipalities to use the argument that because they were not aware of the improper actions of their employees, they could not be held legally responsible for the outcome of such actions. These three court cases have contributed to the increase in police-involved litigation in the last three decades, as they have significantly changed the legal climate in the United States regarding the legal responsibility of police agencies (Stafford, 1986).

As the number of lawsuits involving the police has increased over time, the attention this topic has received by researchers has also increased. Police scholars began to study this issue from a myriad of perspectives. Some of the most popular approaches to studying police-involved litigation include the following: determining the most common reasons that lawsuits are filed against the police (Chiabi, 1996; del Carmen & Smith, 1997; Franklin, 1993; Kappeler, 2001; Kappeler, Kappeler, & del Carmen, 1993; Vaughn, Cooper, & del Carmen, 2001; Worrall & Gutierrez, 1999), how the threat of litigation impacts police officer behaviors/actions on the streets (Garrison, 1995; Hughes, 2001; Novak, Smith, & Frank, 2003; Scogin & Brodsky, 1991; Vaughn et al., 2001), and how organizational characteristics of police agencies impact police-involved litigation (Kappeler, 2001; Worrall, 1998, 2001; Worrall & Gutierrez, 1999).

Other research has focused on some of the ways that police agencies can prevent lawsuits from being filed including the implementation of liability management programs, such as risk management programs (Archbold, 2004; Archbold, 2005) and early warning systems (Walker & Alpert, 2002), as well as making changes to police officer training (Worrall, 1998) and police officer educational requirements (Carter & Sapp, 1990).

The research presented in this article uses a popular approach to study police liability, as it focuses on the causes and costs associated with police liability incidents that result in litigation. This study is unique, however, because it uses a data source that is not commonly used to study police-involved litigation—newspaper articles.

## **Causes and Costs of Police Liability Incidents That Result in Litigation: What Do We Know?**

Because there is no nationwide, mandatory data collection of police-involved litigation by police agencies, there are varying accounts of the causes and costs associated with lawsuits filed against the police in the United States. These figures also vary from study to study because a variety of data sources have been used to examine litigation involving the police including interviews, court records, and survey data. Even with this variation in litigation figures, it is possible to identify some of the trends in police liability incidents that often result in litigation. For example, there appears to be certain types of incidents that result in litigation regardless of the type of data used in the analyses of previous studies. The most common types of police liability incidents resulting in litigation include allegations of false arrest, assault/battery, illegal searches and seizures, excessive force, and vehicular pursuits (Chiabi, 1996; Kappeler, 2001; Kappeler et al., 1993; Meadows & Trostle, 1998; Vaughn et al., 2001; Worrall & Gutierrez, 1999). Each of the previous studies may have ranked these liability incidents in a slightly different order; nonetheless, all five of these liability incidents were identified by the previous studies that have focused on the types of liability incidents that result in lawsuits against the police.

Finding trends in the costs associated with police-involved litigation is not as easy as identifying trends in the most common types of liability incidents that result in litigation. The tremendous variation in payout and settlement figures from one study to the next is, in part, a result of the type of data and overall research designs used. For example, Human Rights Watch (1998) encountered some difficulty in collecting information related to the costs resulting from police-involved litigation from nearly half of the 14 American police agencies that they interviewed for their national police accountability study. Some of the police agencies reported that they did not have that kind of information available for researchers to use; other agencies refused to provide such information (Human Rights Watch, 1998).

Other studies have attempted to collect information on the costs associated with police-involved litigation using survey data from police agencies, city attorney offices, and other city government offices. For example, MacManus (1997) surveyed municipalities across the state of California inquiring about liability costs resulting from the actions of city officials (including police officers). An analysis of survey data from 210 cities across California revealed that police liability was ranked as the most significant factor contributing to the increase in costs resulting from liability claims in the state. Unfortunately, the MacManus (1997) study did not

identify specifically what types of police liability incidents result in litigation or the costs associated with such lawsuits.

Pate and Fridell (1993) surveyed police agencies across the United States inquiring about citizen complaints and lawsuits filed against each police agency. Out of 1,111 law enforcement agencies that received surveys, only 329 agencies provided data concerning lawsuits that resulted from allegations of excessive force (Pate & Fridell, 1993). Similar to the Human Rights Watch (1998) study, Pate and Fridell were told by some police agencies that they do not keep information concerning lawsuits involving their officers, or that they “are unable or unwilling to release information out of concern of political controversies or of provoking additional inquiries from litigants” (p. 146). This study revealed that there were 2,558 lawsuits filed in 1991 against the combined 329 police agencies that completed the survey questions related to litigation. The total amount of payouts resulting from the 2,558 lawsuits totaled \$44,670,776, which resulted in an average payout of \$565,453 per lawsuit involving allegations of excessive use of force by the police (Pate & Fridell, 1993).

A survey of police chiefs across the state of Texas revealed that 36% of the chiefs were employed by agencies that had been named in lawsuits in the last three years (Vaughn et al., 2001). During this three-year time frame, a total of 630 lawsuits were filed against the agencies employing the police chiefs responding to the survey. Monetary damages were awarded in 30.6% of the cases (193/630); whereas, 82% of the cases were settled out of court, and 18% of the cases ended in some jury award or court verdict. The lawsuits that were settled out of court totaled \$8,810,400, which resulted in an average payment of \$55,411 per lawsuit. The average jury award payment was \$98,100 per lawsuit. These statistics serve as examples as to why some law enforcement agencies are quick to settle lawsuits involving their employees outside of court—it is often cheaper to settle some lawsuits outside of court instead of letting a jury determine compensation.

Another data source that has been used to examine the costs associated with police-involved litigation is official court records. Kappeler and his colleagues (1993) analyzed 1,359 liability cases involving the police from U. S. Federal District Courts from 1978 to 1990. They discovered that jury awards ranged from \$1 to \$1,650,000, with an average award of \$121,874 per lawsuit. More specifically, Kappeler et al. (1993) learned that lawsuits based on allegations of excessive use of force by police resulted in average payments of \$187,503, and lawsuits based on allegations of false arrest averaged payments of \$91,631 per case.

Chiabi (1996) examined 465 lawsuits involving police officers filed under Section 1983 in the eastern and southern districts in New York. This study reported that damages resulting from police-involved litigation ranged from \$400 to \$950,000, with an average payment of \$50,408 per case. Damages were awarded in 19.37% of the cases that went to court. It is important to note that nearly one-third (32%) of the lawsuits were settled outside of court. In most cases, part of the settlement agreement is that all court records related to the case are sealed from public view; thus, the public is not privy to information related to the costs associated with these police-involved lawsuits.

Another study by Meadows & Trostle (1998) examined court records of adjudicated tort liability cases filed against the Los Angeles Police Department (LAPD) from 1974 to 1986. This study revealed that the average cost of the cases filed against the LAPD totaled \$158,500. More specifically, the costs associated with police liability

incidents examined in this study included the following: traffic accidents (\$17,500 to \$305,278), use of firearms (\$28,000 to \$1,585,000), use of choke holds (\$27,822 to \$990,000), use of baton (\$25,000 to \$750,000), and vehicular pursuits (\$35,000 to \$286,416) (Meadows & Trostle, 1998, p. 81). This study provided specific details of the costs associated with police-involved lawsuits; however, the sample used in this study (n=79 cases) only represented 2.4% of all of the tort liability cases (3,041) filed during that time frame. Caution should be used when interpreting these findings given that an accidental sampling technique was used to collect the data that was analyzed for the study.

A few years later, Kappeler (2001) published some statistics on the costs associated with police-involved liability incidents resulting in litigation in his book, *Critical Issues in Police Civil Liability*. Using court records from Section 1983 cases from 1978 to 1996, Kappeler (2001) revealed that vehicular pursuits resulted in the highest average payout (\$1,250,000) for lawsuits included in his analysis. Some of the other average costs associated with several of the most common police liability incidents included the following: false arrest/imprisonment or unlawful detainment (\$90,312), excessive force (\$178,878), assault/battery (\$117,013), unlawful searches (\$98,954), and inadequate supervision over police officers resulting in some kind of injury (\$119,114) (Kappeler, 2001, p. 9). These findings are important in understanding the costs associated with police-involved litigation, but these statistics only reflect lawsuits that were filed under Section 1983.

Without having mandatory recording of the causes and costs associated with liability incidents resulting in lawsuits filed against American police agencies, we may never fully understand the social or organizational impact of this type of litigation. In an effort to learn additional information about police-involved liability incidents that result in litigation, the study presented in this article uses a data source that has not been frequently used to study this issue—newspaper articles. More specifically, this study examines the following three research questions:

1. What are the most common liability incidents that result in litigation involving the police?
2. What are the costs associated with some of the most common liability incidents that result in litigation involving the police?
3. What is the most common type of outcome or disposition of liability incidents that result in litigation involving the police?

## **Data Collection and Analysis**

To answer the previously defined research questions, we analyzed newspaper articles that described specific incidents of lawsuits involving the police that appeared in the *Los Angeles Times*, *New York Times*, and the *Chicago Sun-Times* from 1993 to 2003. These three newspapers were selected for this study because of their high circulation rates<sup>2</sup>, because they represent three distinct regions in the United States that have diverse populations, and because lawsuits involving the police have often been a focus of media attention in all three cities (Human Rights Watch, 1998).

A search for newspaper articles was conducted using the phrases “police and lawsuit” and “police and settlement” in both ProQuest and Lexis/Nexis databases. The database searches produced a combined total of 6,516 newspaper

articles. With the help of several research assistants, all of the newspaper articles were examined for inclusion in the dataset. After reviewing all of the newspaper articles, it was determined that a majority of the newspaper articles identified in the initial database searches would not be suitable for this study. We used several criteria as we considered which articles would be included in the study.

First, the newspaper articles that were duplicates or reprinted news stories were discarded during the cleaning of the data. It was common to see the same story printed several times in one or more editions of the newspapers (early or late edition). Duplicate articles were also common because two separate database searches were conducted during data collection using two separate search phrases: “police and lawsuit(s)” and “police and settlement(s).” By conducting these two search phrases independently, it was likely that some of the same newspaper articles would be identified in both database searches; therefore, any overlap in the two searches would result in several duplicate articles. Duplication or reprints of stories eliminated a significant amount of the newspaper articles from inclusion.

The newspaper articles that presented stories about lawsuits involving police officers employed by agencies outside of Los Angeles, Chicago, and New York were discarded. It was common to find articles in the *New York Times* that presented information about lawsuits involving police officers from New Jersey; Washington, DC; or other northeastern cities. These articles were not included in the analysis of this study.

All newspaper articles that did not specifically discuss individual lawsuits involving the police were also discarded. For example, there were some newspaper articles that referred to national trends in lawsuits involving the police or in some cases, police officers involved in acts of misconduct that resulted in appearances in criminal court for which future lawsuits were expected to follow.

All newspaper articles that were editorials or “letters to the editor” were not included in the dataset. Since the purpose of this study was to examine newspaper articles describing specific incidents of lawsuits involving the police, editorials were not appropriate to include in the dataset.

All newspaper articles that involved lawsuits filed against other city, county or state government officials (i.e., county jail workers, state penitentiary correctional officers, or metro transit officers) were not included in the sample.

By using the inclusion criterion described above, we were able to identify *only* those newspaper articles that described specific incidents of lawsuits that were filed against police officers in all three jurisdictions. By only including the newspaper articles that discussed specific, individual lawsuits that had been filed against the police, we were able to examine the frequency of the reporting of this issue in all three cities.

Once all of the newspaper articles were sorted and organized by year, the articles that featured specific lawsuits were grouped together. The database search found several newspaper articles (printed on different days) that discuss the same lawsuit, but in some cases, different articles provided new or additional details about the lawsuit. The “like” articles were grouped together and given one code number for reference in the database. For example, lawsuits involving the Abner Louima case in New York City produced several hundred newspaper articles between the years of



1997 and 2001. All of the newspaper articles related to the Abner Louima case were grouped together and given one code number in the database (which means that the grouped articles were only counted as one lawsuit in our database). This was also the case with the vast amount of newspaper stories that followed the lawsuits in the Rodney King<sup>3</sup> case in Los Angeles, as well as the Amadou Diallo case in New York City. The grouping of “like” articles that discussed specific lawsuits produced a more accurate representation of the frequency of reporting of lawsuits involving the police and also allowed us to track the outcome and payout/settlement amounts of most of the lawsuits reported in all three newspapers.

After grouping all of the “like” articles together, our dataset contained 634 lawsuits spanning the years of 1993 to 2003. Since the focus of this study is police liability incidents that result in litigation, we decided not to include lawsuits that were filed against police agencies by their own employees. After eliminating the lawsuits that were filed by police employees (n=171), we ended up with a total of 463 lawsuits in our dataset (see Table 1).

**Table 1. Lawsuits Filed Against Police Agencies by Citizens as Reported in the *New York Times*, *Los Angeles Times*, and the *Chicago Sun-Times*, 1993-2003**

	1993-1995	1996-1998	1999-2001	2002-2003	
<i>New York Times</i>	18	35	47	28	(128)
<i>Los Angeles Times</i>	60	48	70	26	(204)
<i>Chicago Sun-Times</i>	28	26	46	31	(131)
Total					463

## Research Findings

Content analysis of the newspaper articles included in the dataset for this study revealed important information regarding police liability incidents that have resulted in litigation. The most common police liability incidents resulting in litigation as reported in all three newspapers were divided into the following six categories: (1) Physical abuse/excessive force/assault, (2) false arrest, (3) negligent actions/failure to act, (4) wrongful death, (5) denial of civil rights, and (6) illegal search and seizure (see Table 2). The list of police liability incidents resulting in litigation from the current study mirrors the findings of previous research, with the exception of vehicular pursuits. In the current study, there were only 11 lawsuits that were based on incidents involving a vehicular pursuit, which only represents 2% of all lawsuits identified by newspaper accounts in all three major cities. Nearly half (45%) of the lawsuits resulting from police pursuits were related to incidents in which innocent bystanders were killed as a result of a police chase. In all of these lawsuits, there was no information reported on the outcome of each case or the costs associated with each case in any of the newspaper accounts.

It was possible to identify the race of the plaintiff in most of the newspaper articles dealing with lawsuits based on allegations of physical abuse, excessive use of force, or assault. Minority plaintiffs were identified in 41% (64/156) of these types of lawsuits. In lawsuits based on allegations of false arrest, over half (51% or 36/70) of the plaintiffs were either African American or Hispanic/Latino. Similarly,

over half (51% or 24/47) of the lawsuits based on allegations of the denial of civil rights were filed by minority plaintiffs. Nearly half (48% or 32/66) of the lawsuits based on claims of wrongful death involved minority plaintiffs. There were fewer minority plaintiffs (26%) involved in lawsuits based on allegations of negligent actions by officers or failure to act/respond and also in lawsuits based on illegal searches and seizures of property (35% or 10/29).

**Table 2. Most Common Police Liability Incidents Resulting in Litigation as Reported in the *New York Times*, *Los Angeles Times*, and *Chicago Sun-Times*, 1993-2003**

Type of Lawsuit	Frequency	Percentage
Physical Abuse/Excessive Force/Assault	156/463	34%
False Arrest	70/463	16%
Negligent Actions/Failure to Act	69/463	15%
Wrongful Death	66/463	14%
Denial of Civil Rights	47/463	10%
Illegal Search and Seizure	29/463	6%
Other	26/463	5%

The outcome or disposition of police liability incidents that resulted in litigation was more difficult to study using newspaper accounts. There was some missing data for some of the lawsuits (see Table 3). For example, the newspaper articles did not provide any information about any of the wrongful death lawsuits that named police officers as defendants. Information regarding the disposition of lawsuits involving allegations of physical abuse or excessive force revealed that 24% of the lawsuits were settled outside of court; less than 1% (.06) of the lawsuits were dismissed or thrown out of court; and 25% of the lawsuits resulted in favor of the plaintiff compared to only .019% that resulted in favor of the defendant. Lawsuits based on allegations of false arrest resulted in settlement in 76% of the cases, while only 8% of the lawsuits were found in favor of the plaintiff. Nearly half (45%) of the lawsuits based on allegations of negligent actions or failure to act resulted in settlements, while 9% resulted in favor of the plaintiff.

**Table 3. Disposition of Lawsuits Resulting from Police Liability Incidents as Reported in the *New York Times*, *Los Angeles Times*, and *Chicago Sun-Times*, 1993-2003**

Type of Lawsuit	Settlement	In Favor of Plaintiff	In Favor of Defendant	Dismissed	No Data Available
Physical Abuse/Excessive Force	38/156	39/156	3/156	10/156	66/156
False Arrest	53/70	6/70	0	0	11/70
Negligent Actions or Failure to Act	31/69	6/69	0	0	32/69
Wrongful Death	N/A	N/A	N/A	N/A	66/66
Denial of Civil Rights	27/47	8/47	0	0	12/47

Over half (57%) of the lawsuits based on the denial of civil rights resulted in settlements outside of court; whereas, another 17% of the lawsuits resulted in favor of the plaintiff.

Content analysis of the newspaper articles also made it possible to examine some of the costs associated with police-involved litigation (see Table 4). Monetary payouts for lawsuits involving allegations of physical abuse or use of excessive force ranged from \$10,000 up to \$21,700,000 with an average payment of \$2,555,868 per lawsuit. Nearly half (43%) of the physical abuse/excessive force lawsuits resulted in payouts of \$1,000,000 or more. It is important to note that there was only cost information available on 23% of the lawsuits involving allegations of physical abuse/excessive force. Similarly, there was no information available on the costs associated with lawsuits involving allegations of wrongful death. It is likely that a majority of these lawsuits were settled outside of court due to the nature of the cases. As a result, all court records would have been sealed from the public, thus leaving the costs associated with each lawsuit unknown.

Information related to the costs of lawsuits based on allegations of false arrest, negligent actions or failure to act, and denial of civil rights cases was available for all of the lawsuits analyzed in the dataset. Lawsuits based on allegations of false arrest resulted in payments ranging from \$205,000 to \$740,000, with an average payment of \$400,690 per lawsuit. Litigation involving claims of negligent actions by officers or failure to respond resulted in payments ranging from \$200,000 to \$3,000,000, with an average payout of \$1,725,810 per lawsuit. Over 78% of these lawsuits resulted in payouts of \$1,000,000 or more. Finally, lawsuits involving accusations of the denial of civil rights resulted in payouts ranging from \$20,000 to \$120,000, with an average payout of \$60,249 per lawsuit. Although some of the data was missing for some of the lawsuits, it was still possible to get an idea of the costs associated with liability incidents that have resulted in police-involved litigation.

**Table 4. Costs Associated with Police Liability Incidents Resulting in Litigation as Reported in the *New York Times*, *Los Angeles Times*, and *Chicago Sun-Times*, 1993-2003**

Type of Lawsuit	Range of Costs	Average Cost
Physical Abuse/Excessive Force	\$10,000 - \$21,700,000	\$2,555,868
False Arrest	\$205,000 - \$740,000	\$400,690
Negligent Actions or Failure to Act	\$200,000 - \$3,000,000	\$1,725,810
Wrongful Death	no data available	no data available
Denial of Civil Rights	\$20,000 - \$120,000	\$60,249

## Conclusion

It is likely that police liability and police-involved litigation will remain important issues in American law enforcement for years to come. Since these problems will not simply go away, it is critical for police executives to begin to develop and implement innovative strategies and programs to manage liability incidents before they reach the courtroom. The first step in creating a liability management program is to become committed to tracking and recording police officer activities and behaviors that often result in liability claims or in some cases, lawsuits. Past research on police-involved

litigation revealed that some police agencies do not track and record lawsuits involving their employees (Archbold & Maguire, 2002; Cheh, 1995; Human Rights Watch, 1998; Kenney & Alpert, 1997; Pate & Fridell, 1993). It is likely that many of the other police agencies that were not included in the previous studies also do not track or monitor lawsuits filed against them. When police agencies fail to monitor liability incidents and/or lawsuits involving their employees, they are ignoring a problem that could become worse or in some cases, extremely expensive.

In the last decade, some police agencies have begun to take notice of the most common types of liability incidents that can result in litigation and have taken the initiative to adopt accountability-based programs to deal with such issues. These accountability programs are based on the premise of identifying patterns of officer activities and behaviors that are problematic before they result in citizen complaints, liability claims, or litigation. One example of this type of liability management program includes early warning systems or early intervention systems. Walker (2005) defines an early intervention system as a computerized information system that systematically compiles and analyzes data on problematic officer behaviors, citizen complaints, use-of-force reports, and other performance indicators to identify recurring performance problems. Police agencies adopt early intervention systems in an attempt to manage liability-related incidents that can lead to costly litigation.

Early intervention systems are often only one part of a larger risk management effort made by police agencies. Unfortunately, a recent study revealed that only 4% of the largest police agencies in the United States have some type of risk management division or program in place to help them manage police liability incidents (Archbold, 2004). Until more police agencies across the United States become committed to identifying liability problems and ultimately implementing some kind of liability management program, this issue will remain at the forefront of police administrators' concerns for years to come.

## **Limitations**

As with most data sources, there are some weaknesses associated with using newspaper articles to study police-involved litigation. A major concern would be the selective reporting process that occurs with most media sources, including newspapers. We cannot be certain that the reporting of police-involved litigation by newspapers accurately reflects the current state of police-involved litigation in the United States. It may be the case that newspapers only report the most extreme or extraordinary lawsuits (Robbennolt & Studebaker, 2003). Newspapers may also only choose to report on lawsuits that involve moderate to large monetary awards or settlements (Bailis & MacCoun, 1996). This type of selective reporting would skew the accuracy of the frequency of lawsuits filed against police, as well as the costs associated with police-involved litigation. Newspapers might also only report the monetary awards identified in original verdicts but not provide any follow-up reporting on cases in which final disbursement awards ended up being significantly less than what was awarded in original verdicts (Green, Goodman, & Loftus, 1990-1991, p. 817). In addition, newspapers may not report on all of the lawsuits that were rejected or thrown out by the court on the grounds that the lawsuits were "frivolous" (Robbennolt & Studebaker, 2003).

After considering some of the weaknesses associated with using newspaper articles as data sources (in general), there are some limitations that should be noted when considering the findings of the current study. First, the data collected and analyzed for this study is based solely on what was reported in the *Los Angeles Times*, *Chicago Sun-Times*, and *New York Times*. That means that the findings reported in this article rest solely on the accuracy of reporting by all three of these newspapers. How and why stories on lawsuits involving the police were selected for publication in these three newspapers and the degree to which those stories selected for publication represent the three jurisdictions featured in this study are unknown. In addition, the two search phrases used to collect newspaper articles for this study (“police and lawsuits” and “police and settlement”) could add selection bias to the sample. Future studies that use newspaper articles as data sources should incorporate additional search phrases. Finally, by choosing three newspapers that are located in large, urban cities, the findings of this study are not generalizable to medium-sized or small cities across the United States.

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## **Endnotes**

- <sup>1</sup> Section 1983 lawsuits can be filed by citizens that allege that a public official has deprived them of some rights, privileges, or immunities secured by the Constitution (Palmiotto, 2001). For a more detailed explanation of Section 1983 lawsuits, see pp. 22-23 in Palmiotto (2001).
- <sup>2</sup> In 2003, the *New York Times* ranked third in the top 100 daily newspapers in the United States. The *Los Angeles Times* was ranked fourth on the list, with the *Chicago Sun-Times* coming in at 13th place ([www.infoplease.com/toptens/usnewspapers.html](http://www.infoplease.com/toptens/usnewspapers.html)).
- <sup>3</sup> Even though the Rodney King incident took place in 1991, litigation involving that incident/case carried on over several years after the incident occurred in Los Angeles.

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# **Castle Rock v. Gonzales: Due Process, Police Discretion, and Mandatory Enforcement of Protective Orders: The Promised Land?**

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## **The Nature of Restraining Orders**

Orders of protection, often referred to as protective orders or restraining orders, are frequently used as a civil remedy to provide some level of protection for domestic violence victims seeking to end their victimization by an intimate partner. Restraining orders are orders of the court, issued upon application by the domestic violence victim in response to a real or perceived risk of further violent acts. These restraining orders are signed by a judge either after a criminal procedure has begun for domestic violence (i.e., no contact order) or during the course of civil divorce and/or child custody proceedings (i.e., restraining order). Restraining orders may be short in duration, as in a temporary restraining order, or permanent in nature in the event of a final determination of the court for the need of a lasting order of protection. Violation of such orders constitutes contempt of court and creates the mandate in many states for arrest when the police have knowledge of the violation (Buzawa & Buzawa, 2003). Currently, all 50 states and the District of Columbia have provisions for restraining orders. A restraining order is enforceable outside of the jurisdiction in which it was issued under provision of the federal Violence Against Women Act (VAWA), which provides “full faith and credit” to all restraining orders regardless of the state of origin. Thus, courts can enforce restraining orders (Pennsylvania Coalition Against Domestic Violence, 1999).

Restraining orders seek to accomplish several levels of protection by providing victims relief from future abusive situations. Protective orders generally serve several purposes. Once a situation exists involving physical abuse or the threat of abuse, the protective order eliminates or at least limits unlawful contact with the victim by the offender. This preventive measure is an attempt to use legal sanctions to dissuade further abusive behavior (i.e., no contact orders, established visitation procedures with minor children, orders to vacate the domicile, exchange of property procedures, prohibition against stalking, and court-ordered counseling). These judicial actions can provide a sense of empowerment for a victim whose life may seem out of his or her control. The protective order also provides police with an enforcement tool they can use to offer victims some level of legal protection (e.g., the arrest of a violating spouse). The protective order provides the offender with the opportunity to refrain from further abusive behavior while remaining free to continue working and providing financial support (Buzawa & Buzawa, 2003).

Protective orders by their nature are limited in the level of protection they can provide. Such orders are at the discretion of judges, and such judicial discretion certainly is not automatic or consistent in the scope of protection offered. Victims must be proactive in seeking a protective order, and if they do, victims are also the ones who must notify the police and court of the violation of the order for it to be enforced and for protective action to be taken to the fullest extent provided in the order. Even if victims notify police, arrests are not necessarily automatic. The police must proceed in any situation with a level of discretion. Judgments by the police and subsequent handling in court by the judges are not consistent. Even when protective orders are sought and the police and courts offer the maximum protection afforded by law, the issuance of a legal document does not afford absolute protection against violent actions by the offender (Buzawa & Buzawa, 2003).

A major expectation of protective orders is that police officers responding to a situation involving a violation of a protective order will enforce the order consistently with state law and make an arrest if the appropriate circumstances meet the criteria specified in the order. The reality, however, is that arrests are not always made, even when there is overwhelming evidence of a violation of the court order (Kane, 1999).

In Orchowky's (1999) Virginia study, police officers were found to have positive attitudes toward mandatory arrest policies and viewed arrests as deterrents to domestic violence; however, 60% of the officers responding to the study indicated that they had "not much" or "very little" personal discretion in deciding to make an arrest. According to officers, the decision to arrest should be left to the discretion of the arresting officers. In the study, 33% of the officers made arrests in 90% of the domestic violence calls; whereas, 20% made arrests in half or less of the calls in which they responded. Kane (2000) reported that arrest rates in specific violations of restraining orders ranged from 20% to 40%.

Several categories of factors tend to have an influence on whether or not police officers make an arrest in a situation involving the violation of a protective order. First, situational characteristics influence any specific incident. Even though mandatory arrest laws intend to remove police discretion in domestic violence situations, the inevitable fact is that policing involves the application of judgment to specific situations, resulting in discretionary decisionmaking with regard to arrest factors. No amount of legislation can totally remove discretionary decisionmaking by police officers. In addition, the way that victims are perceived by the police and the attitudes of the victims toward the police influence the discretionary decisionmaking process. This second factor, of course, is further influenced by the third factor, the suspect's traits and behavioral interactions with the police. Other significant factors regarding police discretion in arrest decisions for violations of protective orders include the offender's absence upon the arrival of police, who called the police, the presence of weapons, the police officer's perception of risk to the victim if an arrest is not made, injury or threat of further injury to the victim, the presence of children, and the nature of the relationship between the victim and the offender (Buzawa & Buzawa, 2003; Kane, 2000). Police discretionary decisionmaking related to arrests can, in rare instances, create tragic results.

In a study of police responses to restraining orders, Kane (2000) found that the single greatest predictor of arrest for violation of a protective order was the use of a weapon. When risk was low for harm to a victim, however, the primary objective of preventing reoccurrence of abuse was not as urgent, resulting in the attempt on the part of the responding police officers to find alternatives to arrest. Although not excluded in the

study but relevant to the case under examination in this article, Kane found that in 42.8% of the domestic violence cases reported, the offender had departed before the police arrived, and there were no indications of subsequent arrests.

## 14th Amendment

Ratified in 1868 as the second of the postbellum amendments, the 14th Amendment reads in part as follows:

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.

This portion of the amendment provides certain restrictions on action by states and makes their actions subject to federal review. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law”: The basic idea behind this provision is that states seeking to impinge upon a person’s life, liberty, or property must do so in a fair manner. Perhaps the most familiar function of the due process clause of the 14th Amendment is the selective incorporation of portions of the Bill of Rights to the states. Thus, for example, states may not create laws that deny the right to freedom of religion contained in the First Amendment to the constitution (Nowak & Rotunda, 2000).

The due process clause also contains other less specific protections to persons subject to its application. Specifically, the clause contains both a substantive and procedural component (Nahmod, 1993). Procedural due process concerns *the method* or way government action results in a deprivation of life, liberty, or property. Such deprivations must be accomplished via fair procedures (Wells & Eaton, 1984). Here the focus is on the procedure used by the government to reach some conclusion affecting a person’s life, liberty, or property (Heckman, 2005). This procedural protection is designed to ensure “the security of interests that a person has already acquired in specific benefits” (*Board of Regents of State Colleges v. Roth*, 1972, at 576).

The substantive due process protections of the 14th Amendment are stricter in their limitation of state action. These protect “the individual against certain government actions regardless of the fairness of the procedure used to implement them” (Wells & Eaton, 1984, p. 215). In this area of law, we ask “to what extent does the due process clause concern itself not simply with the methods of governmental action but also with its Substance?” (Gunther, 1985, p. 441). Here, the focus is upon the fairness of the governmental action that affects life, liberty, or property (Heckman, 2005). “Substantive due process prohibits the government from infringing on a fundamental interest unless it has a compelling interest and the infringement is narrowly tailored (strict scrutiny)” (Smith, 2005, pp. 210-211). In these cases, the substantive due process clause creates “certain rights that are not explicitly contained in the Bill of Rights” (Edlund, 1995, p. 101). That is, the clause concerns fundamental values that are not specifically enumerated in the text of the constitution (Gunther, 1985). For example, this clause has been found to encompass a right to vote as well as a freedom to travel among the states (Edlund, 1995). This aspect of due process has also been applied in cases involving personal privacy and autonomy as well as domestic relations

(Gunther, 1985). The Supreme Court has generally been reluctant to expansively construe this aspect of due process and has espoused a preference for analyzing cases under applicable specific textual constitutional protections rather than using the nebulous substantive due process protection (*Sacramento v. Lewis*, 1998).

In short, “procedural due process is concerned with whether the method of application of a law is fair, and substantive due process deals with whether the result is fair” (Mehrbani, 2005, p. 215). The distinction between these two areas of due process can be confusing, and Court opinions often are vague in explaining which aspect of due process is determinative (Wells & Eaton, 1984).

Heckman (2005) notes that there are four primary elements to establishing a prima facie violation of the 14th Amendment due process clause: “(1) the plaintiff is a person; (2) state action is involved; (3) the plaintiff’s life, liberty, or property interest is involved; and (4) there was a lack of due process provided to the individual-plaintiff by the state entity” (p. 2).

A substantive due process violation generally requires a heightened mental state on the part of the government actor. Thus, when a governmental actor performing his or her discretionary duties acts in a way that “shocks the conscience,” a substantive due process claim is warranted. This standard is designed to indicate those few instances when official conduct offends the essence of our civilized governmental system. Only the most egregious governmental conduct is considered arbitrary enough to reach the level of “shocking the conscience” and, thus, to violate the due process clause. The test is not met by the tort concepts of due care and negligence. In these cases, only egregious state action that contradicts basic ideas of fair play and decency will support a claim of a violation. In cases in which the government actor has time to contemplate his or her action, the standard of culpability will fall to “deliberate indifference” (*Smith v. Williams-Ash*, 2005).

The establishment of a procedural due process issue involves different factors. In such a case, a plaintiff must show, . . .

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Mathews v. Eldridge*, 1976, at 335)

Thus, generally “to establish a procedural due process violation, a plaintiff need not only show a protected interest, but must also show that he or she was deprived of that interest without sufficient process” (*Swipies v. Kofka*, 2005, at 715).<sup>1</sup>

In the context of domestic violence litigation, a victim asserts different issues depending upon whether the claim is based upon a procedural or substantive alleged violation of due process. In a claim based on a substantive due process theory, the plaintiff seeks “to force officers to give battered women protection whenever the state is aware of their individual plight” (“Developments in the Law,” 1993, p. 1558). In those cases where the state has already “recognized the distinctive needs of battered women, for instance, with protective legislation or restraining orders, procedural

due process claims attempt to induce individual officers and departments to actually provide that protection" ("Developments in the Law," 1993, p. 1558). Thus, one may distinguish a procedural due process claim from substantive due process claim "because in the former, the right to protection is grounded in state law, rather than the Constitution" ("Developments in the Law," 1993, p. 1562). In essence, a person proceeding under a substantive theory claims that the state is obligated to protect him or her from domestic violence, but a person proceeding under a procedural theory asserts that fair procedures must be used by the government before denying protection from domestic violence (Borgmann, 1990).

### ***DeShaney v. Winnebago County Department of Social Services***

Prior to the *Gonzales* case, the Supreme Court dealt with the duty of a state to protect a citizen from harm caused by a third party. This similarly tragic case, *DeShaney v. Winnebago County Department of Social Services* (1989), establishes an important contextual backdrop to the *Gonzales* case. In *DeShaney*, a young boy (Joshua) had come to the attention of child protective services. While his case was active, he was beaten repeatedly over 26 months with three hospitalizations. The state service providers did not engage in coercive intervention in the case. Ultimately, Joshua was beaten into a coma by his father. He suffered irreparable brain damage and was expected to be in an institution for the rest of his life.

The state was sued by Joshua and his mother under a Section 1983 action. "The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the 14th Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known" (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 193). The claim relied upon substantive due process clause concerns rather than procedural issues, as the "petitioners [did] not claim that the State denied Joshua protection without according him appropriate procedural safeguards . . . but that it was categorically obligated to protect him in these circumstances" (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 195).

The opinion by the justice held that . . .

Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 196).

In short, the function of the clause was to "protect the people from the State, not to ensure that the State protected them from each other" (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 196). Therefore, based on the facts of the case, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause" (at 197).

The opinion did note that a state may have a duty to protect due to the establishment of a special relationship between the state and an individual. For example, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being” (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 199-200). The substantive due process protection in such a case is based upon “the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means” (*DeShaney v. Winnebago County Department of Social Services*, 1989, at 200). In the *DeShaney* case, however, the harm to Joshua was done by his father, who was not a state actor. Moreover, while the state may have been aware of the danger to him, it did nothing to create or exacerbate that danger.<sup>2</sup> The opinion ended by noting that while there was no constitutional duty to protect in this case, states may create duties of care in such cases via legislation or court rulings if they wish.

### **Castle Rock v. Gonzales**

The facts of the *Gonzales* case involve the actions of the Castle Rock Police Department with regard to the enforcement of a restraining order between a divorced couple. Specifically, Jessica Gonzales had obtained an initial restraining order as part of her divorce proceeding from her husband, Simon. The order specified that he not “molest or disturb the peace of [respondent] or of any child” and that he remain at least 100 yards from the family home at all times (at 2800-2801). On the back of the form, the following warning was also printed:

A knowing violation of a restraining order is a crime. A violation will also constitute contempt of court. You may be arrested without notice if a law enforcement officer has probable cause to believe that you have knowingly violated this order. (at 2801)

The order also contained a printed provision directed at law enforcement officers who may come into contact with the court order. This provision, entitled “Notice to Law Enforcements Officials,” read as follows:

You shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existences of this order. (at 2801)

The order was subsequently modified to allow visitation. Specifically, the visitation provision allowed Mr. Gonzales to spend time with his children on alternating weekends and for two weeks during the summer. The order also allowed for less structured visitation “upon reasonable notice” that was “arranged by the parties” and allowed him to come to the home to collect his children for the approved varieties of visitation.

In the late afternoon of June 22, 1999, Simon took his three daughters without prior arrangement of permission. When Ms. Gonzales noticed that her children were gone, she suspected her husband and phoned the police approximately one to two hours after the children were found to be missing. Two officers of the Castle Rock Police Department responded and were shown the above restraining order and asked to enforce it. The officers suggested that Ms. Gonzales recontact the department if the children were not returned by 10:00 PM. Ms. Gonzales received a phone call from her husband and was told that he had taken the children to a local amusement park in Denver. She then called the police and relayed this information and asked that an alert be issued for her husband. The officer fielding her call asked her to wait until 10:00 PM to see whether the children were returned. Shortly after 10:00 PM, Ms. Gonzales again called the police department and was asked to wait until midnight to see whether her children were returned. Ms. Gonzales recontacted the police at approximately 12:10 AM and was advised to wait for a responding officer. No one responded, however, so she drove to the police station.<sup>3</sup> There she filled out an incident report. At approximately 3:20 AM, Simon Gonzales came to the Castle Rock Police Department and opened fire with a hand gun. He was shot and killed by police in apparent “suicide by cop” behavior. The dead bodies of his three daughters were discovered in his vehicle.

The Court in this case was faced with the issue of “whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated” at (2800). The Court’s opinion held that the “respondent did not, for purposes of the due process clause, have a property interest in police enforcement of the restraining order against her husband” (at 2810).<sup>4</sup>

The 7 to 2 opinion by Justice Scalia may be divided into five sections. The opinion begins by noting the substantive due process ruling in *DeShaney* and its limitations. The core holding in that case was expressed as follows: “the so called ‘substantive’ component of the due process clause does not ‘require the State to protect the life, liberty and property of its citizens against invasion by private actors’” (*Castle Rock v. Gonzales*, 2005, at 2813, citing *DeShaney v. Winnebago County* at 195). Yet, the *Gonzales* opinion noted that a different Due Process Clause issue concerning procedural due process was not expressly ruled upon in *DeShaney*.<sup>5</sup>

Justice Scalia then goes on to clarify what the procedural aspects of the due process clause protects. He notes that “to have a property interest in a benefit, a person must have more than an abstract need or desire . . . he must . . . instead have a legitimate claim of entitlement . . .” (at 2814, citing *Board of Regents of State Colleges v. Roth* at 577). Moreover, these “entitlements” flow from “independent sources such as state law,” not the Constitution (at 2814). Thus, an effective claim regarding a violation of procedural due process must “be based on a legitimate claim of entitlement to a benefit” (*Majors v. Oakland*, 2005, at 12). If a state has not created an entitlement “to some benefit, there is not property interest and thus not procedural due process violation” (*Majors v. Oakland*, 2005, at 12).

The next portion of the opinion focuses on whether the state of Colorado conferred such an “entitlement” upon Ms. Gonzales due to the statute passed by the state’s legislative branch. Justice Scalia notes that this determination of state law intention is decided by federal law, yet resolving this federal question “begins . . . with the determination of what it is the state law provides (at 16). So the initial question



for this case is “whether Colorado law gave [the] respondent a right to police enforcement of the restraining order” (at 16). The presence or absence of this right is alone determined by the statute in question, as Gonzales cannot establish a common law or contractual right to enforcement. In attempting to determine this issue, the opinion looked not to the order but rather to the notice provided to law enforcement on the back of the order. Specifically, the opinion used Colorado Revised Statute Section 18-6-803.5(3), which Justice Scalia averred “effectively restated” the provision on the back of the order. Section 18-6-803.5(3) reads as follows:

(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. *A peace officer shall use every reasonable means to enforce a restraining order.*

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . .

(I) The restrained person has violated or attempted to violate any provision of a restraining order; and

(II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry. (at 19-20)

The opinion declines to find that the above Colorado statute created an entitlement to enforcement. In doing so, Justice Scalia relies on the widespread practice of states using mandatory language in their statutes but recognizing the presence of police discretion. He also notes that the Court dicta in *Chicago v. Morales* (1999) averred that mandatory language in a statute designed to deal with criminal gangs still vested officers with some modicum of discretion. To buttress this conclusion, the opinion avers that discretion often is practically necessary to law enforcement, even when language used is mandatory in nature.<sup>6</sup> Justice Scalia also distinguishes the argument that the domestic violence mandatory arrest statutes provide support for the notion of mandatory enforcement. He notes that many such statutes do not provide mandatory direction for those situations, as in the case at bar, in which the offender is not present when the officer responds. He also notes that the statute in question recognizes that at times, arrest will be “impractical” and that in such cases, an officer should seek a warrant rather than to effectuate an arrest. The last portion of the logic used by Justice Scalia to find that Colorado did not create an entitlement enforceable by the 14th Amendment concerns the specificity of the means of enforcement. Essentially, what action was mandated? The statute appeared to mandate the right to have an arrest, to have the police seek an arrest warrant, or to diligently attempt to enforce the order’s requirements. The opinion states that “such indeterminacy is not the hallmark of a duty that is mandatory” (at 2827). For these reasons, the opinion concludes that the law did not create an entitlement regarding the enforcement of the restraining order.

The last major portion of the case's logic focuses upon why the finding of this mandate as a property right would be a substantial change from previous cases. In so doing, the opinion notes that property interests generally have some monetary value. Yet the "right to have a restraining order enforced does not 'have some ascertainable monetary value,'" as some prior case law has required (at 2832, citing *Merrill*, 2000). Next and perhaps more important, Justice Scalia notes that the property interest averred would arise "incidentally" from the government function of arresting people based on probable cause of criminality. Here, the logic draws a fundamental distinction between government action that directly affects a citizen and government action that operates on third parties, which "indirectly or incidentally" affects another citizen's legal rights. Such an indirect benefit is said to be beyond the scope of the 14th Amendment.

The opinion ends by stating the implications of the holding in conjunction with prior case law. Specifically, the case states that "in light of today's decision and that of *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the due process clause, neither in its procedural nor in its 'substantive' manifestation" (at 2836). It is noted, however, that this holding "does not mean States are powerless to provide victims with personally enforceable remedies" (at 2836). Thus, states may create state law based on tort causes of action when police departments are "generally held financially accountable for crimes that better policing might have prevented" (at 2836).

## Policy Considerations

This decision has numerous policy implications for police agencies. Since the Court found the police response in this case was not a 14th Amendment violation, corrective responses by law enforcement agencies are not the primary focus of policy implications. Instead, the most pressing policy considerations involve an examination of the case facts in order to determine what can be learned in an effort to avoid duplication of the tragic results in *Castle Rock*:

- A major constraint on unfettered police action is the threat of civil liability. The lack of civil liability as a consequence of police action or inaction might mean that police officers in similar situations might not take the necessary proactive steps to enforce violations of restraining orders. With competing priorities for police time, especially in large jurisdictions, police response often defaults to what the police officer perceives to be the most pressing: the danger to public safety or the necessity of response to avoid exposure to potential civil suits. Without the threat of civil liability, there might be more police inaction than action.
- This decision recognizes the necessity for police discretion. With virtually unlimited expectations for the provision of police services, police agencies realistically cannot respond to every situation or request for unlimited protection; enforce every law; prevent every crime; make arrests for every violation of the law; and respond to every request for services without consideration of the time, effort, and resources necessary to meet wide-ranging demands. Of course, discretion requires by necessity good judgment in choosing the degree of response to any particular circumstance. *Castle Rock v. Gonzales* graphically illustrates the necessity for officers to carefully consider the consequences of police inaction in situations in which proactive responses may be more appropriate than reactive responses. The officers in *Castle Rock* used their discretion to delay their response in reaction

to the offender's next action, which officers anticipated would be the return of the children. The offender's response, however, was unanticipated, leading to tragic results. No one expects police officers to know precisely what actions people will take in the future, but police officers should have a reasonable expectation that a particular set of circumstances might create a reasonable assessment of risk to potential victims and should take appropriate actions in response to the threat.

- The facts of this case expose the weaknesses of law enforcement agencies in providing long-term protection for domestic violence victims and their children. These cases are overwhelming in numbers, and restraining orders are commonplace. Restraining orders provide protection only to the extent that the respondents are willing to abide by the terms of the orders. The police can only respond effectively to violations when the offenders can be readily located. The police can only respond in a very narrow and limited, superficial manner. Police awareness of the reality of their limited and often ineffective responses tends to create complacency in their reactions to these situations. Police agencies lack the ability to effectively provide specific protection for general threats in an overwhelming number of similar cases. Police leaders, in light of this case, need to closely examine police policies regarding discretionary decisions on a case-by-case basis and more effectively use lethality assessments in making decisions about what type of protection can be provided.
- While the Court's decision does not support the Constitutional duty to protect victims in domestic violence, there is a legitimate public expectation that police will provide a reasonable level of protection. Since police agencies have recognized the need to consider community concerns about crime and disorder, it is readily apparent from this case that the public expectation, regardless of Court decision, would be to have the officers take reasonable steps to locate the offender. Even if the children in the Gonzales restraining order were already dead, the police would have avoided criticism for a timely, legitimate effort to protect them. While public expectations cannot lead police to unreasonable responses, certainly there is a need for realistic responses to reasonable public expectations of police services. If public concerns are not realistically addressed, they become hollow promises that diminish public confidence in the police, which in turn, diminish the capacity of the police to adequately provide their services.
- The court decision may not create a legal consequence for the officers and the agency in these circumstances, but this does preclude an administrative disciplinary action against the officers for not taking what could reasonably be called a minimal response. Clearly, disciplinary action might have been administered. Police agencies examining the facts of this case should see the need for officers to be accountable for making sound judgments in discretionary actions. What would the "reasonable officer" do in a similar situation? Officers daily assess situations to discern what might constitute a potential real emergency. While statistically harm to children in similar domestic situations is low, domestic violence cases in general have a high potential for abuse and violence of some type. Officers have a duty to do their jobs. While this does not rise to a constitutional duty, it can be an organizationally mandated duty with administrative consequences for not using sound judgment and making unreasonable decisions.
- A wide range of social and legal issues influence police response related to domestic violence cases. For example, victims often voluntarily allow offenders to violate orders or selectively request police response to restraining order violation, and the

courts have not always responded to violations of restraining orders in a punitive or protective manner. These complexities of circumstances in domestic violence cases provide mixed messages to police officers, and more definitive expectations might provide definitive responses from the police. While police policy usually provides clear intent as to the actions of police officers in domestic violence cases, the reality of police response does not always meet expectations. Police leaders can discern from the Castle Rock case that policy intent does not always translate into effective police action. The typical administrative answer to such incongruities is more training. While effective training provides some evidence of intent to correct insufficient responses by officers, it does not provide all the necessary components for more effective police responses to discretionary actions requiring reasonable risk assessment and effective judgment for appropriate response. More effective and focused leadership and supervision can mold an organizational culture that will produce greater expectations for more successful interventions.

- The lack of protection available from the police and the court's protection of police inaction may cause victims of domestic violence to lose faith in the use of protective orders as a means of providing protection for themselves and their children. Even though the "piece of paper" is not bullet-proof protection, the protection order does provide a reasonable tool for the court to authorize police action when no other action is possible. Thus, restraining orders can potentially be useful tools in specific incidents in which police action is appropriate and no other authority for action exists. Lack of confidence in restraining orders, however, could create a more disturbing trend in domestic violence protection. The courts and police agencies can counter such a trend with coordinated and effective protection schemes for domestic violence victims.
- The decision by the Court in the Castle Rock case leaves open the opportunity for state legislatures to enact tort remedies for police failure to enforce restraining orders. If this type of case repeats and patterns of nonenforcement persist, then state legislatures may take up the cause of domestic violence victims and provide the tort reform to allow civil remedies for what could be viewed as an abuse of police discretion.
- Regardless of court decisions, law, or agency policy, law enforcement officers and leaders must recognize the moral and ethical responsibilities of providing appropriate responses to pleas for help in citizens' protection from violence. Reasonable officers use sound judgment, make ethically based decisions, and take appropriate actions to protect people who are vulnerable to harm. Anything else is a weak rationalization. Allowing cynicism, laziness, or weariness to conflict with effective police response runs counter to the professional and ethical expectations of the role of law enforcement officers. A less-than-sufficient response premised on powerlessness in uncertain circumstances is bad policing. Police leaders cannot accept this as the norm and must hold officers accountable, not just through the creation of more bureaucratic policy but through more effective leadership, supervision, and accountability. Coercive discipline is not the complete answer to these administrative responses. Developing and reinforcing an organizational climate that values effective, responsive action to potential violence might provide a more powerful and effective leadership response to this challenge.

## Conclusion

The Supreme Court in *Castle Rock v. Gonzales* faced the issue of "whether an individual who has obtained a state-law restraining order has a constitutionally protected

property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated” (at 2800). The Court’s opinion held that the “respondent did not, for purposes of the due process clause, have a property interest in police enforcement of the restraining order against her husband” (at 2810). This holding appears to have foreclosed at least temporarily the due process remedy for failure to enforce a restraining order. The holding also can be read as strongly supportive of the pervasive nature of discretion in American policing. States may individually provide tort remedies for police failure to enforce restraining orders if they wish; however, political will and concerns about the substantial cost associated with such liability would seem to militate against such a policy initiative.

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Mathews v. Eldridge, 424 U.S. 319 (1976).

## Endnotes

<sup>1</sup> See *Solomon v. Philadelphia Housing Authority* (2005), which states, "When analyzing a §1983 claim alleging a state actor's failure to accord appropriate levels of procedural due process, our inquiry is bifurcated. We first must determine whether the asserted interest is encompassed within the 14th Amendment's protection of life, liberty, or property; if so, we then ask whether the procedures available provided the plaintiff with adequate due process."

<sup>2</sup> This idea has become known as the "state created danger theory." In cases in which the state creates the danger and increases a person's vulnerability a substantive due process claim exists (*Star v. Price*, 2005). To prove such a case, plaintiffs must show

five things: (1) that they were members of a limited, precisely definable group, (2) that the state actor's conduct put them at significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the state actor, (4) that the state actor acted recklessly in conscious disregard of the risk, and (5) in total, that the state actor's conduct shocks the conscience (*Hart v. City of Little Rock*, 2005).

- <sup>3</sup> Subsequently, the town of Castle Rock has issued evidence to demonstrate that it spoke with Ms. Gonzales and met with her and responded to the father's residence to look for him and the missing girls on several occasions. The city also asserts that Ms. Gonzales initially agreed that there was no violation of the agreement and did not initially believe her children were in danger.
- <sup>4</sup> Ms. Gonzales subsequently filed a petition with the international civil-rights tribunal—the Inter-American Commission on Human Rights in Washington, D.C. The commission can only make recommendations to government and may not make monetary awards (“Woman Who Lost Daughters,” 2005).
- <sup>5</sup> This unresolved issue concerned “whether state ‘child protection statutes’ gave [him] an entitlement to receive protective services in accordance with the terms of the statute” (at 2813, citing *DeShaney v. Winnebago County Department of Social Services* at 195).
- <sup>6</sup> For example, an officer would need to be able to prioritize enforcement against other competing duties. Moreover, in cases in which the suspect's location is unknown, some discretion would have to be applied used in the methods used to look for the individual.

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# Law Enforcement Training: Rhetoric, Liability, and the Certificate

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If you pick up a trade publication or visit any professional organization's website today, you will more than likely find an advertisement on "how to become a certified \_\_\_\_\_" (you fill in the blank). More and more, the industry is seeing a proliferation of specialized titles for those who pay a rather large fee, submit an essay-style written examination, and/or have experience in a designated area for a specific amount of time. To a further degree, we are also seeing more training programs for practitioners that promote the ability *to* certify or *be* certified.

Holding a certification is central to anything one does in law enforcement. In fact, as will be discussed, certification leads to a whole new world of insight and perspective. The problem lies in the rhetoric of just what certification *means*. This question is best summarized through a familiar and simple inquiry-based methodology that considers the who, what, when, where, and why of certification.

## Who Is Certified?

Typically, "certified \_\_\_\_\_" (you fill in the blank) or agency instructors are law enforcement officers who have been through recruit training or field training programs and have spent some time in the field or in the jail. Depending on agency circumstances, however, this is not always the case. For example, reserve and civilian officers, agency staff, and community liaisons may acquire certifications as agency supplements in an effort to provide services. Agencies may also have reserve officers who have certifications such as "radar instructor" or "radar operator" who themselves do not have basic law enforcement certification. Other times, agencies may have an officer trained and assigned as a community policing officer who spends absolutely no time doing community policing. This is no different than a department that sends its officers to pursuit driving training with a department policy that states that pursuits are forbidden.

It is important for agency administrators to identify specific variables when seeking out potential applicants for specialized training and assignments. Not only should the applicant share similar administrative philosophies about training and the dissemination of such skills, techniques, and knowledge, but he or she should also exhibit a passion for the certificate. How often do officers submit training requests for expensive and seemingly nontangible training simply for purposes of satisfying annual training hours or providing a vacation out of town?

In addition to understanding the needs of the agency and resources available for allocation, savvy police chiefs, sheriffs, training administrators, or their subordinates should also have an intrinsic knowledge of their personnel: their weaknesses, their strengths, their interests, and their commitments to pursuits in



their career. From this, a comfortable (and worthwhile) decision may be made as to “who” gets to be certified and “what” that certification will entail.

## **What Is Certification?**

Certification is perhaps best described as credentialing personnel in an effort to provide an explicit display of competence, recognition, or achievement. It may also be considered as a simple tool for continued personal or professional growth and development.

Law enforcement officers attend basic recruit training and become certified to carry out specific duties and responsibilities under local, state, and federal law. In doing so, officers may become certified to use projectile irritants such as oleoresin capsicum, the baton, taser, and other methods of force. Likewise, officers may become certified to handle a canine unit, head up a community policing initiative, or become a drug recognition expert.

Certifications are most commonly documented through a basic certificate or letter that states that the individual has completed a certain number of training hours, typically including written and practical proficiencies. Some certifications are designated for instructor-trainers; while other certifications may simply provide documentation that the officer is proficient enough to use the knowledge in a basic manner that is consistent with the certifying body, community standards, department policy, and state and federal law. This could be anything from the use of force technique or tool to providing D.A.R.E. programs to a K-12 school district. Careful attention should be given as to how the certificate is articulated. Is it a certificate of *completion*, certificate of *participation*, or *instructor certification program*? Certifications given to officers to instruct or simply use the knowledge are typically accompanied by words and phrases that give them such specific designation.

## **When Is Certification?**

Beyond typical recruit-based training programs, including the academy and field training programs that officers attend shortly after being hired, law enforcement officers usually observe a period of field work and experience before they are authorized to become instructors or “certified \_\_\_\_” (you fill in the blank) in specialized areas. Contrastingly, there are a number of agencies who also try to get their officers into specialized programs immediately for purposes of accreditation, inhouse training, or simply for professional development and competence.

Spending some time within the organization and learning both formal and informal rules assists both the officer and his or her administrators in deciding whether or not the candidate is an acceptable choice for training/certification. It gives administration time to identify specific needs within the agency and further decide where and how to allocate funds (within positive fiscal parameters). This time also gives officers a period of self reflection as to what their passion is within that organization, how their skills may work for the organization, and where their current niche is or is not.

## **Where Is Certification?**

From a physical perspective, training and testing for certifications can occur essentially anywhere. From the confines of a police academy to the squad room of

a law enforcement agency, certification rituals can be held anywhere people can get together. A contemporary event in the course of certification programs is the use of technology. Mediated equipment, from *PowerPoint*<sup>™</sup> presentations to videos and Internet programs, allows the training environment to expand in depth. As a result, many certification programs today are set up in physical quarters in which a projector screen or other equipment may be displayed and used to enhance the training.

## Why Certify?

Perhaps one of the most poignant questions asked about the certification process is its importance. Individual certifications in specific programs or certifications related to the agency as a whole may be required for some for purposes of accreditation or monetary allocations offered by local, state, or federal commissions. Whatever the specific cause, certifications are inevitably obtained and held as a qualifying document of the officer's or agency's proficiency and experience in a specific area or areas. It is also used to advance the overall knowledge of the practitioners in the field, ensuring that they are aware of current initiatives and approaches relative to the area of certification.

In today's litigious society in which a lawsuit is around every corner, law enforcement is reminded daily of the impact of improper decisions or merely "good" decisions that affected the other party *adversely*. As a result, how is certification used to minimize training liability for the trainer or trainer's agency provided to end users? Additionally, at what point is an officer's training certification or the fact that he or she is a training provider called into question negatively by opposing counsel?

The idea that trainers might be held liable because their instruction was somehow faulty appears to be a novel proposition, and little to no information or cases exist on that kind of claim. This situation may simply be labeled as "negligent training"; however, many lawsuits deal with the failure to train, and agencies or municipalities are alleged to have a policy of failing to train officers or failing to train officers adequately regarding tasks frequently performed.

The suggestion that little information exists on what is considered negligent training is due to the difficulty in meeting the burden of proof; therefore, it might be useful to examine a hypothetical lawsuit based upon the notion of negligent training in this context.

The most likely plaintiff in this type of legal action against an instructor would be either the student who took an instructor-training course or a third person claiming harm due to a student-officer who applied a training technique in the field. Alternatively, the plaintiff might claim that a particular training initiative was missing from the instruction. What kind of legal claim would the plaintiff bring in a lawsuit? Most likely, the claim would arise in tort; more specifically, it would allege a claim of negligence.

Negligence is the breach of a duty owed toward those who may foreseeably be harmed. In a lawsuit for negligent training, the plaintiff's claim would assert that a trainer's instruction or failure to instruct created an unreasonable risk of harm to the plaintiff. The claim could further assert that the trainer failed to take into consideration changes in the law or simply failed to abandon a technique that had been shown to be invalid (either through scientific or medical scrutiny). It might be

asserted that the instructor knew or should have known that a point of instruction was invalid or was excluded and that this resulted in harm to the plaintiff.

An important aspect of negligence is foreseeability. Although it is foreseeable that a training component or failure to include some aspect in training might lead to harm in general, it might be argued that the requisite foreseeability required more specificity. For example, instruction for a use-of-force technique might be given and then applied inappropriately to an arrestee by a student-officer. Even though a plaintiff would try to argue that the negligence was foreseeable, the relationship between some unknown third party and the original trainer is somewhat attenuated. In other words, the likelihood that the harm was foreseeable to the plaintiff, specifically, is difficult to prove, and it would depend largely on the facts and circumstances of each case as governed by *Graham v. Connor* [490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)].

Consider these factors: Did the student-officer retain reliable and valid training and simply forgot something and applied it inappropriately? Were there other intervening or contributing factors for the harm? Were there particular facts and circumstances unique to the situation? Four elements are required for a negligence claim: (1) duty, (2) breach of duty, (3) causation, and (4) harm (or damages). All four elements have to be proven in order for the plaintiff to be successful in a lawsuit. Each element is discussed below in the context of the previous hypothetical scenario.

*Duty.* Proving that the instructor had a duty to the plaintiff would not be outside the realm of possibility. A duty or obligation of reasonable care can arise out of statute, common law, policy, custom, contract, or relationship. For example, a third party such as an arrestee might have a weaker case against the trainer than the student-officer would have against the instructor. At least one obvious reason for this would be that the student had a better ground to claim that a duty arose to train effectively, which may include an argument based on duty arising out of custom, contract, or relationship. The third-party arrestee, however, would have to be craftier in developing an argument that the student-officer owed *him* a duty because that relationship is more attenuated.

*Breach of Duty.* A breach of duty implies that the instructor owed a duty but did not act in accordance with that duty. The instruction could be considered incompetent, unreliable, or invalid. But how are training methods deemed unacceptable? Who determines what is unacceptable? Regarding legality, training techniques are deemed unacceptable by determining reasonableness under the circumstances. Evidence that the training, or lack thereof, was unreasonable or reckless would have to be attested to in court. Who determines, then, the standards for appropriate training techniques under a set of circumstances? Content experts such as professional trainers, consultants, and law enforcement or corrections officers themselves would be called upon. For example, there may be differences in training courses, and these individuals would have varying opinions as to which training courses were best. Summarily, the reasonableness would depend on a variety of factors such as the testimony of the expert, specific facts, and circumstances of each case or the jurisdiction.

The standards for certification are determined by those who sit on their boards. Do they consist of civilians, attorneys, administrators, or city government or are they content experts, law enforcement officers, and public safety trainers? The standards of what constitutes competent and reliable training are largely controlled by the certifying bodies themselves.

Does it matter from which certifying organization instructor-training is received? While many instructor-schools have training that does not conflict with state P.O.S.T. or non-P.O.S.T. commissions, theoretically, liability would not rest on whether instructors came from a certifying organization. The question would be the *quality* of the training and whether it was recognized in the field as reasonable under the circumstances. An instructor or administrator, however, would also want to make sure that the organization offering instructor training had comparable and nonconflicting training standards as those offered in similar instructor schools in order to reduce the risk for liability and the argument that the training was unreasonable. For example, is an essay-style examination enough to qualify one as a “trainer”? Is law enforcement experience alone, without commensurate specialized instruction, testing, or education enough to qualify one as trainer or “expert”? The answers to these questions are found only through a generalizable, affirmative recognition by other trainers and certifying bodies regarding what is commonplace and acceptable as certification.

*Causation.* Causation is the link between the conduct of the officer and the resulting harm. In applying this element to our hypothetical situation, the plaintiff would try to prove that the trainer’s instruction (or lack thereof) was the cause for harm. Causation asks, “but for the trainer’s instruction (or lack thereof), would this harm have resulted?” Instructors defending themselves or their agency against a lawsuit would hope that despite their instruction, the harm would have resulted anyway. Although this question might only be answered based upon the specific facts, previous discussion regarding foreseeability demonstrates that proving that the instruction was the cause is, indeed, difficult.

*Damages.* Lastly, damages are the resulting harm suffered by the plaintiff. Damages can be upon a person or property and be both physical and emotional. Such harm may include injury or death, medical expenses, pain and suffering, loss of comfort, loss of society, humiliation, loss of income, or loss of expenses for property damage. A court presiding over the negligence claim must have a standard for which to measure the instructor’s blameworthiness. Typically, a standard in negligence claims is the failure to exercise reasonable care under the circumstances; however, some jurisdictions apply a higher standard for which to assess conduct. This higher standard is termed “gross negligence” and is typically defined as acting with reckless disregard to the consequences of one’s actions. The gross negligence standard forces the plaintiff to prove a higher level of blameworthiness on the part of the instructor. Instead of merely proving that the trainer acted carelessly or unreasonable under the circumstances, the plaintiff must prove that the instructor was reckless in training. Obviously, the instructor would want his or her jurisdiction to apply the higher standard of gross negligence because this is more difficult to meet. The court in the specific jurisdiction defines the standard that must be applied in the liability area. If this situation has never come up before in the jurisdiction, the court will have to determine what the standard will be for all future cases with the same kind of claim.

Here are a few suggestions for instructors to help minimize their risk for tort liability:

- If providing inhouse training to fellow officers, design training adequate to the tasks performed by officers in the agency on a regular basis.

- Develop course outlines, goals, learning objectives, and means of assessing the learning objectives. Keep updated course outlines and materials as changes develop in the law and training content.
- Offer updated training on a regular basis.
- Continue your own training on a regular basis, even if this is not required and even if it is only a refresher course. Keep a record of all training you have received. It is beneficial to keep the course training announcement with the dates, instructor(s), accrediting agencies, and the training and methods used to instruct you.
- If you have trained to be an instructor through a certifying program, it is beneficial to keep copies of policies. This information will provide data on training sources the program approves or accepts as well as its credentials and standards. If your training is done through an organization that does not “certify,” keep any material that describes its mission and goals, means of accomplishing goals, and information on its standards.

## **Suggested Legal References for Additional Reading**

### ***Liability***

42 U.S.C. Section 1983

*Bivens v. Six Unknown Federal Agents*

### ***Training***

*City of Canton (OH) v. Harris*

*Graham v. Connor* (1989)

*Valdez v. Abney* (1986)

*Whitney v. Warden*

*Owens v. Haas* (1979)

*Hays v. Jefferson County, Kentucky* (1982)

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# Minneapolis Police Department Pursuit Study

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This study is a review of police pursuits in Minneapolis, Minnesota, and an analysis of 18 months of data compiled in the International Association of Chiefs of Police (IACP) pursuit database. It also explores the demographics of pursuits to better aid the Minneapolis Police Department (MPD) in its use of policies and procedures when engaging in or deciding to engage in pursuits.

Frequently, police departments separate the function of emergency operation of a police vehicle from emergency vehicle operation in pursuit of a suspect. Department policy of the MPD makes a clear distinction between these two actions. The procedure for driving to a situation with emergency equipment is identified in "7-402 Vehicles-Emergency Response (10/12/01)" (MPD, 2004). Additionally, a special radio code is designated within the policy for this type of operation. Following this policy in the *MPD Policy and Procedures Manual* is a department policy titled "7-403 Pursuit Policy (11/20/01)" (MPD, 2004), which uses terminology distinctly different from that used in an emergency response. The definition applied to "vehicular pursuit" is, "... whenever an officer pursues a driver of a vehicle who has been given a signal to stop by the activation of red lights and siren, and the suspect or violator fails to comply and attempts to elude the officer by taking evasive actions" (MPD, 2004, paragraph 20).

As is normal practice, in early 2004, the management decision within MPD was made to review policy involving police vehicle pursuits to determine whether the public, suspects, and police officers were sufficiently protected from injury and/or death. It was apparent that a critical component was to review the existing internal data on police vehicle pursuits. From a training perspective, within the prior three to four years, MPD had engaged in hands-on pursuit training. The implementation of pursuit training was made in compliance with state law mandates. Officers and supervisors had also trained on policy and making "smart" choices to end pursuits. These smart choices include but are not limited to calling pursuits off. MPD management hoped that data collected would show that MPD supervisors and officers were using "smart" choices to "terminate" (MPD, 2004) at least 50% of the pursuits in which they engage.

MPD management decided to review data covering the time periods beginning January 1, 2003, and ending June 30, 2004, an 18-month time frame. Within the time frame, 352 police vehicle pursuits occurred that provided usable data and met review criteria. To provide for future comparative analysis of the data from other agencies,

MPD collected and analyzed vehicle pursuit variables that were being used nationally by an IACP pursuit database.

## Review of Related Literature

A study conducted by Alpert (1998) contained a sample of 1,055 sworn officers from four different police agencies, each operating under different policy and traffic and weather conditions. Each officer was given a questionnaire that included different police pursuit scenarios. Miami-Dade, Florida, Police operated under policy in which pursuit was only justifiable in the event of a violent felony. Omaha, Nebraska, Police operated under a judgmental policy. Mesa, Arizona, Police operated under policy in which pursuit was only justifiable in the event of a serious felony, and the Aiken County, South Carolina, Sheriff's Office had a very vague pursuit policy. The results of the study suggested that officers were more likely to pursue a driver suspected of driving under the influence than a driver for a traffic violation. In contrast, officers reported that they were more likely to pursue a driver for a traffic offense than a suspect for a property misdemeanor. Alpert (1998) found that commercial or freeway settings had little impact on the decision to pursue. In urban and residential areas, pursuits were much less likely to occur. Officers were three times more likely to pursue when roads were not overly congested and almost twice as likely to pursue when roads were dry. The most important factor in the decision to pursue was the need to apprehend a suspect by the officer(s).

In 1997, Falcone and Wells used an emergency radio frequency maintained by the Illinois State Police called Illinois State Police Emergency Radio Network (ISPERN) to collect vehicle pursuit data. Self-report data was collected and combined with the ISPERN project. The results from the ISPERN data set were very similar to police vehicle pursuit studies reviewed by Falcone and Wells. The pursuits ranged in length from 3.2 minutes to 5.0 minutes and were the result of traffic violations, misdemeanor offenses, and nonserious or nonviolent felonies. The nonurban locations were considered a big factor in the low accident rate. Only 62% of ISPERN pursuits ended in suspect arrest, compared to the range of 68% to 72% from the other studies. Falcone and Wells were able to establish that using police radio communications like ISPERN provides a realistic alternative to traditional data collection methods.

Pipes and Pape (2001) studied court cases that involved police vehicle pursuits and how agencies have developed pursuit policies:

CEOs of law enforcement agencies must create a policy that balances the need to apprehend offenders in the interests of justice with the need to protect citizens from the risks associated with police pursuits. Additionally, the policy must protect the financial interests of the community based upon potential losses of taxpayer dollars following successful litigation against the agency as a result of law enforcement actions deemed inappropriate by the courts. (p. 16)

From October 1994 to May 1995, the Police Executive Research Forum (PERF) made a concentrated effort to collect police pursuit and use-of-force data from agencies across the country. Becknell, Mays, and Giever (1999) were able to conclude that by themselves, policies, training, and evaluations of police departments may not adequately reflect the relationship between policy restrictiveness and the rate of force. There was also a small association with restrictive policies and excessive force, asserting that as restrictive policies increased per unit, the amount of excessive force used decreased.

In researching risks and alternatives to police pursuits, Hill (2002) noted problems with the ability of the officer and agency to accurately report the pursuit itself and the issues that arose with using the term "pursuit-related crash" (p. 14). Hill noted that the majority of police pursuits only last a few minutes and that over 50% of the accidents related to pursuits occur within the first two minutes.

In 1997, Alpert studied aspects from the view of officers, supervisors, the public, and suspects. Alpert illustrates in his research the need to update police pursuit policies since numerous departments have failed to update their policies to meet the changing needs of the department. Alpert interviewed over 100 suspects that had been arrested for fleeing the police, with over 70% of those suspects indicating that they would have slowed down when they felt safe. Feeling safe was later interpreted by the suspects as about two city blocks or about two miles on the freeway.

This study does not cover offender views on pursuits, but the data collected by Alpert reviews this topic comprehensively. This particular piece of research allows agencies some insight into why criminals are running from the police and offers suggestions for agencies when reviewing their current policy to help protect the public, officers, and suspects from injury. A majority of offenders were concerned with their own safety, believing they would not get caught. This article strongly implies that if law enforcement agencies change their vehicle pursuit policy to only pursue in a known violent felony situation, the result could be a reduction in the number of pursuits and the number of accidents and injuries to the public, suspects, and law enforcement personnel.

Crew (1995) also looked at a collection of 4,349 MPD pursuits from 1989 to 1993. Crew collected four categories of information for his study, "the offense that precipitated the chase, the personal injuries and property damages, and the rate at which each type of offender was apprehended" (p. 418). Police pursuits may seem to be effective in catching fleeing criminals; 75% are caught, but 44% of all chases result in property damage.

Senese and Lucadamo (1996) identified characteristics of pursuits to help set a baseline for police administration and aid in the decision-making process involved with pursuit policy. They suggested that pursuit policies should be based on a realistic and complete understanding of pursuits and should not be based on opinions about what might happen or who might be involved in the pursuit itself (including law enforcement officers and suspects). Their study looked at an unnamed agency located in the northeast section of the country. Their pursuit study collected and analyzed data from over 1,000 pursuits in a six-year period. They reviewed a number of factors such as weather conditions and reason for initiating and terminating the pursuit. They found that 36.7% of the pursuits resulted in an accident, 75% of the pursuits occurred when the sky was clear, 88% when the road was dry, and 66% at night. They also discovered that the average pursuit distance was 1.7 miles and the average speed was 60 miles per hour. The article concluded that about one-third of the pursuits analyzed ended in an accident.

## **Methodology**

This study on MPD police vehicle pursuits covered data recorded from the MPD Computer Assisted Police Reporting System (CAPRS), which is a computerized database into which MPD officers input their reports. The data was extracted by



undergraduate law enforcement interns from Winona State University under the supervision of the commander of the MPD CODEFOR Unit over a three-month period from May to August 2004. Using a search function in CAPRS, interns entered the keyword "FLEE" to conduct a query of the database, from January 2003 through June 2004. This query returned 352 reports that involved police pursuits, which interns read through in order to determine whether the data was useable for our study. Each of these reports was read thoroughly, and details were recorded manually onto the IACP data form. The four primary data categories that were predetermined by the IACP were as follows: (1) general information, (2) environment/conditions during pursuit, (3) termination, and (4) officer/suspect information.

Under the general information heading, data was collected on starting dates, times of each pursuit, and termination dates and times. Data was also collected to see whether the pursuit was monitored by a supervisor, how many additional units were involved, and whether other agencies were implicated. There were four subcategories of violations: (1) Traffic (DWI, speeding, reckless driving, and routine traffic), (2) Criminal Misdemeanor (DWI, assault/battery, and firearm use), (3) Nonviolent Felony (burglary, stolen auto, and white collar), and (4) Violent Felony (homicide, robbery, assault, and rape).

Environmental conditions during pursuit contained five different subcategories: (1) pursuit in an urban, suburban, rural, or interstate setting, (2) traffic conditions—light, moderate, or heavy, (3) time of day involving the pursuit—light, dusk, or dark, (4) road conditions—dry, wet, and icy or snow-covered, and (5) the average speed during pursuit. Options under the speed limit included recorded pursuit occurring below the posted speed limit and the maximum pursuit speed. Options over the speed limit included the average speeds of 0-10 MPH, 11-25 MPH, and 26+ MPH over the posted speed limit.

Termination included two subcategories for recording data. The first subcategory was the reason for the terminations: driver pulls over and stops the pursuit, collision by the officer, collision by the suspect, officer discontinued, supervisor discontinued, violator eluded by vehicle, violator eluded by foot, police intervention, vehicle disabled, and violator exited jurisdiction. The second subcategory addressed the type of police intervention used: precision immobilization technique, roadblock, rolling roadblock, tire deflator, and remote engine disabler.

Officer and suspect information was collected. Officer data included sex, age, years of service, and badge number. Suspect data included sex, age, race, alcohol or drug impairment, mental illness, and license status at the time of the pursuit.

Injury and/or fatality included data for property damage and its estimated/approximate value. Data subcategories included injuries sustained and property damage either by officers in law enforcement vehicles, suspects in fleeing vehicles, and uninvolved vehicles and persons. Property damage was recorded using an approximation that any vehicle damage incurred during a pursuit would be assessed a value of \$1,000. Any other property belonging to the city or an individual property owner, such as trees, street signs, and yard fixtures, were assigned a value of \$500.

## Findings

The data collected from CAPRS was entered into the IACP pursuit database by the undergraduate interns. A summary report of findings from MPD data, separated

by each category and percentage, was generated. The database also provided a nationwide summary, which included 32 agencies; a summary for comparable jurisdictions (population between 250,000 and 500,000), which consisted of three agencies; and a summary report of comparable jurisdictions with a population density over 5,000 per square mile, which consisted of ten agencies reporting. This study compared the overall numbers from all three studies to demonstrate the similarities and contrasts between each of the reports.

The duration of pursuit events (in minutes) was measured and compared. According to the data, 140 incidents or 40% of MPD pursuit events lasted one minute or less, and 82 or 23% lasted between one and two minutes. The nationwide average from the IACP database was 33% of pursuits lasting one minute or less. These two percentages are very close to each other, which helps demonstrate that the majority of pursuits nationwide last one minute (from start to end). This was similar to the findings in Hill's research in which he found that the majority of police pursuits last only a few minutes. Additionally, Hill's research found that over 50% of pursuit collisions occur within the first two minutes of the pursuit's initiation.

The pursuit distance (in miles) was measured and compared. MPD had 286 incidents or 81% of pursuit events that lasted one mile or less. When compared to the national report, 51% lasted one mile or less. In the comparable jurisdictions (by population size), 70% of the pursuits were one mile or less. Again, these numbers show that nationwide pursuits overall are very short in both time and distance. This does not, however, mean that pursuits are not dangerous in nature. When time and distance are combined in the research, the most critical decision-making window exists in the first two minutes and first mile of pursuit.

The initial violations that led to the pursuit were also measured and compared in this study. The traffic violation subcategory accounted for 38% of the pursuit events. The next most frequent violation, nonviolent felony-stolen auto, accounted for 19% of the events. In the nationwide report, both traffic-other and nonviolent felony-stolen auto accounted for 24% of the initial violations. In comparison to the jurisdictions comparable in population, they found that 30% were for traffic-other and 27% were for nonviolent felony-stolen auto. This indicates that around the nation, criminals are initiating pursuits for mostly minor traffic violations and for stolen autos. These two categories are not representative of dangerous crimes, nor are they indicative of immediate danger to the public. Police agencies are in conflict about whether to pursue these criminals, especially for the minor traffic violations. The continual management issue is questioning whether putting the public, officer, and/or suspect in danger for a misdemeanor offense is worth pursuing the suspect. This question plagues police administrators all the time.

The environmental conditions of the pursuit were measured and compared, as well. The urban demographic accounted for 99% of pursuit events, which is an expected finding, due to Minneapolis being in an urban setting. Pursuits during dark lighting conditions accounted for 66% of the events, with 51% of the pursuits with an average travel speed of 0-10 MPH over the posted speed limit. Of the pursuits studied, 67% took place during light traffic conditions, with 88% occurring when the road conditions were dry. The maximum pursuit speed was found to be between 31 and 50 MPH. When looking at the comparable jurisdictions (by population size), the numbers in each category are very similar to the findings of this study (99% urban, 62% while it was dark, 41% average

speed of 0 to 10 MPH over the posted speed limit, 73% when traffic was light, 92% when road conditions were dry, and 46% when the maximum pursuit speed was between 31 and 50 MPH). When these findings are compared to the nationwide report and the population density of over 5,000 per square mile, the numbers are still consistent with MPD findings with the exception of one category. There was a notable difference between the MPD findings and the national findings when analyzing the average pursuit speed over the posted limit. In the nationwide report, the average pursuit speed was over the speed limit by 26+ MPH in 50% of the pursuits and 49% in the population density of 5,000 per square mile. One reason for the difference in the pursuit speeds may be because of the types of agencies reporting. The difference in infrastructure (e.g., accessibility to freeways and traffic density) vary dramatically by municipality and agency.

The reason to terminate a pursuit was also measured and compared. Driver stop was the number one reason for the termination of the pursuit in 30% of the incidents. The next termination reason was collision by the suspect, representing 26% of the events. When looking at the nationwide report, 39% was for driver stop; in the comparable population size data, 33% was for driver stop. Overall, the driver stop category was the highest of all the termination reasons. Senese and Lucadamo (1996) found that 36% resulted in an accident. While the percentages in the current study and Sense and Lucadamo's are very close, they do not report the data for other reasons of termination. The percentage of the suspects stopping could be significantly higher, and yet they do not report this in their findings. Although many researchers will say that these numbers may change on a regular basis, which they possibly could and do, at the time of both studies, the findings concluded that driver stop was the most popular reason why the pursuit was terminated. Crew (1995) found in his Minnesota study that in 51% of the pursuits, the driver stopped, and 25% of the pursuits were terminated because of a collision by the suspect. The Crew study helps support this study and shows that driver stop is the number one reason for the termination of pursuits.

Suspect information and demographics were measured and compared. Males accounted for 92% of the pursued suspects, with an average age of 19 to 23 in 21% of the events. The suspect was also unlicensed, with no impairment 24% of the time. The characteristics of the other reports were also very close to MPD's findings, with 29% unlicensed, 23% of the suspects between 24 and 28 years of age, 87% males, and 49% with no impairment.

When looking at the injuries of law enforcement personnel, suspects, and uninvolved persons, the statistics are quite interesting, not just in MPD's study but also in the other IACP-generated reports. In the MPD data, 98% of law enforcement officers had no injury, 88% of the suspects had no injury, and 97% of the uninvolved persons had no injury. In comparison, nationwide, 99% of law enforcement had no injury, 93% of the suspects had no injury, and 97% uninvolved persons had no injury. This suggests that actual injuries to officers, suspects, and citizens are somewhat rare. What is also interesting is the percent of property damage that occurred. Some property damage occurred in 35% of the events, which is higher than the nationwide report, showing property damage in 19% of pursuit events. The population report that was comparable to MPD showed some property damage in 23% of the reported incidents.

Another factor of interest to many agencies is whether officers are choosing to discontinue pursuits on their own or whether they are given instruction to do so. The MPD study found that officers discontinued 6% of the pursuit events and supervisors discontinued 6% of the pursuit events. In all the other reports that were obtained from

the IACP, the percentage of officer and supervisor discontinuation of the pursuit was between 5% and 9%. The MPD was looking at over 50% discontinuation of pursuits by calling them off by officers and supervisors; 12% is very low and was not what the original hypothesis stated. This tells us that even though the police had engaged in hands-on training for the last three to four years, officers and supervisors had not been terminating pursuits. Many agencies, including MPD, want their officers to exercise the ability to call off a pursuit more often.

## Discussion and Recommendations

Police officers are pursuing suspects more for minor offenses than for felonies; with the pursuit of these traffic offenses also comes more property damage throughout the city. Reliability of reports became an issue due to lack of information, which led to many marks in other or unknown categories. Agencies should have a pursuit form that they require each officer to fill out after every pursuit, helping to track pursuits in their city and understanding the model of a pursuit. Another topic that can be examined is whether the officers and supervisors are able to understand the rules and regulations of their pursuit policy. Many have trouble understanding specific aspects of the pursuit policy set by their agency. This can lead to more pursuits or unnecessary pursuits that could be avoided.

Training of the officers on more than just a driving course may also prevent pursuits from happening, whether a more restrictive pursuit policy is in effect or not. Finally, the officer and suspect property and injury accident rate related to these pursuits, particularly when weighed against the lack of felony-related crimes used as a justification for the pursuit or lack of felony offenses discovered at pursuit termination, should be a critical area of concern in policy making in densely populated areas.

## Conclusion

Police pursuits remain a constant issue for agencies; they must continually weigh the positives and negatives of whether or not to pursue a suspect. Previous policies were set in place to apprehend the suspect at all cost no matter the consequences to the public, officers, and suspects. Today, policies are beginning to change, but pursuit is an ongoing issue that needs to be assessed continually. Studies like this one collect data from one department and compare it to similar data collected in a centralized database. Perhaps the most important thing to come from this study is that law enforcement agencies need the ability to review their own data and base their pursuit policy on evidence from their jurisdictions and not some national policy exemplar or a state-level standards requirement. Every jurisdiction is unique and has its own set of variances from the national or similar sized city comparisons; therefore, this study does not illustrate some "silver bullet" to end risk related to vehicle pursuits. Instead, it serves as evidence that pursuit policy decisions should be based upon the organization having sufficient expertise to be able to collect its own data, analyze it, interpret it, and make evidence-based policy decisions in response to the patterns and trends occurring locally, not based on national or state standards.

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# Police Custody as a System and Unified Policy: Best Practices for Reducing Officer and Prisoner Risks of Injury and Death

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*In memory of James "Jim" Fyfe . . . Champion of police best practices, academic colleague, Deputy Commissioner New York City Police Department, and always a friend.*

## Introduction

As a matter of law and public policy, law enforcement officers have the authority and power to arrest and detain suspects under certain circumstances. The arrest and deprivation of a person's freedom is the most intrusive action of government against a person and demands that law enforcement officers do it as best as can be done. An arrest on the street, however, is only the beginning of a person's/prisoner's custody by law enforcement officers. From the time of arrest until the prisoner is released from custody (lock-up/jail), many activities and events take place over a period of time, which, in some cases, may involve numerous officers over several hours or days. It is understood and generally accepted by law enforcement that officers have an obligation and duty to provide and manage the control, safety, security, and well-being of the arrestee and the officers alike while in police custody. (The terms *police* and *law enforcement*, include sheriffs, jailers, state and federal agents, and shall be considered synonymous in this article.)

Silver (2005) states, "The duty to protect arrestees and jailees from harm and to provide reasonable medical care is premised partially on the notion that the government is responsible for these individuals because it has deprived them of the ability to look after themselves" (p. 2-13).

The common police practice of restraining or not properly restraining a prisoner in custody has many implications. A prisoner not restrained with seat belts in the rear seat of a police car can break his or her neck or suffer serious head injuries if "screen tested" (prisoner slammed violently against cage/screen if police car is in an accident or stops suddenly); a prisoner's balance is impeded by being handcuffed behind the back and can fall forward/backward if not escorted/assisted, striking his or her head while handcuffed behind the back resulting in serious injuries or death. Very simply, a prisoner who is handcuffed behind the back cannot look after him- or herself because the prisoner is incapable of using the arms and hands to regain balance or extending the arms to cushion a fall.

A prisoner in lockup, who is not required to turn 360 degrees for the officer's visual inspection before the officer opens the cell door, could remove his handcuffs and/or procure a weapon and attack the police officer when the officer opens the door. At this moment, the officer is at risk of having a physical confrontation. If

the officer has a weapon, he or she is at risk of having the prisoner take it and use it against the officer. A prisoner in a cell who is permitted to stand at the cell door facing the officer, rather than backing out of the cell door is in a position to hit, kick, spit, or rapidly approach the officer, forcing the officer to push the handcuffed prisoner backward causing him or her to fall. This level of force would have been unnecessary had the door not been opened. In effect, the officer's risky action created the dangerous situation.

A prisoner wearing leg shackles with a 14-inch chain cannot be expected to get out of a wagon and step down 15 inches without falling and causing injuries or even death. Also, if a prisoner is not restrained appropriately, the officer's safety may be placed at risk. Likewise, if a prisoner tells the arresting officer that he or she will kill him- or herself and the officer does not inform the jail officer of this, the prisoner is at risk of self-destruction while in a jail cell.

Examples of "bad practices" are endless and demonstrate a need for formulating systematic police custodial best practices. In doing so, it is imperative that custody activities and events not be considered as discrete but rather continuous, accumulative, and interrelated.

In such instances, however, an examination of the post-incident reports should conclude that the officers failed to follow the best practices, and those failures were the cause of the harm suffered by the prisoner and/or officer. Unfortunately, this is unlikely because law enforcement agencies have not viewed custody as a system of activities and events. The reality is that it is highly likely that the officers' conduct will not be measured against any standard that considers custody systemically. As a result, the officers' conduct will be excused; the harm suffered by the officer and/or prisoner will be attributed to the prisoner; and police policies, procedures, practices, and training will go unchallenged and unchanged.

Police custody is not a single event but rather many continuous activities conducted by numerous officers over a period of time; therefore, custody must be considered as a whole rather than as discrete activities. In order for officers to be properly guided and trained in the complexities of custody as a system, policymakers must provide officers with a unified custody policy. Officers should not rely on segmented, discrete policies for effective guidance. For the purposes of this article, *custody* shall be defined as a system of continuing, interrelated, and interacting behaviors, activities, and events contributing to the safety and well-being of both prisoners and officers from the moment of street arrest to release from jail/lockup.

## **The Problem: An Example**

When an officer makes an arrest of an injured, intoxicated, aggressive/combatative, threatening, poorly spoken/non-English speaking, emotionally disturbed, male, the custody complexities become more apparent and more meaningful. Consider further, the prisoner, after being arrested, begins to joke with the officer and his victim. During transportation, he tells the transport officer that his life is not worth anything. During booking/processing, he is observed being very quiet. Once in his cell, the lock-up officer observes/hears the prisoner crying. If the officers, collectively, do not record and inform each other at each successive activity, officers will be placed at risk of a prisoner who threatened to kill cops. Likewise, if

the lock-up/jail officer is not completely aware of the prisoner's seemingly minor mood changes over time, the likelihood of a suicide attempt is high. Additionally, consider that the prisoner is diabetic and suffers from heart disease. How are the police to know? Without any doubt, the human animal in captivity poses complex challenges for his keepers. All of this begins at the arrest on the street.

Clearly, it is highly likely, in the course of daily police work, for officers to have such an encounter. It would not, however, be uncommon or incorrect for such an arrest to be described by an officer as follows: "the prisoner was restrained and taken to the station where he was processed and released later to his family" (or perhaps to the coroner). To understand the complexities involved in custody situations, however, a more formal examination is necessary.

Currently, in such an encounter, law enforcement management has provided officers with directives and training. The officers will have to know and comply with an array of police directives that may become relevant during the custody process from arrest to jail intake. These directives could include the following: use of force, control of arrestees, felony stops, high-risk warrant service, restraint/handcuffing and leg shackles, soft restraints, mental illness/emotionally disturbed persons, search/pat-down, property inventory, injured prisoners, opposite sex prisoners, Americans with Disabilities Act, first aid, prisoner transportation, transportation vehicles, prisoner movement, prisoner health and medical treatment, police lock-up, weapon security, sally port operations, jail transfer, police building security, emergency procedures, CCTV/video/audio equipment, special reports, report writing, written directive systems, and others.

On the dark side, if the officers fail to protect the prisoner and themselves, other policies may become relevant including internal affairs, collective bargaining agreements, discipline, retirement, criminal prosecution of officers, widows and survivors benefits, and others. Of course, the potential for civil litigation is omnipresent.

Unfortunately, many agencies do not provide officers with such guidance and/or training. Also, it is known that arrestees and officers are seriously injured, and prisoners, more often than officers, die while in police custody. Under these circumstances, it appears that the primary reason for officer and prisoner injuries/deaths is the lack of directives and/or training, which results in the officers' lack of understanding of complex custody interactions.

## **The Challenge**

Clearly, law enforcement officers must manage these many activities and events as a complex system. Managing a prisoner in custody requires physical control of the prisoner for the mutual protection of the prisoner and the officer. Of equal importance, however, is the maintenance of a continuous and accumulative written record of relevant information that accompanies the prisoner and is reviewed by each officer during each successive activity and event while the prisoner is in custody.

The challenge for police policymakers is to develop and provide officers with unified custody policy and procedures and corresponding comprehensive training



and education to ensure that officers and supervisors understand the many procedural ramifications. This unified policy must recognize custody as a complex system and, at the same time, present it as simply as possible.

Law enforcement best practices must address prisoner custody as two primary custodial elements, which, for simplicity and at the expense of being dehumanizing, shall be called packages. Package One is the physical prisoner. Package Two is the relevant information presented as a continuous written record that must accompany the prisoner during custody.

## **Best Practices**

The basic premise of “best practice” has nearly a 100-year history. The notion of “best practice” was first presented in *Principles of Scientific Management* by Frederick Taylor in 1919 and became known as the “one best way” (Kanigel, 1997).

Best practice is a management idea, which asserts that there is a technique, method, process, activity, incentive, or reward that is more effective at delivering a particular outcome than any other technique, method, process, etc. (definition retrieved from [http://en.wikipedia.org/wiki/Best\\_practice](http://en.wikipedia.org/wiki/Best_practice))

Best practice is a very useful concept in that it sets a standard. Hoag and Cooper (2006) offer that standards are a plumb line for what is possible rather than what others do.

For the purpose of this article, best practices are defined as follows:

Superior practices, techniques, methods, or processes that optimize the officers’ ability to manage and control the physical environment and provide the officer with the physical and psychological advantage to improve the protection, safety, security, and well-being of persons in police custody and for the officers involved in that custody.

Fundamentally, best practices in law enforcement must be lawful and ethical. Functionally, custody best practices are those practices, techniques, and methods that identify and analyze risks to prisoners’ and officers’ safety, security, and well-being, and the best response to those risks. A systems view of custody brings to the front problems that aggressively must be solved by law enforcement policymakers.

The standard to test or challenge custody best practices is whether the alternative increases the likelihood of risks to prisoners and/or officers and/or decreases their well-being, safety, and security. Of course, alternatives also must be lawful and ethical.

It is understood that the basic premise and obligation for law enforcement officers during all of these activities and events are to manage and control the prisoner’s physical environment, assume physical and psychological positions of advantage (Package One), and continuously document/report accordingly (Package Two).

## Research Summary

A review of more than 400 written law enforcement and jail directives (e.g., policies, procedures, general orders, rules, regulations, and training lesson plans), representing more than 80 agencies, indicates that prisoner custody activities, events, and information are not addressed collectively but by separate, written directives—many in great detail, others rather scantily, and others not addressed at all. The review failed to reveal any agency having a single comprehensive, unified custody policy/directive that addresses all of the activities, events, and information requirements. There is no evidence that any law enforcement agency has a directive that addresses custody activities, events, and information as a system.

This administrative failure means prisoners and officers alike, are likely to be exposed to dangerous custody situations created by officers who are left to their own common sense devices. Of course, common sense often is not in the best interest of prisoner and/or officer safety. Officers should not be expected to use common sense approaches to manage the complex and critical dimensions of prisoner custody situations. Likewise, officers should not be expected to comprehend custody as a complex system. If the law enforcement policymakers have not done so, why should individual officers be expected to do so?

## Summary of Common Custody Physical Activities and Events from Arrest to Jail/Lock-Up Release (Prisoner – Package One)

- Force used to make arrest (e.g., OC, Taser, sustained struggle, positional compression, baton strikes, K-9, firearm, others)
- The moment of arrest/restraint/handcuffed
- Physical movement to the transport vehicle; walk/escort; mobile transportation to a hospital, lock-up, jail, court, or other facility
- Transportation by car or wagon
- Physical movement from mobile transport vehicle to lock-up/jail cell or other facility
- Processing (i.e., intake, booking, property, medical treatment, court, and other activities out of lock-up/cell)
- Isolation/placement into cell
- Control/supervision while in cell
- Physical movement out of cell to mobile transportation or release from custody

At first blush, these activities may appear to be simple and capable of being accomplished by mere common sense. Over many years, however, law enforcement agencies, researchers, academics, and professional organizations have made numerous recommendations regarding prisoner custody and officer safety that have influenced police policies and training. As a result, best practices have evolved and include the following to accomplish the previously listed activities and events.

## **Summary Outline of Generally Accepted Best Practices of Physical Control of Prisoner and Officer for Security and Safety (Prisoner – Package One)**

- Handcuff from behind and double-lock handcuffs.
- Pat-down for weapons/contraband.
- Walk/stay behind and to the side of prisoner to limit risk of officer being kicked or lunged at.
- Touch/hold prisoner while walking to prevent falling/escape.
- Match/use equipment to prisoner needs (e.g., physical disability, pregnant, leg shackle chain to be longer than height of highest step, etc.).
- Restrain with seatbelts in rear of car or wagon during transportation.
- Separate officer from prisoner with barrier (e.g., car cage, cell bars/wall/doors).
- Search transport vehicle and cell/holding area for weapons and contraband.
- Officer must manage and control ingress and egress at all doors (i.e., violator's car, police car, residence, wagon, sally port, cell, etc.).
- Remove and/or apply handcuffs from behind prisoner while being separated by a barrier (prisoner not facing officer).
- Collect, report, and secure all property.
- Never leave prisoner alone/unattended.
- Maintain control and security of all prisoner and officers' weapons.
- Do not enter any enclosed area alone with prisoner (e.g., rear car seat, wagon, cell).
- Maintain one-on-one ratio of officers to prisoners on the street and at lock-up.
- Verify prisoner identity before removing him or her from cell.
- Review all prior documentation regarding prisoner.
- Maintain current written record.
- Others

The issue of information and reporting requirements to provide all officers who have a responsibility for the custody and safety of prisoners and attendant officers with a continuous record of custody is complex and problematic but necessary and critically important for officer and prisoner safety.

## **Summary Outline of Common Information Requirements from Arrest to Jail/Lock-Up Release (Documentation – Package Two)**

- What is the crime for which prisoner has been arrested?
- Has prisoner threatened officers?
- Has prisoner threatened harm to self?
- Is prisoner injured?
- Is prisoner physically disabled?
- Is prisoner diabetic, epileptic, pregnant, other?
- Does prisoner wear a prosthetic?
- Does prisoner take any medication?
- What is the medication?
- Is prisoner under a doctor's care?
- Does prisoner have any Med-Alert type identifiers?
- Is prisoner responsible for any unattended children, dependant, or sick people?
- Describe prisoner's ongoing/changing behavior.
- What information can witnesses/neighbors provide about the prisoner?

- What is the prisoner's mood/behavior?
- Is prisoner, based on police training, exhibiting signs or symptoms of mental illness or emotional disturbance?
- To whom will the prisoner be released?
- Others

At the expense of being repetitious, law enforcement best practices must address prisoner custody as two primary custodial elements. Package One is the physical prisoner. Package Two is the relevant information presented as a continuously written record that must accompany the prisoner during custody. The physical and informational dimensions of police custody must not be and cannot be neatly separated and discrete. Physical custody and custody information are integrated and interactive, as presented below.

## **A Unified Custody Policy – Integrating Physical Activities, Events, and Information as a System of Custody Best Practices: A Summary Narrative**

A unified custody policy must address, at a minimum, the following topics and reflect the complex interactions inherent to custody. In turn, officers must be educated and trained so they understand custody as a system. They must no longer view custody as arrest or transportation or force or restraint. Rather, officers must view custody as arrest, *and* transportation *and* force *and* restraint, as an example. Simply, systems are really about understanding *and* education *and* training are most important to understanding a unified custody policy.

The following presents a more detailed, but not an all-inclusive, discussion of integrated physical and information needs of custody. An attempt is made to present an operational rationale and demonstrate the importance of and relationships between physical control and the essential corresponding information during custody. It should become apparent that when custody is considered a system of activities, events, and information, police policy, training, supervision, and performance will be challenged in new and significant ways.

The following topics are presented as an approximate chronology of police custody activities.

**Prisoner handcuffed, double-locked behind back, recording events of arrest.** Police custody begins, and officers are responsible for managing the prisoner while in custody. Prisoner pat down must be completed. The circumstances of the arrest and the amount of force used must be documented. The officer should record whether the prisoner struggled and resisted, whether pepper spray (OC) and/or a Taser were used, whether the prisoner was restrained on the ground, and whether officers held him down for control and restraint. This information may be critical to supervisors, medical personnel, and lock-up/jail personnel as they assess for positional/compression asphyxia and the potential for custody death.

**Physically controlling (hold) and escorting prisoner to police transport vehicle.** The officer needs to hold prisoner to prevent escape and falling. With hands handcuffed behind his back, a prisoner is unable swing his arms to maintain normal balance and is off-balance. Should he fall, he cannot extend his arms to break the

fall. This is accentuated for uncooperative, blind, physically impaired, injured, pregnant, physically ill, alcohol/drug intoxicated, irrational, and uncooperative prisoners.

**Prisoner placed into inspected transportation vehicle and restrained with seatbelts/restraints.** The transport vehicle interior will have been inspected for weapons, etc. and cleaned of body fluids and debris prior to prisoner entry. If the prisoner is grossly obese, contaminated excessively with body fluids, violent, or any other reason that seatbelt/restraint cannot be accomplished, the prisoner will not be transported in a police vehicle. Medical transport will be arranged, and the prisoner will be transported to a medical facility.

**Field medical screening for physical injuries, illness, and medication.** Determine visually whether the prisoner is physically injured, intoxicated, and able to understand and respond coherently. Determine visually whether he has a Med-Alert type necklace or bracelet. Ask the prisoner whether he is injured. Ask whether he takes any medication from a doctor (prescription). Ask the same questions of others who may know the prisoner.

**Field behavior/mental screening for indications of mental illness or any behavior placing prisoner at risk.** Record prisoner's initial mood at the time of arrest and any changes in behavior/mood during custody. For example, changes in mood from angry to happy to sad, to crying, to silence can be important indicators of potential suicide later in police lock-up and/or jail. Lock-up and jail officers should be provided this information. Likewise, behavior may indicate an illness such as diabetes or seizure as the prisoner does not respond coherently.

The presence of alcohol can mask serious physical and mental conditions.

**Determining prisoner destination such as hospital, mental facility, judicial officer, lock-up, or jail.** The officer must consider all facts present. Determine whether the prisoner is nonresponsive to questions, unconscious, bleeding, or exhibiting symptoms of mental illness or other illness. Extreme alcohol or drug intoxication, display of Med-Alert type identification, talk about suicide, statement of sickness, or request for medical care must also be considered.

**Transporting prisoner and medications, if available.** Inform police dispatch with prisoner name, location, odometer reading, and destination. If prisoner is of the opposite sex of driving police officer, interior vehicle lights should be illuminated so police/prisoner activities can be better observed from the outside. Interior lights should not be illuminated if the officer has reasonable information that someone is likely to use a firearm to shoot the officer or prisoner.

Ask prisoner, witnesses, and neighbors about prisoner health and medications. This is especially important if the prisoner appears to be intoxicated or otherwise nonresponsive to officer's questions. Alcohol, for example, can mask other serious medical conditions.

All prescription medications in labeled prescription containers with the prisoner's name on the label should be transported with the prisoner. The prescription label provides important information including the medicine, dosage, prescribing

physician, and pharmacy with telephone number. This information is verifiable prior to the administration of any medication or medical treatment.

**Physically controlling and escorting handcuffed prisoner from transportation vehicle into destination facility.** Always use sally port properly, if available. Before opening vehicle door, visually inspect prisoner to ensure that he remained handcuffed and seat belted/restrained. Have the prisoner lean forward to inspect handcuffs. Noncompliant/uncooperative prisoners should always be considered a greater risk; however, compliant/cooperative prisoners must not be considered a non-risk. Be alert and cautious. Once prisoner is out of the transport vehicle and in sally port, conduct search for weapons, contraband, etc.

**Weapon storage/security.** Officers must remove firearms, pepper spray (OC), batons, Tasers, etc. and properly store them before entry into cell area where unhandcuffed prisoners may have access to an officer's person and attempt to get control/possession of the weapons. Appropriate weapons must be accessible to officers, not prisoners, in emergency situations.

**Prisoner only, *not* officer, entry into a cell or holding room.** A police officer on the street should never enter or reach into an occupied vehicle. An officer, likewise, should never enter an occupied cell alone. When a prisoner is entering any lock-up, holding/detention/jail cell, or room, control of the door/locks and keys is critical and the responsibility of the officer(s). It is always better to have two officers present at the cell, one to control the prisoner and the other to control the door. If no sally port search was conducted, when the prisoner is in the cell/holding area, conduct search for weapons, contraband, etc. This area should be free of office equipment, tools, and articles that could be used as a weapon or for self-destruction. Adjoining office and other doors should be closed and locked. If the prisoner is going to be unhandcuffed in the cell, his belt, shoelaces, and other items in his possession that could be used as a weapon or for self-destruction should be removed and recorded as property. Prisoners should not be handcuffed for excessively long periods of time, due to the potential for injuries to wrists and shoulders.

An officer should open the cell door and have the prisoner enter the cell handcuffed. The door should be closed and locked, and the prisoner, if he is to be unhandcuffed, should be asked to back up against the cell bars. The officer can then unlock and remove them while safely outside the cell. When the cell or room does not have bars or a grill to allow for the above described unhandcuffing technique, the cell door should be opened with the prisoner slightly inside the cell facing the rear of the cell and handcuffs removed. An officer should *not* enter the cell alone but stand behind the prisoner in a position by which the officer can better withdraw from the doorway and close the door rapidly should the prisoner become agitated, noncompliant, or aggressive.

**Prisoner observation in cell.** Preferably, nonviolent prisoners should not be celled alone allowing other prisoners to observe one another. Prisoners should be observed continuously by closed circuit television (CCTV) and every 30 minutes by an officer's personal visual observation. This allows the officer present to use his senses to better hear, see, or smell anything that would indicate that the prisoner is in distress or in some way threatening himself, others, or the facility.

**Policy that prisoner should come to officer, and officer should not go to prisoner.** Just as officers on the street direct suspects to turn around, kneel/get down, etc., prisoners in custody should be given appropriate directions to enhance officer and prisoner safety. Directing the prisoner to come to the door, turn around, and back out of the cell doorway is safer than having the officer enter the cell and escort the prisoner out.

**Removing cooperative prisoner from cell handcuffed and backward.** Prisoners in single and multiple occupancy cells present unique issues, but certain practices are common. Officer control of the cell door is both critical and obvious. The officer controlling the cell door or the officer nearest the prisoners must not be armed. The officer should verbally identify the prisoner to be moved, by name and/or seat location, if in a multi-prisoner cell and have that prisoner stand. All other prisoners should remain seated. The officer should not open the door until he visually observes the prisoner and determines that the prisoner's handcuffs are in place, he is not holding anything in his hands, he is not injured or bleeding, and he does not have visible body fluids on his clothing or in the cell. The officer should remain outside the cell and observe the prisoner by having the prisoner turn 360 degrees. When satisfied the prisoner is prepared to be moved out of the cell, the prisoner should be instructed to move toward the door. Before the officer opens the cell door, the prisoner should be instructed to turn around, back to the cell door/officer. The officer may now open the door and escort the prisoner out backward by holding him and controlling the cell door. This technique reduces the likelihood that the prisoner will lunge or kick, since the prisoner's back is toward the officer. Likewise, by holding the prisoner, the officer increases direct physical control and reduces the likelihood the prisoner will fall.

**Removing uncooperative prisoner from cell after being handcuffed in cell by two or more officers.** More than one officer is required, and appropriate weapons (e.g., OC, Taser, baton, others) may also be required. Restraint chairs and security/restraint blankets must be used as consistent with policies, and the prisoner must never be left unattended. Supervisors must be summoned at any sign of distress and evaluated, as trained, for transportation to medical assistance.

**Emergency exception to officer entering cell alone.** An officer may be permitted to enter a cell alone only if the cell is occupied by one prisoner and that prisoner is in medical distress (e.g., hanging or other situation in which the officer is trained and equipped to take immediate action in an attempt to save the prisoner's life or prevent further injury).

**Injury or death to prisoner while in custody.** Injury or death in a cell, caused by other prisoners or by an officer, should be considered a crime scene and protected, preserved (photographed and evidence collected), and processed according to accepted police criminal investigatory practices.

**Internal Affairs (IA).** Because custody is a system of interrelated activities, the death or serious injury of a prisoner/officer must be subject to IA investigation. Even when a death or injury occurs in a facility not controlled by the arresting officer's agency (e.g., local police prisoner dies in sheriff's jail), the death must be subject to an IA investigation by the police agency making that prisoner's arrest and commitment to the jail and another IA by the department responsible for

the management of the lock-up/jail. This is essential to determine whether any actions or inactions by the arresting and/or transporting officers contributed to the death or injury in the sheriff's jail. This usually relates to the quality/absence of the information package the police provide jail staff and the jail staff's response to the police information.

**Exchange and flow of critical information.** From the moment the officer comes into contact with the subject on the street until the subject is released hours or days later from jail, that subject and often numerous officers and agencies are involved with the custody of the subject/prisoner in a variety of ways. These activities and interactions must follow best practices including critical information recorded and transmitted/passed appropriately.

Lock-up/jail intake officers must have all relevant information about the prisoner's preceding custody activities to better ensure his safety and well-being while in custody. The sources of that information are the prisoner himself and the committing police officer, but often the committing officer is not the arresting officer but the transportation officer. This is the point at which vitally important information can be lost. As an example, jail intake forms usually ask, "Has the prisoner's mood changed?" Obviously, the intake officer cannot determine from a single observation any mood change. In order to make that determination, the intake officer must have knowledge of the prisoner's prior moods as recorded by the arresting and transporting officers. The failure of the arresting and transportation officers to record such vital information places the prisoner at risk. Likewise, a diabetic prisoner, who has the odor of alcohol on his breath or is showing symptoms of drug use is at risk of not receiving appropriate medical treatment. In fact, the prisoner's inability to respond to the intake officer's questions may not be a result of intoxication or drug use but rather the result of a diabetic episode.

## **Continuous Information: Meeting the Challenge**

Officers must not only be trained; they must be educated to understand custody issues that range from the very obvious to the very subtle. This understanding will better enable officers to detect, record, and transmit essential custody-related information. Likewise, this understanding will better motivate officers to consider carefully what officers reported previously during a prisoner's custody.

It is proposed that law enforcement agencies develop a "Continuous Custody Chart (3C)" in which, all officers are competently trained and educated. (Yes, another piece of paper or computer template.) The 3C should reflect the essence of the agency's unified custody policy, in which the officers have been trained and educated. The 3C should serve the officers just as the preflight check sheet/card serves pilots. It should reflect the physical and information best practices that leave little to officer memory. The 3C is not a ritual but rather a means to get results as measured by reduced risk of injury and death to officers and prisoners alike. Likewise, the 3C or any "checklist" will not be the end product. It is only a means to remind officers of the many custody factors they have learned during their training and education.

The 3C is not meant to demean officers in any way. It is meant to assist officers. Military and commercial pilots who are educated and well-trained are provided



with printed preflight and prelanding check sheets/cards to systematically check all procedures, operations, and systems. This process reflects aviation's best practice, leaves little to pilot memory, and results in a nominal chance of error. Similarly, hospitals start a patient's medical chart at the emergency room, and that chart collects continuous information that stays with the patient until discharge. This process reflects medical best practice, leaves little to medical providers' memories, and results in greatly reduced chances of error. The management of prisoners in police custody is no less important and the consequence of error no less serious.

Prisoner custody management means being responsible and accountable for the total physical and informational requirements of a person in custody. Best practices means addressing how the total physical and informational requirements are met, resulting in the optimum security and safety of officers and prisoners.

It is ironic that police management has developed checklists, forms, and templates to assist officers in gathering basic information for criminal incidents and accident reports; inspecting police vehicles and equipment before shift; maintaining and tracking (chain of custody) of a dirty sneaker found at a crime scene collected as evidence; performing inventory of impounded vehicles; and tracking internal affairs investigations, command reviews, and performance appraisals, as examples. No unified protocol, however, is available to assist officers in managing the unique and most critical aspect of law enforcement in a free society—protecting prisoners and officers during police custody. As a result, individual officers are left to their own devices and their individual memory as to what the many police policies require of them as they navigate through the complex waters of protecting and serving persons in police custody and at the same time protecting themselves.

Each officer at every moment while a prisoner is in custody must physically protect the prisoner; however, in order to do this effectively, officers must be aware of all prior activities and events relevant to the prisoner. This continuous information is critical for constantly evaluating potential and changing risks to officers and prisoners. Likewise, this information must be in a form that is readily available and easily passed to and reviewed by each officer having custody and control of the prisoner. This is crucial for officer and prisoner safety and well-being during the total custody experience.

It is submitted that the foundation for prisoner and officer safety and well-being throughout a prisoner's custody is effective communications of relevant information. Because systemic communications is more complex than common sense can accommodate, police must develop a formal model that best assures prisoner and officer safety. Simply, what an arresting officer knows on the street or should know about a person being arrested has important implications about the prisoner's and officer's safety and well-being hours or days later while in custody and under the supervision and control of officers other than the arresting officer(s).

All of the practices, techniques, processes, and methods offered in a C3 *may or may not be* found in a criminal justice agency's existing policies, procedures, and training. Nevertheless, what a C3 will do is compile them into a system of custody best practices. A C3 satisfies the requirements of best practice (i.e., it leads to

exceptional protection of prisoners and officers). Police organizations and experts recognize prisoner and officer safety, security, and well-being as universal goals and outcomes of prisoner custody.

## Training and Education

Law enforcement must continue its struggle from that of a technical craft to becoming a well-educated and highly trained profession. In a complex police organization, training is the organizational function that translates policies to practice; however, because police officer selection, education, intelligence, attitudes, values, and beliefs are so variable, police training, as well, is variable. Also, it is recognized that some officers are marginally trainable. One training approach, albeit undesirable, is for police trainers to teach-to-test (i.e., the instruction focuses on having the student officer know the answers to tests, rather than having the student officer thoroughly understand the concepts). It is for these and other reasons that police training, whether organizational or centralized statewide, must be viewed with a critical eye. The mere exposure to training courses and materials does not mean that the officers “learned” the meaning of the content information. Likewise, the failure to learn means the officers do not understand the information. These training deficiencies can have serious consequences for officers’ lives and careers and can be deadly for those in police custody.

Package Two – Information will require more than technical police training, which instructs officers *how* to do things. Package Two will require officers to understand *why* it is done. This is a fundamental difference between training and education, and it is a reason for providing a C3, in some form, and having policy makers, supervisors, trainers, and officers understand the *why*.

Without understanding *why* custody activities are done and custody information is necessary, the likelihood of officers having the knowledge base to appreciate physical and information custody problems is unlikely. Expecting officers to conduct an analysis and formulate a reasonable best practice solution to a custody problem is even more remote. Management must accept the responsibility, make the time, and invest the resources to provide officers and citizens in police custody with the best practices. It is education *and* training that better fosters critical thinking and problem solving on the streets and in police executive suites.

## Conclusion

Herman Goldstein, and later others, advanced the idea of problem solving and problem-oriented policing in the context of community policing. Although the term *problem solving* has been interpreted in various ways, generally it has focused on the external problems associated with crime in the community. It is argued here that the complex problems associated with police custody must be resolved internally using the same problem-solving methods advanced in community policing. Essential to both is the identification of necessary information and treating it systemically. In this way, best practices can be discovered, articulated, implemented, and tested.

Police failure to properly control and manage a prisoner and provide relevant information during custody can create a situation requiring the use of force. As

a result, should a prisoner become injured or die while in police custody, police policies, practices, and procedures will most likely be carefully scrutinized and rightly so. Using best practices as the standard of analysis, four fundamental questions come to the surface:

1. Did the police use superior practices, techniques, methods, or processes that optimized the officers' ability to manage and control the physical environment and provide the officer with the physical and psychological advantage to improve the protection, safety, security, and well-being of the person in police custody and for the officers involved in that custody?
2. Did the officer's failure to use best practices create the dangerous situation that caused the officer or prisoner to be harmed, injured, or die? (Often, the harm, injury, or death is a result of the use of force and possibly excessive force.)
3. Did the failure of the law enforcement agency to advance best practices through systemic policies, procedures, training, education, and supervision rise to the level of deliberate indifference and open the door to federal civil rights actions?
4. Should agency best practices be considered as conditions of work or considered as safety, health, and welfare issues in collective bargaining?

E. B. White said that with one thing leading to another, he predicted a bright future for complexity. Police custody is complex, and there are no indications of a changing tide. Likewise, police policies, procedures, training, and education are complex and interrelated, and they must represent the best practices in law enforcement. Officers need help from police management to make collective sense out of all the information to which they are exposed so they can, in fact, know and engage in custody best practices. Clearly, by following best practices, law enforcement should have better outcomes including safer and more secure prisoners and safer officers with more secure careers; however, it is abundantly clear that the devil is in the details.

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# Risk Assessment and the Police Use of Force: A Social Science Model for Proximate Cause Analysis

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Traditionally, police responses have been concerned with threats in society that are external to the organization. Consequently, there is little attention given to the preparation for internal organizational threats. Police deviance and negligence of duty cannot be predicted in absolute terms; however, the potential is inherent in every officer. In 1950, the Federal Bureau of Investigation reported that there were 3.2 officers for every one crime (Lombardi, 1996). Today, there are 3.2 crimes for every one officer (Bennett, 1994). To compound this problem, it was reported that in 1991, 16% of job applicants were considered high risk, compared to 21% in 1992. Twenty-five percent of employees admitted to stealing from employers, and 42% admitted being tempted to steal (Doyle, 1994). Additionally, administrators are failing to meet organizational needs, further introducing opportunities for deviance or negligence into the agency.

Considering internal threats, Fournies (1987) provided research addressing why subordinates have traditionally failed to follow operational procedures. In his study, he found that most individuals did not know what the organizational objectives were, how to do them, or why. Lombardi (1996) explained that when managers attempt to address the problem of nonperformance, they often neglect the fact that employees have a lack of knowledge regarding their job duties. If police administrators fail to implement, communicate, or follow policy, officers will have no direction or find little importance in following policy themselves. Control over the organization, then, becomes limited or nonexistent. Over a period of time, this pattern may lead to nonrandom risks that perpetuate deviant or negligent opportunities. Failure to anticipate problems will ultimately create a reactive approach to organizational security instead of a proactive one.

To protect police assets, consistently using the same management tools helps to reduce the opportunity for negligence in police use of force. This includes understanding organizational objectives, controlling through documentation, as well as implementing other risk reduction strategies. Defending a police organization against negligent operational claims can be difficult. Exploring policies and procedures and responding to specific defense queries comprise some of these difficulties. Understanding a strategy of defense litigation could actually help an agency organize and define its position relative to the incident.

Elements of organizational dynamics provide the framework for the predatory prevention matrix as a social science model of proximate cause. This common sense application allows police administrators to learn from training and control through documentation so that deviant or negligent opportunity may be anticipated in terms of foreseeability. This matrix isolates four key variables in explaining or defending a police organization's proactive prevention efforts: (1) policy, (2) control,

(3) risk, and (4) phases of attack. These are benchmark cells comprised of primary, secondary, and tertiary goals. Through this model, the primary goal is for police organizations to support and participate in intervention methods. The secondary goal of this model is for the organization to intervene before an incident occurs. It anticipates why officers need to follow policy (i.e., organizational goals and objectives). The tertiary goal is to reduce the probability of a criminal or negligent act being completed by the officer through effective control measures.

## Policy

In today's society, accountability is of integral importance in the police organization. As a result of criminal and civil litigations relative to police actions, law enforcement organizations are consistently inundated with accountability factors in an effort to improve police standards, control crime, and serve the public. These factors are explicitly conveyed through certain tools and resources including training and education. Organizational policy, however, is the cornerstone of effective communication between the employer and employee in respect to identifying goals and operations within the organization. It also defines the first cell within the predatory prevention matrix.

Without policy, and more specifically written policy, there can be no anticipation of police deviance or negligent behavior. Consequently, security is documented only in the administrator's mind. While some departments have written policies, others have patterns of practice. Patterns of practice, however, are not documented and may open up the department to claims of negligence should something go wrong. For example, exceeding the speed limit in response to emergencies is a common practice in policing. Without written documentation that stipulates how fast over the speed limit is reasonable or what emergencies warrant excessive speed, the department or officer can be held liable for negligent actions should a person be injured or property destroyed.

In thinking about policy, the police manager must identify what the problem is and what resolution is appropriate. Drucker (1974) explained that concepts of business are not abstractions but rather action commitments through which a department will carry out its objectives. Furthermore, they provide standards for which those objectives may be measured. This may simply be utilized as a strategy for effective use-of-force policy. "Objectives are needed in all areas on which the survival of the business depends. The specific targets, the goals in any objective area, depend on the strategy of the individual business" (Drucker, 1974, p. 100). Taking a critical look at the objectives, goals, and strategies of a law enforcement agency and putting those concepts to work, police executives foster a relationship between members of the organization. This application is also construed as an effort to establish internal security. A policy and procedure manual that governs departmental protocol is arguably the most cogent and standard means available to disseminate information and promote the organization's philosophy and mission.

## Definitions

It is important to define *policy* and *procedure*, as the two are not synonymous. A *policy* is defined as "a definite course or method of action to guide and determine present and future decisions, or a guide to decisionmaking under a given set of circumstances within the framework of corporate objectives, goals,

and management philosophies” (definition retrieved from Bizmanuals.com, 2001). A *procedure*, on the other hand, is often defined as a particular or consistent way of doing something. Furthermore, it explains how to implement or carry out a policy. Both provide accountability measures for the department. Consider, for example, use of force policies. *Graham v. Connor* (1989), which measures whether an officer’s use-of-force is objectively reasonable in light of the facts and circumstances, is a U.S. Supreme Court case that corresponds with most departmental force policies. To deviate from this policy may criminally or civilly implicate the officer and department. Likewise, a deviation from a departmental procedure on how to effect a use-of-force option may be just as detrimental to the officer or department.

## **Communication**

A policy and procedure manual serves as an explicit means of translation between the administration and the rest of the organization. Once the department’s philosophies have been identified and implemented, the manual is the most effective means of communicating that information. Explicit knowledge, as conveyed in a policy manual, is easily passed on to others due to its formal and systematic processes and definitions. Certain members of the organization may implicitly know the philosophies; however, it cannot be assumed that they are known by the organization as a whole. Through a written means of communication “. . . this knowledge is shared and understood as an explicit body of knowledge. The purpose is to disseminate information, inform members of the organization about recent management decisions, or to signal the community about organizational purpose” (Kinnaird, 2001, p. 75).

## **Time**

Mandatory retraining is a large part of work in contemporary police society and consumes numerous hours both inside and outside of police duty. Although police academies, workshops, and seminars provide basic instruction in use-of-force activities, they often do not consider departmental policies and procedures. It is, therefore, up to the individual departments to train their members on the expectations, goals, and objectives of the organization in respect to certain aspects of departmental protocol. Furthermore, many policy manuals reiterate duties as instructed at police academies, promoting an acquired knowledge in an effort to maintain standards of service. Mandatory retraining, then, can be left for the acquisition of new knowledge for other law enforcement functions.

## **Strengthening Operations**

When an organization acquires knowledge collectively, it also benefits collectively. Although the mission may be the same, law enforcement agencies are made up of many different divisions, and written policy in the use of force ensures that everyone in the department follows appropriate agendas. From detectives to jailers to department heads, it is critical that each member of the organization understands and interprets their positional objectives and capabilities, as well as the overall departmental objective. Providing a written communication method that is comprehensive in respect to all divisions will promote quality and consistent directives that should be followed by all members of the organization.



Hicks (1967) explained that administrative and strategic planning is critical to the proper functioning of departmental operations. In developing a policy and procedure manual, police managers must provide for growth and efficiency of objectives. If an organization is to remain healthy, it must pursue realistic objectives as well. "Effective plans are flexible, and adapt to changing conditions" (Hicks, 1967, p. 253). The old adage explaining that it is much easier to keep the patient well than it is to cure his sickness is true to a certain extent. Police administrators must anticipate changes and emergencies in the organization both internally and externally. If an inmate in the county jail needs medical treatment, a determination of who will handle the transportation must be made. Will there be sufficient help should something happen? Likewise, changes in case law may require a reorganization of departmental procedures. Finally, crime and societal threats are always fluctuating with changes in population and demographics. Although there exists a principle of commitment in establishing the goals and objectives of a police organization, there is even more of a commitment in putting those objectives to work.

## Control

Control is the second cell of the predatory prevention matrix. Having established policy as the foundation of this four-stage model, a police organization can successfully control its assets through documentation. To defend a police agency in an excessive force lawsuit, it must be illustrated that there exists an interaction between policy and control. Essentially, was policy developed through study of documentation? Control in this model is defined as the necessary documentation of the proposed resolution of the defined problem. This becomes a continuous and dynamic process, as policy must constantly change with the environment and be redefined. This ensures consistency, certainty, and stability in the organization. It also defines vulnerability exposure to the organization's assets. Lombardi (1996) explained that control documentation is a proactive prevention method for reducing negligence or deviance before they end up controlling those assets.

If criminal opportunity is to be reasonably determined and preventive planning to be considered, security risks must be identified through control documentation measures. Police incident reports and use-of-force forms tend to be the most critical benchmarks when lawsuits are imminent. Kuhlman (1989) explained, "Because there is no way to prove what did happen, there is no way to prove what did not happen, so you have no way to defend yourself against false accusations" (p. 356). Additionally, statistics are essential in providing police administrators with control measures. Types, frequency, and circumstances of force are recorded and evaluated to determine how well the components are functioning. This determination may be based upon an individual officer or the effectiveness of the entire group as a whole (e.g., drug enforcement unit, bike patrol, SWAT, etc.).

Performance evaluations are another control measure for the agency. Feedback from all sources, positive and negative, ensures equitable guidance in the officer following new goals as well as following existing ones. Measuring performance judges the overall efficiency and effectiveness of the agency. *Effectiveness* is defined as the *degree* of achieving goals while *efficiency* encompasses the manner in which goals are achieved (Anderson & Carter, 1998). Although these two concepts appear synonymous, they are not. In fact, effectiveness can be viewed as subsequent to efficiency due to the mobility and facilitation of resource management within the

process of efficiency. For example, a police manager that exhibits proper skills in communication and facilitates information-oriented programs within the department will better provide officers with appropriate tools to elicit effective public service by their own means.

Other control measures to consider would be employment background checks and employee assistance programs. Consider the law enforcement officer who has been known to use excessive force in effecting police duty. A supervisor must address this problem. Once identified, it is the administrator's responsibility, based upon the circumstances, to place that officer into an appropriate program to resolve the conflict. This may be in the form of training, retraining, orientation, or anger management courses. As a result, not only has the police supervisor attempted to resolve the problem, the program placement explicitly conveys his or her effort to do so.

With the independent and discretionary nature of police work, administrators are not always aware of an officer's actions. Policy and control documentation, then, signals to the organization and community that policy must be followed, and deviance from it will result in reparations, rehabilitation, or termination. From a litigation standpoint, policy and control documentation impacts the foreseeability of negligent or deviant opportunity by an officer. "Reasonable or adequate security is situational and interrelated with risk factors associated with foreseeability and legal notice" (Lombardi, 1998, p. 261). The basic elements of risk comprise the third cell of the predatory prevention matrix.

## Risk

In almost all civil litigation cases against the police, the organization must prove that it used its control documentation and policies to determine the risk of negligent or deviant opportunities by officers. For purposes of this model, *risk* is defined as the intent, capacity, and opportunity to commit such acts. "Since professional 'learned' methodology is not and should not be based on fortune-telling, we cannot know of an individual's intent without any further information" (Lombardi, 1997, p. 23). This same philosophy is apparent with capacity. Opportunity, however, is the only factor a police organization can control ahead of time. By using policy and control, opportunity can be reduced before an incident occurs. Consequently, an opportunity would never be acted upon despite the officer's intent and capacity to do so. When looking at opportunity, however, it must be understood that it cannot exist without intent and capacity. *Intent* is the desire to commit a deviant act. It is seldom proved by direct evidence; therefore, it is difficult to know in advance exactly what an individual's intent is. *Capacity* is the competence to take a risk by committing the act or understanding the consequences of the act (Lombardi, 1997).

Consider police official deviance, as this is often a breeding ground for negligence due to opportunistic circumstances. Chevigny (1969) explained, "The policeman sees his job to be catching criminals, not complying with procedures" (p. 150). New transfers and rookie police officers must "unlearn" much of what is learned in the police academy or from prior service with other agencies. More than just adhering to new policy, officers must learn the unwritten rules promulgated by the organization. This often comes in the form of "playing the game" regarding the officially sanctioned deviation from formal procedures (Tifft, 1970). The

legitimization of this deviance is substantiated through a common understanding of needs in police work. Chevigny (1969) explained that without official deviance, officers would be hampered and ineffective. With the collective effort of policing, is there a reciprocal responsibility of the organization to those who occupy its offices? Barker and Roebuck (1973) concluded in their investigation that the real organizational task of police administrators is not so much keeping their officers honest but managing the level of police deviance so that work may be done without arousing public outrage. Lies and deception are familiar forms of official police deviance. "Deception of civilians untutored in their rights makes police work simpler and gets the job done" (Lee, 1981, p. 206).

Officers may be asked by superiors to change or fabricate their incident reports in an effort to reduce ambiguity or add evidence for convictions. Consider deadly force by officers, as this is often a continuous point of contention relative to police deviance from procedure. This may or may not be independent of "officially sanctioned" deviance as previously described but still represents risk attributed to opportunity. Kohler (1975) analyzed 1,500 situations of deadly force in which evidence was seriously questioned regarding the need to resort to that level of force. In the study, Kohler found only three of the 1,500 cases in which the officer or officers were subjected to criminal punishment for their actions. Did opportunities exist for deviant or negligent police actions? Was it a result of poor policy or control documentation? The answer could be yes. It would be problematic, however, to determine the premise of the deviancy, either officially sanctioned or not. The point here is that opportunities for deviant police behavior do exist and are determined by various circumstances created by the organization; therefore, it is critical for police administrators to not only implement good policy and control it, but to make sure that they control those who supervise others.

## **Foreseeability**

Phases of attack is the fourth and final stage of the predatory prevention model. This particular cell is used to determine foreseeability and notice. *Foreseeability* is defined as "the reasonable anticipation or expectation that harm or injury can result from the commission or omission of certain acts" (Lombardi, 1996, p. 422). Conversely, *notice* is the communication of the knowledge of a fact and is usually conducted by a police supervisor. Quarles (1989) explained that any attack has particular stages: an invitation, a confrontation, and an assault.

An invitation is any situation or circumstance that prompts an initiation of a crime or deviant or negligent act. For example, a female walking alone at night in a poorly lit area may provoke an attack from a violator. Likewise, a traffic stop arrest, or attempted arrest, that escalated into a physical force situation, due to poor tactics, knowledge, supervision, or lack of police assistance, also defines an invitation. Additionally, an invitation that produces officer negligence may be a result of a gap in time whereby backup officers or administrators have yet to arrive at the scene.

A confrontation to attack is anything that deters or makes the invitation less attractive. "If the criminal does not face sufficient confrontation because the opportunity was not reduced or removed, it is probable that he or she will commit the crime" (Lombardi, 2001, p. 63). Proper levels of backup officers, knowledge through training, and appropriate force responses provide confrontational circumstances for

the potential police resistor or attacker. Those same circumstances also serve as a “control” against an officer who attempts a deviant act against the violator himself.

An assault is the action commitment or the end result of an invitation. It is the very element that is to be prevented through proper policy and control documentation. Time, as mentioned previously, is a factor that relates to all three elements regarding the assault. This aspect regarding spontaneity also provides the premise of this cell of the matrix.

A spontaneous attack conceptualizes all three phases as having occurred simultaneously. In other words, if the phases of an attack occur within seconds, there is insufficient time to prevent a negative event from occurring. The lack of a time gap between phases provides support for the defense in litigation. Conversely, a nonspontaneous attack has differential time gaps between the invitation and confrontation phases or confrontation and assault. This time gap “represents the element of foreseeability that supports a claim of nonspontaneous or planned attack on the plaintiff” (Lombardi, 1996, p. 423). Furthermore, if there is sufficient time for appropriate intervention, the event is also not spontaneous. As a model, this is critical when considering proactive organizational planning prior to an incident or as a reactive assessment relative to damage control.

By virtue of the four stages of the Predatory Prevention Matrix, deviant opportunity can accurately be pinpointed. Likewise, it can be proved that excessive force was anticipated and planned for, regardless of the act. If control is documented properly through policy, it is unreasonable to expect police supervisors to have foreseen the possibility of negligent use of force if the incident was unpredictable. Anticipation through a proximate cause analysis of negligent incidents provides the law enforcement administrator and trainer with effective tools to protect the organization’s assets. With today’s litigious society, internal practice of effective communication through policy and early warning measures creates the opportunity to reduce liability risk by defining the problem and increasing awareness of it. Consequently, proactive planning through an understanding of organizational dynamics and common sense control measures produces safe and effective service opportunities for law enforcement. It is also critical for departments and their officers to analyze and review administrative, state, and federal policy specific to the use of force.

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# Sex, Videotapes, the Internet, and Police Misconduct

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Law enforcement personnel are held to personal standards higher than other members of our communities. Conduct unbecoming an officer has been a common and historical charge used in controlling and censuring police officers and other public employees, for both on- and off-duty actions. The *Police Officer's Code of Ethics*, written back in the 1950s, contains that often-referenced line in training and court decisions: "I will keep my personal life unsullied as an example to all."<sup>1</sup>

Court decisions regarding public employee misconduct involving conduct unbecoming commonly requires that the act of misconduct have a "nexus" to the employee's job performance or ability to perform or have an adverse effect on the agency's "morale," "operations," or "efficiency."

Cases have repeatedly surfaced that involve police employees engaging in sexual activities with connections to the Internet and videotaping these activities. When these off-duty activities are exposed to the agency and/or public, a reasonable public agency must investigate the circumstances to determine whether intervention and/or discipline is warranted.

A case in point involved three deputies and their wives engaging in explicit group sex porno tapes, which were offered for sale on the Internet from a site hosted by one of the wives. The conduct was brought to the attention of the sheriff's office by an anonymous caller. The deputies attempted to have their faces obscured in the videos, but this was not always effective.

What is particularly interesting in this case was the apparent conflict between the original IA investigator, her supervisors, the hearing panel, Florida POST, and the sheriff as to whether the conduct was a violation of the agency's standards and its reliance on the *Code of Ethics*. The issue of whether the deputies violated the agency's rule of obtaining prior approval for off-duty work was also disputed. The sheriff was adamant on all grounds that these acts were misconduct, and his position was supported by the district court and the 11th Circuit.<sup>2</sup>

The court in this case reported, "Additionally, the PBCSO required its employees to adhere to its adopted Code of Ethics, which mandated that employees must keep their private lives 'unsullied as an example to all.' The obvious purpose of the prior-approval regulation was to prevent damage to public confidence in the PBCSO by employees' off-duty employment, and the ethical rule similarly required employees to conduct their private or off-duty lives so as not to place the PBCSO in disgrace . . . ."

Although "[a] government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment," nonetheless "a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."

This case involving the sheriff's deputies cited a 2004 U.S. Supreme Court case involving a San Diego police officer.<sup>3</sup> The officer was selling videotapes of himself masturbating in a police uniform on e-bay; however, the uniform had no markings of the San Diego Police Department. These types of products are restricted to a separate site of e-bay. Apparently, another member of the police department observed and recognized the officer. The police department terminated the officer, but the disciplinary action was overturned by the Ninth Circuit, citing First Amendment protections of the officer. This was subsequently reversed by the U.S. Supreme Court. Of course, what was not addressed was who and why some law enforcement officer was on this site to have noticed the San Diego officer.

A recent case involving an FBI agent concerned his videotaping of himself and three females (two were employees of the FBI) while engaging in sex.<sup>4</sup> One of the incidents was with the consent of the female partner, but other incidents involving her were not consensual.

The agency in this case argues that the appellant's conduct is so egregious that nexus must be presumed, and that, even if such a presumption does not arise in this case, nexus nevertheless has been shown by preponderant evidence. We need not consider the first of these two arguments. Even if nexus may not be presumed in this case, we find that the agency has shown, by preponderant evidence, a nexus between the appellant's conduct and the efficiency of the service . . .

In the absence of the kind of presumed nexus mentioned above, an agency may establish nexus by showing that the employee's conduct (1) affected the employee's or his coworkers' job performance, (2) affected management's trust and confidence in the employee's job performance, or (3) interfered with or adversely affected the agency's mission . . . The record shows that the appellant's failure to live up to these standards caused the ASAIC and others in the agency to lose confidence in the appellant's honesty and integrity, to question his judgment, and to have "much less confidence in his abilities to perform . . . any job . . .

It also shows that the two FBI employees the appellant taped became aware of the videotapes, that information and rumors regarding the taping spread throughout the division, that the information and rumors were upsetting to both of the employees, that it interfered with their ability to concentrate on their work, and that the ASAIC accordingly needed to spend time counseling them and making sure that they and other employees concentrated on their work rather than on the gossip and rumors related to the videotaping.

Another case illustrates the significance of the *Code of Ethics* or other such value statement. It involves a domestic incident occurring in 1998 and another one in 2002.<sup>5</sup> The officer had been a police officer since 1989 and was hired by his current agency in 1996. When he joined the agency, he signed an "oath of office," which consisted of the *Police Officers' Code of Ethics* and *Canon of Ethics*, as well. In 2003, the officer was involved in an altercation with a sergeant who had been his personal friend for the past 18 years. The sergeant informed the agency of the prior domestic violence incidents. The officer was charged with both incidents. The first was beyond the three-year statute of limitations. The state contended, however, that the officer was bound by a state statute that extended the limit to 10 years for "public officers."

The court found that a police officer was “considered on duty 24 hours a day.” So, even off-duty conduct would be applicable to this standard. What the court found specifically important was that the officer signed these oaths and codes. What is not necessarily answered is whether a signature is essential. Would the fact that these were used in some form of swearing in ceremony or embodied in a manual that the officer acknowledged receiving be sufficient?

Another recent case exemplifies these concepts.<sup>6</sup> This is a case essentially involving an office romance issue. The plaintiff, who was a deputy clerk for the Circuit Court and an at-will employee, became involved in an intimate relationship including engagement with a local practicing attorney. The county terminated the plaintiff for engaging in an “adulterous affair.” The District Court granted the county’s motion to dismiss. The Appeals Court, however, affirmed the District Court’s dismissal but for other reasons.

The attorney was still married to his wife although separated from her. His wife was employed as a clerk and master in another court on the same floor of the courthouse as the plaintiff. What is not in the case summary is whether the plaintiff was ever advised of the workplace problems her relationship was causing and given some opportunity to resolve the issue (this would have been a reasonable supervisory approach before initiating discipline).

Plaintiff’s claim cannot prevail upon the application of rational-basis review to the employment action taken by her employer . . . Henderson County Courthouse officials, deciding that it was unacceptably disruptive to the workplace for a woman employed in the office on one of the county’s courts to be openly and “deeply involved in a romantic relationship” with a man still married to a woman employed in the other county court down the hall, acted upon a “plausible policy reason” . . . A rational basis for the decision is therefore evident.

Arkansas State Police did not violate a sergeant’s rights who began a sexual relationship with a crime victim before the prosecution was concluded. Although the affair was consensual and private and occurred while off-duty, management felt that he compromised his position because of the need for objectivity between a victim and an investigator. He filed suit, alleging privacy considerations. The U.S. District Court rejected his claims and sustained his termination. A three-judge panel of the Eighth Circuit has affirmed:

To our knowledge, no court has held that a police officer has a fundamental privacy right that precludes a police department from investigating a citizen’s complaint that the officer had sexual relations with a crime victim during the course of the investigation involving that victim. . . . First, we conclude that a police force has a compelling interest in precluding a criminal investigator from having sexual relations with witnesses or victims involved in an underlying criminal investigation. The criminal-justice system—a bedrock of our democracy—must maintain the public’s respect and trust. . . . If a criminal investigator freely engaged in sexual relations with the victims and witnesses involved in the underlying investigation, claims by criminal defendants of unreliable evidence and false accusations would be plentiful. The investigator’s and the victim’s or witness’s credibility would be impugned by the sexual relations.



The fact that an investigator could be exploitive also was a concern:

The police force has another compelling interest in prohibiting sexual relations between criminal investigators and crime victims: victims should be confident that police officers are striving to bring perpetrators to justice and are not exploiting crime victims. A criminal investigator permitted to have sexual relations with crime victims could use his authority to sexually exploit those victims. The panel concluded that the internal investigation “was narrowly tailored to serve the state’s compelling interest in administering a fair and unbiased criminal justice system.”<sup>77</sup>

Unfortunately, these are not isolated examples of conduct engaged in by law enforcement and other public employees. These cases and police practices do not direct nor encourage public agencies to intrude into the personal lives of public employees, but when these types of incidents do come to the attention of the agency and the conduct has a potential effect on the employee’s performance or the operation of the agency, they should be investigated.

Agencies are now accessing personal websites, such as MySpace.com, when undertaking background investigations of applicants. This has revealed some conduct that can reasonably be foreseen to predict subsequent behavior on the part of the potential employee and should be pursued further during the background investigation. The outcome of the investigation will determine what, if anything, should be done by the agency.

## Action Steps

1. Include the *Police Officer’s Code of Ethics* or similar agency value/conduct statement in your agency’s written manual, personnel handbook, employee orientation training, and, if applicable, any hiring ceremony.
2. Have each employee sign acknowledgment of receipt and understanding of these standards of conduct.
3. Include these concepts during basic, inservice, and supervisory training.
4. When your investigation concerning allegations of this type is sustained, ensure that the charges are fully described to include the “nexus” of the act of misconduct with the employee’s ability to perform and, if warranted, how that act of misconduct has the potential to adversely affect the morale, operations, or efficiency of your agency.

## Endnotes

- <sup>1</sup> International Association of Chiefs of Police. (1957). *Police Officer’s Code of Ethics*.
- <sup>2</sup> *Thaeter v. Palm Beach County Sheriff’s Office*, 449 F.3d 1342 (11th Cir. 2006).
- <sup>3</sup> *City of San Diego v. Roe*, 543 U.S. 77, 125 S. Ct. 521 (2004).
- <sup>4</sup> *Doe v. Department of Justice*, M.S.P.B. 246, 103 M.S.P.R. 135 (2006).
- <sup>5</sup> *State of Washington v. Cook*, 125 Wn. App. 709; 106 P.3d 251 (2005).

<sup>6</sup> Beecham v. Henderson County, 422 F.3d 372 (6th Cir.)

<sup>7</sup> Sylvester v. Fogley, U.S. App. Lexis 25750 (8th Cir. 2006).

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# Have You Any Fourth Amendment Expectation of Privacy in Your Workplace Computers? The Ninth Circuit Follows Many Other Courts to Hold the Answer Is “No”

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This article reviews the current status of privacy expectations of employees with respect to workplace computers and electronic information storage systems and highlights a new Ninth Circuit opinion decided on August 8, 2006, *United States of America v. Ziegler*, 456 F.3d 1138 (9th Cir. 2006). The key facts follow.

## Factual Background

The FBI conducted an investigation into the workplace Internet activities of one, Jeffrey Brian Ziegler, the director of operations for a Montana-based Internet services provider. Ziegler was suspected by other employees of accessing child pornography websites on the company's computers. The company had a “firewall” in place that permitted it to continuously monitor employees' use of the Internet.

Supervisory employees also suspected Ziegler was accessing the pornographic websites and installed a device in Ziegler's computer that recorded his Internet activity. Ziegler's search engine activities revealed that he had searched for information on “pre-teen girls” and “underage girls.”

Cooperating with the FBI, the company made copies of Ziegler's hard drive and delivered one copy together with the tower containing the original hard drive to the FBI. Company supervisors obtained a key to Ziegler's private office and entered late one night to accomplish these seizures obviously, without Ziegler's knowledge or consent. The hard drive revealed many images of child pornography.

## Proceedings in the Trial Court

A federal grand jury indicted Ziegler, whereupon Ziegler's counsel moved the trial court (United States District Court for the District of Montana) to suppress all information and evidence obtained as a result of the search and seizure of Ziegler's workplace computer. In its findings of fact within the order denying the motion on the basis that Ziegler “had no reasonable expectation of privacy in the files he accessed on the Internet,” the trial court specified that “(FBI) Agent Kennedy contacted . . . (company employees) and directed them to make a back-up of defendant's computer files” (emphasis in opinion). The trial court relied on a Fourth Circuit case, *United States v. Simons* (206 F.3d 392, 2000) to find that Ziegler had no expectation of privacy in its order denying the motion.

Ziegler argued that the search of his computer was carried out at the behest of Agent Kennedy and that it violated the Fourth Amendment. The government responded that Ziegler could not have a reasonable expectation of privacy in a computer paid for by the company for use in company business, within an office paid for by the company, and where the company had installed a firewall to monitor employees' Internet usage. Apparently, this monitoring capability was well known by all employees.

## The Ninth Circuit Opinion

Noting that "for most people, their computers are their most private spaces," [*United States v. Gourdi*, 440 F.2d 1065, 1077, 9<sup>th</sup> Cir. 2006 (en banc)], the Court said the "validity of that expectation depends entirely on its context." In order to prevail, Ziegler would have to prove that he had a *subjective* expectation of privacy and that his expectation of privacy was *objectively reasonable*.

As to the first element of Ziegler's burden, the presence of his *subjective* expectation of privacy is established by the need for his personal password to access his computer and the lock on the door to his private office.

Turning to the second prong (objective reasonableness), the Court reviewed *United States v. Simons* upon which the trial court relied. There, the Fourth Circuit held that an employer's Internet usage policy—which required all employees to use the Internet only for official business and informed employees that the company would conduct audits, including the use of a firewall—defeated any expectation of privacy in the records of employees' Internet use.

The Court, as did the trial court below, relied on this reasoning to hold that Ziegler had no reasonable expectation of privacy in his computer, where his employer published an employment manual that was provided to new employees including Ziegler, which established policies prohibiting use of the computers for personal activities and explained the company's program of continuous monitoring through the use of the firewall. Ziegler did not contradict these facts, nor did he assert that he was unaware of the policies.

The Court noted the established rule in many similar cases, which held that the employers' policies providing for official-business-only use, monitoring, company access, company ownership, and so forth, defeat any reasonable expectation of privacy. So, the rule is that the existence of such policies effectively diminishes employees' expectations of privacy in the use of the employers' computers. By resolving this case on these grounds, the Court found it unnecessary to confront the question of whether an "agency relationship" existed between the FBI and the company when the supervisors entered Ziegler's locked office in cooperation with Agent Kennedy. But did the entry into Ziegler's *locked office* violate any expectation of privacy? The Court distinguished cases that found such an expectation in a locked office on the basis that there was no "general search" of Ziegler's office nor entry into a desk or file cabinet "given over to [Ziegler's] exclusive use, (*Schowengerdt v. General Dynamics Corporation*, 823 F.2d 1328, 1335, 9<sup>th</sup> Cir. 1987), in which Ziegler could have kept private papers or effects." The entry was, rather, an "operational reality."

## Conclusion

In the typical law enforcement workplace, policies on use of department-owned computers and other electronic information and storage systems are common. These prohibit use for “personal” business or activities and provide for employer access and monitoring. Employees are often required to acknowledge these policies in writing, signaling their understanding that the employer will access the systems for any legitimate business purpose, including ensuring compliance with the policies.

Hence, in most situations, the employer’s intrusions into computers and electronic systems assigned to employees do not violate the Fourth Amendment. For criminal investigation purposes, law enforcement employers might decide to seek a search warrant in a particular case, but the law is clear that under the circumstances discussed herein, the Fourth Amendment provides no shield against employer access to agency-owned computers and electronic information systems.

Simple adherence to these policies and rules is the best protection against employer intrusions into private affairs, administrative misconduct charges, and occasionally, as here, criminal prosecution.

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# Ninth Circuit Deals Another Blow to Law Enforcement Use of Force: Federal Appeals Court Expands Basis for Punitive Damage Awards

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In a case brought by civil rights attorney Stephen Yagman, the court in *Diaz v. Gates* (docket no. 02-56818) opened the door for plaintiffs in the LAPD Rampart scandal to sue law enforcement officers and departments as a “racketeering enterprise” under the civil “RICO” statute. That ruling significantly expanded the risks and consequences of civil liability for police misconduct and made our jobs that much harder to perform.

Within a week after that decision, in another Yagman case, the Ninth Circuit once again strengthened the hand of plaintiffs suing over excessive force by law enforcement officers. The new decision, *Dang v. Cross* (2005 DJDAR 10232), will make it easier for plaintiffs to recover punitive damages in federal civil rights actions involving excessive force. Unfortunately, these decisions increase the peril under which we must work, as there is often a fine line between legitimate and excessive force, and we never have the luxury that judges and juries enjoy, to second-guess these decisions.

## Who Pays Punitive Damages?

Precedent making it easier for a plaintiff to recover punitive damages raises a special concern for officers in the field. The ordinary compensatory damages that a jury may award for excessive force are generally paid by the employer, which is usually named as a defendant and shares joint liability for damages inflicted in the course and scope of employment.

Any punitive damages awarded, however, are generally imposed on the individual officer; governmental entities are usually immune from punitive damage liability. The governmental employer is not required to pay the part of a judgment that imposes punitive damages on an employee. In California, there is a statute that *permits* the employer to pay an employee’s liability for punitive damages, subject to certain conditions, but does not *compel* the payment under any circumstances. Keep in mind that the purpose of punitive damages is not to compensate the plaintiff; rather it is to punish the individual defendant and make an example of that defendant to deter others in the future.

California Government Code, Section 825(b) authorizes the employer to pay for punitive damages imposed on an individual employee, in the employer’s sole discretion, and only if it finds the employee acted in “good faith” without “actual



malice.” The interpretation of the statutory terms *good faith* and *actual malice* has spawned considerable litigation, and a synthesis of these rules is beyond the scope of this article. It is important to realize, however, that if an officer is held liable for punitive damages, there is never any solid assurance that the employer will pay that part of the judgment. The part of a jury’s verdict that is designated as punitive damages may well become the sole responsibility of the individual officer.

It is also impossible to purchase insurance against punitive damages. California Insurance Code, Section 533 makes it unlawful for an insurance company to issue insurance against punitive damages or pay the part of a judgment that constitutes punitive damages. Neither homeowner insurance nor vehicle insurance can cover punitive damages or pay the part of a judgment that constitutes punitive damages. This statute reflects the public policy that insurance cannot cover willful or intentional misconduct. The officer in the field must therefore exercise diligent self-control to avoid engaging in the kind of conduct that creates exposure to punitive damages.

## **New Case Broadens the Standard for Recovery of Punitive Damages**

In the newly published *Dang v. Cross* case, the Compton Police Department arrested H. N. Dang, a merchant suspected of operating an unlicensed pawn shop. During the arrest, a struggle erupted, and Dang was either punched or kicked in the groin by a Compton officer. Dang brought a federal civil rights suit under Title 42 U.S.C. § 1983, which was eventually narrowed down to a case against the officer and Chief Hourie Taylor, alleging unconstitutional search and seizure, false arrest, and excessive force.

The jury awarded Dang \$18,000 in compensatory damages against the officer but no punitive damages. Dang appealed to the Ninth Circuit, arguing that the trial judge erred in refusing to give a requested jury instruction on punitive damages. The trial judge gave the standard punitive damage instruction from the Ninth Circuit Model Civil Jury Instructions, which permitted the jury to award punitive damages only if it found “that defendant’s conduct was malicious, or in reckless disregard of the plaintiff’s rights.” The Ninth Circuit remanded the case for a new trial because it found that the standard instruction failed to inform the jury that it could also award punitive damages based on “oppression.”

## **General Standard for Punitive Damages**

The standard Ninth Circuit instruction defines the standards *malicious* and *reckless disregard* by explaining that “conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff’s rights if, under the circumstances, it reflects complete indifference to the plaintiff’s safety, rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff’s rights under federal law.” As mentioned above, under these instructions, the jury declined to award punitive damages.

On plaintiff’s behalf, Yagman requested and argued for an instruction that would also authorize the jury to award punitive damages if it found the conduct of the officer was “oppressive.” Specifically, Yagman proposed an instruction that the

jury could award punitive damage if the conduct was “oppressively done” and defined that term to mean, “done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.”

## **Whether Oppression Is a Proper Basis to Recover Punitive Damages**

The request for this jury instruction squarely framed the issue on appeal in terms of whether oppression is a valid basis upon which to award punitive damages in an action brought under federal civil rights law. State law in most states does recognize oppression as a basis for awarding punitive damages. For example, California Civil Code, Section 3294 provides for recovery of punitive damages for “oppression, fraud, or malice” and defines *oppression* as “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” In our view, this definition of oppression is much more narrow than that proposed and sets a fairly high threshold.

There is no equivalent federal statute that establishes a clear standard for recovery of punitive damages. Federal case law has generally derived the standard from state tort law. The Ninth Circuit Model Jury Instructions do not include oppression among the types of conduct that furnish a basis for recovering punitive damages. In requesting the special instruction quoted above, Yagman asserted that “oppression” was the basis of plaintiff’s punitive damage argument. Because he wanted to argue the punitive damage case on that basis, Yagman indicated that the plaintiff would be willing to accept alternative wording of a special instruction on punitive damages, as long as it included reference to “oppression.” The trial judge rejected the requested special instruction, concluding that the requested instruction was an inaccurate statement of the law, and the trial judge thus gave only the model instruction.

The Ninth Circuit reversed that ruling. After surveying the standards recognized in Supreme Court and Ninth Circuit precedent, the appellate court ruled that “the district court erred in concluding that oppressive conduct is not a proper predicate for punitive damages.” Calling the Model Instruction “incomplete,” the appellate court held that “malicious, wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for assessing punitive damages. . . . Such acts are, therefore, all proper predicates for punitive damages under section 1983.”

It is quite useful to examine closely the aspect of the definition of *oppression* that includes abuse of power and taking advantage of weakness. These aspects of the definition appear almost tailored to the excessive force paradigm. With this standard in mind, officers in the field need to remember the following: Never act from anger. Keep emotions in check. When the job is done, stop work. Once a suspect is handcuffed and searched, move right on to the next task. And even then, avoid verbal interactions such as insults, threats, and dire predictions that can reveal a personal motive. Even when you have successfully taken a dangerous individual off the streets, physical or psychological overkill too often results in the tables being turned in court.

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# The Demand for Ethical Leadership in Law Enforcement

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For years we have questioned the practice of requiring law enforcement officers and other social service providers to attend mandatory training on ethics. We viewed this practice as dubious because we believed persons who enforced the laws and engaged in the delivery of human services were responding to a calling, a higher purpose, and, by the very nature of their work, they did not require training on ethical behavior. In addition, most of the training on ethics we have observed was pedagogically defective in that the presenters dryly discussed the difference between right and wrong, quoted language from regulations and statutes, or attempted to “preach” to those in attendance.

Based on an emerging body of knowledge, coupled with recent research, we have, regrettably, abandoned our view that ethics training is unnecessary. Furthermore, it is our view that the entire issue of ethical conduct needs to be revisited.

## Actual Cases

For a one-week period, we subscribed to a service through the search engine Google™ that provided us with current news items—both in print and electronic media—on a variety of subjects. We searched several terms on a daily basis—*police officer*, *sheriff's deputy*, *deputy sheriff*, and *law enforcement officer*—which provided us with a wealth of information: accounts of innovative police strategies; current issues in law enforcement; chiefs of police in given jurisdictions; challenges faced by police, and there are many; tragic deaths within the law enforcement community; and special recognitions presented to police personnel. Unfortunately, this research also provided information that did not speak well of the law enforcement profession. While we initially had planned to record American news stories generated during the entire month of October 2006, we were overwhelmed with reports during the first week of the month and quit this exercise after only seven days.

During the first week of October 2006, Google™ highlighted the following news stories:

October 1, 2006 – *KVIA-TV Channel 7 News* (El Paso, Texas), “Police officer allegedly assaulted wife.”

October 1, 2006 – *Washington Post* (District of Columbia), “Veteran officer charged with four counts of second-degree assault.”

October 1, 2006 – *Baltimore Sun* (Maryland), “Second officer charged with SUV arson plot.”

October 1, 2006 – *USA Today*, “Florida deputy shoots self showing off gun.”

October 1, 2006 – *Milwaukee Journal Sentinel* (Wisconsin), “Charges contrast with officer’s public image: Father of six, union board member now accused of sexual assault.”

October 2, 2006 – *Boston Globe* (Massachusetts), “Boston police officer pleads not guilty to shooting fellow officer.”

October 2, 2006 – *KGTV-TV Channel 10 News* (San Diego, California), “Officer failed to pay \$63,000 in taxes.”

October 2, 2006 – *Desert Sun* (Palm Springs, California), “Desert Hot Springs officer charged with 49 felony counts.”

October 2, 2006 – *WDAM-TV Channel 7 News* (Laurel-Hattiesburg, Mississippi), “Petal cop accused of child molestation.”

October 2, 2006 – *WBAL-TV Channel 11 News* (Baltimore, Maryland), “Accused Baltimore police officer arrested again.”

October 3, 2006 – *Lexington Herald-Leader* (Kentucky), “Former Clark deputy pleads not guilty to drug charges.”

October 3, 2006 – *WSOC-TV Channel 9 News* (Charlotte, North Carolina), “Police, students surprised by accusations against resource officer.”

October 3, 2006 – *WMC-TV Channel 5 News* (Memphis, Tennessee), “Former Memphis police officer sentenced in federal court.”

October 3, 2006 – *KVTV-TV Channel 11 News* (Fort Worth, Texas), “Comments from sheriff’s captain called racist.”

October 4, 2006 – *Baltimore Sun* (Maryland), “Female officer’s lawsuit settled.”

October 4, 2006 – *The Union* (Grass Valley, California), “Deputy resigns after incident: Officer accused of sexual conduct with prisoner.”

October 4, 2006 – *Cleveland Plain Dealer* (Ohio), “Madison officer who kept licenses quits.”

October 4, 2006 – *Chicago Tribune* (Illinois), “Cop’s mistress has sentence cut.”

October 4, 2006 – *Orlando Sentinel* (Florida), “Deputy found guilty of resisting arrest gets probation.”

October 4, 2006 – *KARE-TV Channel 11 News* (Golden Valley, Minnesota), “Richfield officer pleads guilty to federal charges.”

October 4, 2006 – *Anderson Independent Mail* (South Carolina), “Officer arrested in drug sting.”

October 4, 2006 – *WRTV-TV Channel 6 News* (Indianapolis, Indiana), “Deputy accused of pointing gun loses job.”

October 4, 2006 – *WOAI-TV Channel 4 News* (San Antonio, Texas), “Former deputy indicted for murder.”

October 5, 2006 – *Utica Observer-Dispatch* (New York), “Indicted Utica police sergeant’s duty to change.”

October 5, 2006 – *KOB-TV Channel 4 News* (Albuquerque, New Mexico), “Navajo Nation police officer accused of DWI.”

October 5, 2006 – *Baltimore Sun* (Maryland), “Officer, convicted drug dealer arrested.”

October 5, 2006 – *Dallas Morning News* (Texas), “Officers resign police careers after plea in suspect’s death.”

October 5, 2006 – *The Sun* (Myrtle Beach, South Carolina), “Ex-police officer sentenced for misconduct.”

October 5, 2006 – *The Tennessean* (Nashville, Tennessee), “Metro police captain investigated.”

October 5, 2006 – *The Republican* (Springfield, Massachusetts), “Judge rules ex-cop guilty of assault.”

October 5, 2006 – *Houston Chronicle* (Texas), “Missouri City officer retires in wake of probe of shooting.”

October 5, 2006 – *The News Press* (Fort Myers, Florida), “Honored Lee deputy accused of theft.”

October 5, 2006 – *Atlanta Journal Constitution* (Georgia), “Tifton cop resigns after DUI wreck in patrol car.”

October 5, 2006 – *Washington Post* (District of Columbia), “Limited duty, full-time pay.”

October 5, 2006 – *WISN-TV Channel 12 News* (Milwaukee, Wisconsin), “U. S. attorney files federal charges in beating case.”

October 5, 2006 – *KPIX-TV Channel 5 News* (San Francisco, California), “Contra Costa deputies file sexual harassment suit.”

October 5, 2006 – *WALB-TV Channel 10 News* (Albany, Georgia), “Former cop receives split verdict.”

October 6, 2006 – *Bakersfield Californian* (California), “Kern deputy arrested.”

October 6, 2006 – *Pittsburgh Tribune-Review* (Pennsylvania), “Fayette constable accused of assault.”

October 6, 2006 – *Kansas City Star* (Missouri), “Officer gets probation.”

October 6, 2006 – *Washington Post* (District of Columbia), “Nebraska deputy arrested in school threat.”

October 6, 2006 – *Cincinnati Enquirer* (Ohio), “Domestic charge filed against deputy.”

October 6, 2006 – *Asbury Park Press* (New York), “Asbury detective charged, suspended after probe.”

October 6, 2006 – *Worcester Telegram & Gazette* (Massachusetts), “City officer, wife face charges.”

October 6, 2006 – *San Jose Mercury News* (California), “News from the San Joaquin Valley.”

October 6, 2006 – *WVEC-TV Channel 13 News* (Norfolk, Virginia), “Police officer faces insurance fraud charge.”

October 6, 2006 – *Muncie Star Press* (Indiana), “Middletown officer gets deal in child porn case.”

October 6, 2006 – *WTVM-TV Channel 9 News* (Columbus, Georgia), “Arab officer convicted of soliciting sex from women fired.”

October 7, 2006 – *Newark Star-Ledger* (New Jersey), “Veteran cop arraigned in case of stolen evidence.”

October 7, 2006 – *Harrisonburg Daily-News Record* (Virginia), “Prosecutor named for deputy’s DUI case.”

October 7, 2006 – *KNBC-TV Channel 4 News* (Los Angeles, California), “Man beaten by LA police settles suit.”

In all the incidents cited, and assuming what has been reported is accurate, we find ourselves returning to a question frequently asked by Cheryl K. Townsend, former president of the National Association of Probation Executives, when confronting aberrant behavior on the part of criminal justice professionals: “What were they thinking?” Two possible answers to her rhetorical question come to mind: (1) they were not thinking or (2) they were thinking, but their thinking was governed by a flawed or disconnected value system.

These news reports represent some of the most egregious behavior on the part of persons holding positions of responsibility in the law enforcement profession, and because most of them involved detected law violations, they found their way

into electronic and print media. They do, however, cause us to pause and ask the following questions:

- What other violations are occurring that are not subject to media exposure?
- Are police leaders failing to model and demand ethical behavior within their agencies?
- Has the culture of our law enforcement organizations deteriorated to the point that we are now tolerating the intolerable when it comes to staff conduct?
- And if unethical behavior is prevalent in our organizations—organizations charged with the responsibility of providing public protection—what does this say about us as a profession?

Unfortunately, no empirical answers to these questions exist. Without ethical and courageous leadership, the response to the issues raised by these questions will not come easy.

## Other Research

Ironically, on the day following the conclusion of our week-long effort, the *Dallas Morning News* published a fairly detailed and lengthy report on Texas police officers in prison. Citing FBI data, the article, authored by the highly respected reporter Diane Jennings (2006), notes that “in the last two years more than 365 police officers have been convicted nationwide” (p. 18A).

Persons employed in law enforcement should not feel singled out by this article. Similar Google™ searches were conducted in the fall of 2005 on probation and parole officers and in the spring of 2006 on correctional officers and jailers with equally disturbing results (Beto & Corbett, 2006a, 2006b).

In addition, veteran news reporter Mike Ward provided a comprehensive report on arrests of employees of the Texas Department of Criminal Justice in April 2006. According to his research, much of which was gleaned from the records of the Texas Department of Criminal Justice, during calendar year 2005, a total of 761 prison employees were arrested for a variety of felony and misdemeanor offenses. During the first two months of 2006, a total of 148 employees of the Texas Department of Criminal Justice were arrested (Beto & Corbett, 2006b).

## Unacceptable Behavior

While many forms of unacceptable behavior are identified in the news synopses found earlier herein, for the sake of clarity, we are providing a list of ethical violations we have found to exist within the ranks of the criminal justice system:

- General crime
- Theft, to include submitting fraudulent time sheets and travel reimbursement claims; misapplication of supplies, equipment, and seized evidence; and intellectual property violations
- Attending conferences at employer’s expense and doing everything but attending workshops
- Kickbacks and bribery
- Demanding and accepting gratuities



- Trafficking in contraband
- Brutality and prisoner abuse
- Discrimination due to age, race, ethnicity, gender, sexual orientation, and religion
- Application of a double standard
- Favoritism, bias, and patronage
- Violations involving sex, including general sexual harassment, supervisors sexually harassing subordinates, employees having sex with offenders, and employees having sex with superiors to advance in the organization
- Drug and alcohol use and abuse on the job or that impacts job performance
- Improper use of equipment
- Laziness
- Disloyalty, gossiping, and duplicitous behavior
- Failure to report illegal and unethical behavior
- Failure to do the assigned job in accordance with established rules, regulations, and customs
- Behavior that is not mission driven

We readily acknowledge that there may be other forms of unethical or illegal behavior we have failed to identify. Those that we have listed are those that we have observed occurring during our combined careers.

## **Possible Strategies to Address Unethical Behavior**

In October 2003, we asked a number of relatively new correctional administrators to describe ethical dilemmas they had faced during their careers. In addition, they were asked to identify strategies that might make criminal justice practitioners more ethical. Their thoughtful responses for suggested strategies, which cover a fairly wide range, are as follows:

- Teaching morals and values at an early age
- Better recruitment and selection
- Better pay
- A course in ethics required before college graduation
- Better education and training
- Staff mentoring
- Developing an organizational culture that stresses ethical conduct
- Rapid and consistent response to ethical violation
- Establishing clearly defined expectations, with those expectations being modeled by those in authority
- Improved leadership

Regrettably, a number of the strategies identified are beyond the realm of influence of chiefs and sheriffs; however, those that can be addressed within the agency should be done so with vigor and courage.

The data we have presented makes a compelling case that ethical violations in the law enforcement profession are a growing problem. What, then, might an organization do to create a climate of integrity, promote “in character” behavior, and deter and reduce unethical acts?

## **Taking Ethics Seriously**

There are at least a few important steps that leaders can take so that their organizations can achieve a high ethical standing. Perhaps most importantly, they can use the “bully pulpit” of their offices to underscore the importance of ethical actions. In their communications with staff, they can continually highlight the importance of acting in line with ethical norms. They can also avoid the “everybody else is doing it” mentality (Richardson, 2006). These may seem like simple suggestions, but, in our experience, law enforcement leaders seldom take these steps except in response to a recent scandal. At that point, it is too late; the horse is already out of the barn.

If it is true, as we believe, that we instruct more effectively by example than by precept, leaders must be scrupulous in their attention to the highest standards in their own behavior (see Dvorak, 2006; Jacocks & Bowman, 2006). This will be reflected in how they treat others in the organization, the associations they make in both their public and private lives, their strict adherence to organizational rules (accounting for work time, job-related expenses, use of sick and vacation time, etc.), the manner in which hiring and promotional decisions are made, and even the language that they use. We all sense instantly when we are dealing with persons of character; they act in small and large ways in alignment with a clear set of deeply held values. They are, to use an old-fashioned term, virtuous.

The manner in which all ethical infractions are handled will send a clear message throughout the organization about the importance of ethical behavior. Major infractions must, of course, result in serious penalties. We believe, for example, in a “zero tolerance” policy regarding criminal behavior. Any evidence of even minor criminal activity (e.g., drunk driving) should lead to discharge. More importantly, minor infractions must always result in some administrative sanction. There must be a rational continuum of sanctions for employee behavior just as there is for offenders within the criminal justice system.

While it can reasonably be questioned whether it is possible to instill character through training, training does have a role to play here. As one of our colleagues used to say, “I think our training programs might well take up the topic of the Ten Commandments, since some of our staff seem to need a refresher course.” He had a point. Such instruction need not be in the form of Sunday School but could promote deep and substantive discussion of ethical standards and how they apply to common dilemmas faced by law enforcement officers. For example, what is the proper response to the offer of a gift from a suspect or a relative or friend of a suspected criminal? To what extent should an officer spend his or her free time at well known “watering holes,” race tracks, and adult entertainment clubs? What relationships, if any, should officers form with known criminals? What constitutes abuse of sick leave? What obligation does an officer have to report unethical conduct by a coworker?

## **An Ounce of Prevention**

Perhaps the straightest route to organizational improvement in this area is through more conscientious recruitment. It is not clear to us that the screening for character before hiring is valued nearly as much as screening for competence. Surely we

want recruits who are properly credentialed and have the appropriate skill set, but shouldn't we go further and seek evidence of strong ethical underpinnings?

How would we screen for character? At least two strategies come to mind:

1. We should pose more detailed questions to references and inspect prior work histories more carefully regarding the candidates' code of conduct. Have there been any instances of dishonesty? What level of respect do the candidates hold among colleagues? How have the candidates responded to challenges or constructive criticisms from supervisors? How do the candidates address and interact with those confined? Do they establish firm yet respectful boundaries?
2. We could pose hypothetical dilemmas to candidates during employment interviews for the purpose of measuring their moral reasoning. How would they handle an inappropriate approach by a member of the criminal element? Respond to a situation in which a partner is involved in criminal activities? Would they participate in a walk-out or sick-out? Would they engage in behaviors that border on sexual harassment? How would they handle encouragement from a colleague to join in office gossip or mission-disruptive pranks? Evidence that a coworker is falsifying reports? The number and type of scenarios employed are limited only by the imagination of those conducting the employment interview.

We can also take care to put candidates for promotion through a similar ethical screen. Have they exemplified the highest standards of behavior? Are they recognized as exemplars of good character by colleagues and others? Only those with an unblemished record should be seriously considered for promotion.

Those in law enforcement have a special obligation—given the nature of the enterprise—to conform to the highest standards of professional and personal behavior. We cannot hope to put others on the straight and narrow path if we have not faithfully and relentlessly traveled that road ourselves.

It is time for a period of ethical renewal in the law enforcement profession.

## References

*Assorted news articles and television reports can be found in the previous case listing. All of the articles and news reports cited in this section were generated from the originating media's website on the Internet. In some cases, events were reported in more than one source.*

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# Homicide Solvability Factors in El Salvador: An Initial Exploration

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## Introduction

For more than a decade, El Salvador struggled through a civil war, motivated largely by ideological differences. The war ended in 1992 with the signing of the peace treaty between the government and rebel groups (Martínez, 1996). One of the most important agreements reached through peace negotiations was the dissolution of the military-controlled security forces in charge of public safety and the creation of a new law enforcement agency, the National Civil Police (PNC), which was entrusted with providing basic law enforcement services nationwide (Call, 1997). Under the supervision of the United Nations, the PNC was systematically implemented and deployed by 1994 (see Costa, 1999).

Despite the peace treaty, nonpolitical violence has been one of the most enduring issues in El Salvador (Arana, 2001), and while the PNC has effectively tackled major crime-control problems since its creation (see Ponce, Woods, & Skelton, 2005), homicides continue to remain a major concern for criminal justice practitioners as well as the public in general (see Mejía, 2005; Mejía & Arauz, 2005b). Notwithstanding the exigent and practical concerns regarding the prevalence of homicides in El Salvador, there has yet to be an empirical examination of the characteristics of criminal homicide cases that increase case solvability. The present exploratory study seeks to remedy that gap by examining the case features (e.g., victim and crime scene characteristics) that affect the solvability of homicides. For the purposes of this study, solved cases are defined as those cases in which: “. . . an offender has been identified. This may involve the arrest of a suspect, laying of charge without apprehending a suspect, or solving the case in some manner” (Regoeczi, Kennedy, & Silverman, 2000, p. 142). One thousand fifteen homicides perpetrated between July 2002 to July 2003 were included in the analysis. Of those 1015, 31.5% (n=320) were solved, and 68.5% (n=695) were unsolved.

## Literature Review

Homicide is considered to be one of the most serious and “visible” crimes: its’ occurrence and clearance faces vigilant scrutiny—and accountability—from various political entities, the general public, and the media (Blau, 1993; Meyers, 1997; Puckett & Lundman, 2003). Compared to other crimes, homicides are one of the most valid and reliable indices of violence and sources of data because their occurrence falls under the purview of law enforcement agencies rather than the victims themselves (LaFree, 1999). Despite much interest from various academic disciplines, the study of murder

investigations and their efficacy as a warrantable topic of inquiry remains sparse and has only come to the attention of researchers recently (see Keppel & Weis, 1992).

Researchers have found that solvability of homicides is affected by inherent conditions of the work itself, the idiosyncratic characteristics of agencies and their investigators, variations in social structure, and the victims themselves (Keppel, 1992). In the review of the literature below, we discuss the factors that pertain to homicide investigations thematically and by relevance.

## **Homicide Circumstances**

There is consensus that criminal organizations have a significantly detrimental effect on the clearance of homicide cases (Finn & Healey, 1996; Koedam, 1993). That is, gang-related and drug-related homicides have lower chances of being cleared through arrests because offenders in these types of cases engage in tactics such as witness intimidation, which impede criminal investigations (Litwin, 2004; Puckett & Lundman, 2003; Regoeczi et al., 2000; Wellford & Cronin, 1999, 2000). It has also been demonstrated that the aim of aggression affects the likelihood of a case being solved. Expressive homicides can be characterized by their impulsivity and spontaneity: “expressive violent acts tend to begin as a fight, brawl, or argument that occurs relatively spontaneously with little rational planning” (Block & Block, 1991, p. 40). Instrumental violence, on the other hand, is predatory: it is highly premeditated and carefully planned, exemplified in the acquisitive character of the act. Simply put, the aim of expressive violence is to hurt the other; whereas, instrumental violence is to acquire material gain.

The differences in aim are highlighted in the patterns observed in the temporal, spatial, weapon usage, and victim-offender relationships in homicides. The cast of characters, the time, and setting of expressive homicides indicate that they are culminations of confrontations that are social in origin, hence, committed primarily with weapons of opportunity. Instrumental homicides, on the other hand, are marked by the rational calculation of maximal utility, and are prototypically committed by strangers against strangers (Block & Block, 1992; Wolfgang, 1958). For investigators, instrumental homicides pose a greater challenge to solvability due to the anonymous nature of the participants involved; expressive homicides are relatively easier to solve, as the participants share emotional, social, and dramaturgical foci (Innes, 2002; Puckett & Lundman, 2003; Regoeczi et al., 2000).

Relatively few homicides involve the use of restraints during the aggression; these cases are generally characterized by their instrumental motivations, careful execution, and desire to avoid detection by law enforcement (Salfati, 2003). On the other hand, homicides that show a careless execution, such as those that involve overkill, commonly take place between people that share a close relationship and expressive motives (see Browne, Williams, & Dutton, 1999). This suggests that cases that involve the use of restraints to control a victim (e.g., instrumental orientation) will negatively affect the chances of solving homicides, while those cases in which overkill is present (expressive orientation) will more likely be solved. The following two hypotheses are therefore proffered: (1) homicide cases in which the victims are tied up at the scene are less likely to be solved than those in which the victim has not been tied up and (2) homicide cases in which overkill is present are more likely to be solved than cases in which overkill does not exist.

It has also been demonstrated that homicides committed during the commission of other crimes are more difficult to solve. Homicide crime scene research shows that two concomitant types of crimes can be identified through the analysis of offender behaviors during the commission of murder: (1) property offenses and (2) sexual offenses (Salfati, 2000; Salfati & Haratsis, 2001; Santtila, Canter, Elfgrén, & Häkkinen, 2001). These actions are associated with more organized offenders who are cognizant of forensic techniques (Salfati, 2003). This, in turn, suggests that homicides that involve the commission of property and/or sexual crimes are less likely to be solved; therefore, the following two hypotheses were tested: (1) homicides that involve the perpetration of property offenses have lower chances of being solved than homicides that do not involve additional offenses and (2) homicides that involve the perpetration of sex crimes have lower chances of being solved than homicides that do not involve additional offenses.

### **Victim Characteristics**

Research also demonstrates that homicide clearance is mediated by social structural characteristics of victims, which include sex and age of the victim as well as gang membership.

#### ***Victim's Age and Sex***

Research has shown that females are more likely than males to kill and be killed by acquaintances (Browne & Williams, 1993; Browne et al., 1999) while the elderly are more likely to be killed by strangers (Muram, Miller, & Cutler, 1992). Thus, at least in some locales, it has been found that the chances of clearing a homicide are improved if the victim is 10 ten-years old or younger and/or female (Regoeczi et al., 2000), younger than 30 and/or indigenous (Mouzos & Muller, 2001), older and/or not Hispanic (Litwin, 2004). Differences in culture and homicide victimization patterns affect these results, however (Regoeczi et al., 2000). This is consistent with previous research, which posits that murders involving younger females as victims tend to be solved.

Unlike previous research, a recent victimization poll in El Salvador revealed that the victim's gender, age, and relationship are not significant predictors of the type violence they experience (Cruz & Santacruz, 2005). This suggests that El Salvador has a different homicide victimization pattern than the ones experienced in countries like the United Kingdom, United States, or Australia. Hence, age and gender may not be related to homicide clearance. To test this premise, the following two hypotheses were put forward: (1) female homicide cases are more likely to be solved than male homicide cases and (2) homicide cases in which the victim was under 30 are more likely to be solved than cases in which the victim was over 30.

#### ***Gang Membership***

In addition to potential differences in victimization patterns, El Salvador is unique in that it has been the repository of deported gang members from the 18th Street and Mara Salvatrucha (MS13) gangs from the United States (Zilberg, 2004). The latter, an originally all-Salvadoran gang created by immigrant youths during the 1980s in Los

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\* Cruz and Santacruz (2005) consider two types of violence in their analysis: (1) social: aggressions motivated by the desire to gain or maintain social power or benefits and (2) economic: violent acts motivated by need to gain or maintain economic gain or power.



Angeles, California, is currently considered by experts the most dangerous gang in the United States (Domash, 2005). Just as the American-based MS13 gangs use violence to intimidate or eliminate witnesses who are collaborating with law enforcement (Markon & Glod, 2004), their Salvadoran counterparts have been known to engage in such actions to avoid conviction. Additionally, Salvadoran gang members are mostly victimized by rival gang members (Santacruz, & Concha-Eastman, 2001). This suggests that victims who are affiliated with gangs were most likely killed by another gang member and that probable witnesses may be reluctant to collaborate with authorities, hence this type of homicide will have poorer chances of being solved. As a result, we hypothesize that homicides involving gang members as victims are less likely to be solved than homicides involving those who are not gang members.

## **Time and Location**

Different types of locations and times of the day have been found to affect homicide clearance. Research indicates that those carried out in residences are more likely to be solved; whereas, murders perpetrated in taverns or bars have less chances of being cleared (Litwin, 2004; Mouzos & Muller, 2001; Wellford & Cronin, 1999, 2000). Murders committed between 6:00 PM and 6:00 AM are also less likely to be solved (Mouzos & Muller, 2000). The work of Keppel and Weis (1992) shows six distinct findings in this area:

1. Solved cases more frequently contain information about the time and location of the initial victim-offender contact and the initial assault on the victim.
2. Gathering information on time and location of the actual murder, the initial assault site, and the point of contact between the offender and victim increases the chances of homicides being solved.
3. Solvability of homicides decreases as the time between the victim's last sighting and body recovery increases (i.e., greater than 24 hours).
4. Solvability of homicides decreases when the time span between the initial assault and the actual murder is greater than 24 hours.
5. If two or more events (i.e., actual murder and body recovery) occur more than 200 feet apart, the chances of the case being solved decrease.
6. Cases in which the victim is initially contacted by the offender and the body is recovered more than a month later and more than 1.5 miles away tend not to be solved.

Many academics argue that witness collaboration with detectives and responding patrol officers is crucial to clearing homicide cases (Greenwood, Chaiken, & Petersilia, 1977; Riedel & Rinehart, 1996; Reiss, 1971). Mouzos and Muller (2001) found that law enforcement professionals involved in homicide investigation share a similar opinion, as they believe that "the absence of a witness severely impedes the investigation" (p. 5). Wellford and Cronin (1999, 2000) determined that cases that involve an eyewitness or a witness who provides information about the circumstances, motivation, or identity of the offender or his or her whereabouts are more likely to be solved. Their study also contends that when confidential informants provide useful information or when they come forward on their own, the odds of solving cases improve.

One notable difference between the United States and El Salvador is the relative disparity in the capabilities of forensic investigations; there is a preference for testimonial over scientific evidence in El Salvador (Mejía & Arauz, 2005b; Mejía, 2005).

Considering this shortcoming, the presence and identification of witnesses at crime scenes is crucial to solving homicides in El Salvador. Extant research unequivocally demonstrates that early discovery of the body and the presence of eyewitnesses improve the solvability of homicides. This suggests that, in El Salvador, homicides committed at times and places that involve a high probability of individuals witnessing the murder will have greater chances of being solved. Although there is no direct measure of the existence of witnesses, intuition suggests that crimes committed during the day-time hours would increase the probability of solving a crime. We hypothesize, therefore, that homicides committed during day-time hours are more likely to be solved than homicides committed at night.

As noted, homicides perpetrated in residences have a greater chance of being solved than cases involving strangers in a public setting. In El Salvador, violence carried out in closed spaces is limited to residences (16.8%) and place of work (5.7%) (Cruz & Santacruz, 2005). This suggests that Salvadoran homicides committed in closed spaces have an expressive orientation and involve individuals that share a close relationship; these incidents have better chances of being solved. Thus, we hypothesize that homicides committed in closed spaces have better chances of being solved than homicides committed in open spaces.

As previously mentioned, solvability decreases when the actual murder and body recovery locations are different. Transporting the body has been considered a sign of both the offenders' organization and planning in instrumental homicides (Ressler, Burgess, & Douglas, 1996) and the offenders' effort to separate themselves from the crime scene and avoid detection in expressive themed murders (Salfati, 2000; Salfati & Haratsis, 2001). This entails the beliefs that the police possess the sophisticated forensic capabilities and that an offender's cognizance of those techniques that hinder investigations will yield efficacious results. The situation in El Salvador is different in that there is a dearth of confidence in the ability of the police to identify and arrest offenders (Cruz & Santacruz, 2005); this suggests that common citizens will be less likely to adopt sophisticated measures to avoid detection. Thus, transporting the body is more likely to be indicative of Salvadoran instrumental homicides. As a result, we hypothesize that homicide cases in which the discovery and murder sites are different are less likely to be solved than cases in which the discovery and murder sites are the same.

### **Weapon Used by Offender**

The amount of evidence left at homicide scenes is proportional to the distance required to complete the act since more distance equates with less of a struggle between the victim and the assailant (Geberth, 1996). Close range weapons, such as knives and blunt objects, and "hands on" methods, may require a struggle between the victim and the offender and, therefore, leave abundant evidence that could be used to identify the assailant.

Unlike intimate contact methods, murders perpetrated with firearms have less chance of being solved but only in those places in which there are restrictions on the accessibility to firearms to the general public (Regoeczi et al., 2000; Mouzos & Muller, 2000). After more than a decade of civil war in El Salvador, which ended in 1992, thousands of weapons and ammunitions were left behind and are available through the black market (Call, 1997). This suggests that the population's firearm availability

is relatively high; therefore, the relatively easy accessibility of firearms to the general public militates against the solvability of homicides in El Salvador.

The wide availability of firearms in El Salvador suggests that assailants that use close-range weapons do not plan homicides and act impulsively, augmenting the chances of their assaults being witnessed by bystanders and thus, making murders committed with these types of weapons easier to solve. Literature also suggests that crimes in which the victims are poisoned are more easily solved; offenders wishing to distance themselves from the aggression both physically and psychologically will use this killing method (Salfati, 2003). Additionally, this method involves a close emotional bond between the victim and his or her assailant (Salfati, 2000). This limits the list of suspects that investigators have to narrow down, shortening the investigative process and increasing the chance of successful resolution. As a result, we put forth two hypotheses: (1) homicides committed with close-range weapons or methods have better chances of being solved than those perpetrated with firearms and (2) homicides committed by poisoning the victim have a greater chance of being solved than all other types of homicide.

An offender's choice of weaponry may be a function of rational calculation or simple opportunity. Offenders in instrumental homicides bring the murder weapon, anticipating violent confrontations with their victims based on their past interactions (Salfati, 2000; Salfati & Haratsis, 2001); whereas, offenders in expressive homicide often use weapons found at the scene to kill their victims in an impulsive act during the commission of other crimes (Santtila et al., 2001).

Regardless of the aim of aggression, the actions of offenders who bring the murder weapon has been associated with other behaviors that indicate planning, organization, and forensic awareness (Salfati, 2003). Thus, bringing the murder weapon to the scene of the crime may be accompanied by offender actions that make it more difficult for authorities to solve. We, therefore, hypothesize that homicides in which the offender brought the murder weapon to the scene have less chances of being solved than murders committed with a weapon selected at the scene.

According to previous research, it is imperative to quickly identify the victim to determine the circumstances under which the murder occurred in order to increase the odds of solving the homicide. Nonetheless, as noted before, Salvadoran law enforcement criminal investigations are limited by poor forensic investigative capabilities. Specifically, senior homicide investigators have stated that fingerprint identification is almost impossible (Mejía, 2005). This suggests that identifying victims through their fingerprints is difficult, which indicates that those cases in which the victim's head/face are injured are less likely solved.

Santtila et al. (2001) found that the mutilation of body parts in homicide cases frequently co-occurs with other actions that indicate planning. In a later study, they determined that these types of homicides were not statistically associated with a close relationship between the victim and the offender (Santtila et al., 2003). Serial murder literature has linked body mutilation with lust-motivated homicides in which the killing is just an instrument to satisfy other needs of the offender (Hickey, 1997). These murders mirror the serial murder offender's desire to fulfill certain fantasies and at the same time avoid detection. The planning and careful execution that characterizes the homicides perpetrated by these types of murderers suggests that their homicides are executed in

such a way that physical or testimonial evidence is minimal or nonexistent, limiting the chances of their crimes being solved. Furthermore, local authorities have attributed Salvadoran homicides in which body parts have been mutilated to gangs (“*Vidas Interrumpidas*,” 2003). This decreases the odds of the case being solved because of witness intimidation practices common in gang-related incidents. This problem is compounded because fingerprint identification is almost impossible in El Salvador (Mejía, 2005). This suggests that identifying victims through their fingerprints is difficult, which indicates that those cases in which the victim’s head/face are injured are less likely to be solved. Thus, we hypothesize that homicides involving injuries to the victim’s face or mutilated body parts are less likely to be solved.

## **Aims of the Study**

The present study seeks to identify the variables that affect the solvability of homicide cases in El Salvador. Specifically, it explores the influence of victim characteristics, time and location of offense, premeditation and control in the execution of the crime, weapons and wounding, and commission of concomitant criminal offenses, on the probability of clearing Salvadoran murder incidents.

## **Methodology**

The PNC’s investigative units were restructured in July of 2002 (“*Policía Confirma*,” 2002). This change required physically moving case files to new facilities and transferring personnel in and out of investigation offices. Considering that case files for murders perpetrated before July 2002 may have been misplaced or labeled incorrectly during their change of location (which would make their examination impossible) and case detectives may have been transferred to other units (which would make it more difficult to contact or locate them), it was determined that only homicides committed after the restructuring process were to be included in the present study. One thousand and fifteen homicides (n=1,015) perpetrated during July 2002 and July 2003 were analyzed. These included solved (n=320) and unsolved homicides (n=695).

Data was gathered by PNC police agents who volunteered to assist in an internal call launched by the Center of Criminology and Police Sciences (CECRIPOL). They went through a selection process and were instructed on how to code the information into the data-gathering instrument. Afterwards, they were divided into five teams and each deployed to one of the five regional criminal investigation offices. Data was obtained through the examination of case files (kept by police investigative units and the General Attorney’s Office) and personal interviews with the police detectives in charge of each case. The case files generally contain autopsy reports, witness interviews, crime scene photographic albums, crime scene reports, crime laboratory results from evidence gathered at the scene, and other official documents relevant to the investigation of the crime. Interviews with detectives were only utilized to corroborate case file information and obtain the investigator’s opinion as to the presence of overkill in the homicide cases.

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\* Solved cases only include single victim/single offender homicides, and unsolved cases involve only single victim homicides.

## **Dependent Variable**

The present study utilizes a dichotomous dependent variable to describe case status (1 = solved; 0 = unsolved). The coding of this variable is based on the Regoeczi et al. (2000) definition of a cleared case, in which they consider solved homicides those in which “. . . an offender has been identified. This may involve the arrest of a suspect, laying of charge without apprehending a suspect, or solving the case in some manner” (p. 142). As previously noted, there were a total of 1,015 homicides committed during the study time period. The majority of all cases (68.5%, n=695) remain unsolved; therefore, it is important to ascertain what characteristics make it more likely a case will be solved.

## **Independent Variables**

A review of available data allowed for the inclusion of several different variables that may predict the solvability of the homicides: homicide characteristics, victim characteristics, time and location of the homicide, and weapon used to commit the homicide. Although a significant amount of information was collected on each of the individual cases, there were problems with consistency in terms of what information was included in the official files or how that information was recorded. As a result, it was necessary to code each of the independent variables as dichotomous categories as 0 or 1. Each of the selected variables are reviewed below and included in Table 1.

### ***Homicide Characteristics***

The ability to solve a homicide may be directly influenced by the characteristics of the offense. Research indicates that a variety of different circumstances, such as expressive or instrumental motivations for the offense (Block & Block, 1991), victim-offender relationship (Block & Block, 1992; Wolfgang, 1958), execution of the offense (Salfati, 2003; Brown et al., 1999), and the commission of other crimes (Salfati, 2000; Salfati & Haratsis, 2001), may account for either increasing or decreasing the ability to solve the case. Although inclusion of measures for each of these categories of homicide characteristics would strengthen the ability to predict solvability, only a limited number of measures were available in the official Salvadoran case files. More specifically, this data revealed that the following two categories of variables were present: (1) instrumental or expressive motivations for the offense and (2) evidence of concomitant crimes.

As previously mentioned, evidence of expressive motivations for homicides is often recognized by the methods used to execute the murder. In instances in which evidence that “excessive trauma or injury, beyond that necessary to cause death” (also known as overkill) (Douglas, Burgess, Burgess, & Ressler, 1992, p. 354) exists, law enforcement officers may presume that the victim and the offender knew one another, therefore, increasing the probability the case will be solved. For the purposes of this study, a measure of overkill is included, which allows the researchers to determine its existence. Likewise, instrumental motivations for committing an offense are characterized by planning and careful execution to avoid detection. As noted by Salfati (2003), this may be best exemplified by the restraint of a victim during the commission of the crime. For the purposes of this study, we include a measure of restraint indicating whether or not the victim was tied up.

**Table 1. Descriptive Statistics for Dependent and Independent Variables Included in the Analysis**

(n=1,015)	Number	Percentage
<b>Dependent Variable</b>		
<b>Case Status</b>		
0=Unsolved	695	68.5
1=Solved	320	31.5
<b>Independent Variables</b>		
<b>Homicide Characteristics</b>		
<i>Overkill</i>		
0=No evidence	793	78.1
1=Evidence exists	222	21.9
<i>Evidence of a Sex Crime</i>		
0=No evidence	996	98.1
1=Evidence exists	19	1.9
<i>Victim Found Tied Up and/or Evidence of Being Tied Up</i>		
0=No evidence	1001	98.6
1=Evidence exists	14	1.4
<i>Identifiable Property Stolen</i>		
0=No evidence	970	95.6
1=Evidence exists	45	4.4
<i>Valuable Property Stolen</i>		
0=No evidence	935	92.1
1=Evidence exists	80	7.9
<i>Belongings Missing</i>		
0=No evidence	785	77.3
1=Evidence exists	230	22.7
<b>Victim Characteristics</b>		
<i>Sex</i>		
0=Male	920	90.6
1=Female	95	9.4
<i>Age</i>		
0=Older than 30	414	40.8
1=30 or younger	601	59.2
<i>Gang Affiliation</i>		
0=Not in a gang	773	76.2
1=Known gang member	242	23.8
<b>Time and Location of Offense</b>		
<i>Time of Crime</i>		
0=06:01-17:59	453	44.6
1=18:00-06:00	562	55.4
<i>Type of Crime Scene</i>		
0=Open crime scene	620	89.2
1=Inside a building	75	10.8
<i>Body Recovery Site</i>		
0=Nonisolated area	832	82.0
1=Isolated area	183	18.0

(n=1,015)	Number	Percentage
<b>Time and Location of Offense</b>		
<i>Different Body Discovery and Murder Sites</i>		
0=Same scene	960	94.6
1=Different scene	55	5.4
<b>Weapon Used by Offender</b>		
<i>Weapon Brought to Scene</i>		
0=Weapon of opportunity	145	14.3
1=Weapon selected	870	85.7
<i>Stab Wounds</i>		
0=No stab wounds	755	74.4
1=Stab wounds present	260	25.6
<i>Blunt Force Injury or Blunt Force Wounds</i>		
0=No blunt force	910	89.7
1=Blunt force present	105	10.3
<i>Victim Poisoned</i>		
0=Not poisoned	1005	99.0
1=Poisoned	10	1.0
<i>Gunshot Wounds</i>		
0=No gunshot wounds	294	29.0
1=Gunshot wounds	721	71.0
<i>Wounds Suggesting Strangulation, Hit, Kicked, or Pushed Against Object</i>		
0=No evidence present	974	96.0
1=Evidence present	41	4.0
<i>Mutilation</i>		
0=No mutilation	981	96.7
1=Mutilation	34	3.3
<i>Head and Face Wounds</i>		
0=No head and face wounds	424	41.8
1=Head and face wounds present	591	58.2

The presence of concomitant crimes, particularly property and sexual offenses, has been shown to decrease the likelihood of solving a case (Salfati, 2000; Salfati & Haratsis, 2001; Santtila et al., 2001). As previously mentioned, assailants in these cases tend to be more organized and forensically aware (Salfati, 2003). Therefore, we measure the occurrence of both property and sex crimes as follows: identifiable property stolen, valuable property stolen, belongings missing, and evidence of a sex crime.

### **Victim Characteristics**

Based on the previous literature, distinct victim characteristic differences exist in the ability to solve homicide cases. In particular, sex, age, and gang affiliation influence solvability. For the purposes of this study, we included three measures of victim characteristics in our analysis: sex, age, and gang affiliation. Research assessing the relationship between the sex of the victim and case homicide solvability reveals that females are more likely to kill or be killed by someone they know (Browne & Williams, 1993; Browne et al., 1999). It is, therefore, important to include a measure of the sex of the victim in the present study.

Previous research also indicates that the age of the victim impacts case solvability. Homicides involving younger victims (those under the age of 30) were more likely to be solved (Mouzos & Muller, 2001). Because the case files only allowed us to dichotomize the variables included in the study, we chose age 30 as our cutoff to distinguish between victims; therefore, age is defined as all offenders 29 or younger and those 30 and older.

Given the recent increase in gang activity in El Salvador, gang membership of the victim may be an important factor influencing the solvability of the case. As previously suggested, homicides perpetrated by gang members tend to target rival gangs as victims (Santacruz & Concha-Eastman, 2001). A measure indicating known gang membership is included in the analysis. Although there is no way to separate distinct group membership, data allows us to determine whether the victim displayed or was known to be a member of a gang.

### ***Time and Location of Offense***

Previous research indicates that the ability to solve a case is directly influenced by the time and location of the offense. The probability of solving a homicide case increases when the murder occurs during day-time hours (6:00 AM to 6:00 PM) when witnesses are more likely to be present (Mouzos & Muller, 2001). Determining the time of the incident can be critical in developing a model for predictability. For the purposes of this study, we categorize the time periods by homicides committed between 06:01 to 17:59 and those committed between 18:00 and 06:00.

Additionally, homicides perpetrated in residences (homes and apartments) are more likely to be cleared (Mouzos & Muller, 2001; Wellford & Cronin, 1999, 2000) than cases committed in taverns or bars (Litwin, 2004). Additionally, murders occurring in closed spaces are typically motivated by expressive violence and occur between individuals who know one another, which increases the probability of solving the case. Although our data does not allow us to distinguish by type of location, it does permit us to determine whether the crime occurred inside a building (closed space) or in the open. Additionally we are able to distinguish the body recovery site between nonisolated and isolated areas.

The literature indicates that when murder and discovery sites differ, the chance of clearing cases decreases (Ressler et al., 1996). More specifically, those cases in which the homicide occurred in one location and the body was transported elsewhere suggest advanced organization and planning, therefore, decreasing the likelihood of detection. A review of the official case files provided information that allowed us to categorize whether the homicide occurred at the same location where the body was recovered.

### ***Weapon Used by Offender***

The type of wounds a victim receives in a homicide has been directly linked to the ability to solve the case. A review of case files reveals two distinct categories of information: (1) whether a weapon was brought to the scene and (2) type of wound received.

As previously suggested, the choice of weaponry may either be a function of rational calculation or simple opportunity. In instances of instrumental motivation, offenders typically anticipate violence and therefore, confront situations prepared



to respond in a violent manner (Salfati, 2000; Salfati & Haratsis, 2001). Likewise, when expressive violence occurs, offenders take advantage of the opportunity that exists and respond with whatever weapon is available at the time (Santtila et al., 2001). It is, therefore, important to distinguish whether the chosen weapon was one of opportunity or was brought to the scene.

Understanding the weapon of choice and how it relates to solvability of the case can also be an important factor. As previously suggested, the following set of injuries increases the likelihood that homicide cases will be solved: gunshot wounds in areas with high firearm availability (Regoeczi et al., 2000), stab wounds (Gerberth, 1996), and poisoning (Salfati, 2003). The need for advanced forensic techniques increases with the presence of body mutilation or head/face wounds (Hickey, 1997; Santtila et al., 2003). Likewise, case solvability is problematic in El Salvador where forensic capabilities are limited; therefore, any form of body mutilation (especially of the head/face) decreases case solvability (Mejía, 2005). This data set allows us to distinguish between these wounds as well as blunt force injury or blunt force wounds, and strangulation and wounds resulting from being hit, kicked, or pushed against an object.

## Results

To ascertain whether case solvability can be predicted, it is important to understand and examine the relationship between variables. Cross-tabulations were initially run between the dependent variable (case status) and each of the independent variables (see Table 2). A chi-square test for association was then run to “determine whether the probability that the observed frequencies across a set of categories are significantly different from the expected frequencies that would occur by chance” (Vito & Blankenship, 2002, p. 177). From this analysis, we were able to identify those characteristics that warranted further exploration and could potentially be identified as predictors of solvability.

Because each of the variables was coded as dichotomous, a logistic regression analysis was used. Logistic regression differs from the chi-square analysis because it is able to predict group membership (dependent variable) from a set of predictors (independent variables) rather than just identify whether a relationship exists between the observed and expected frequencies (Mertler & Vannatta, 2005; Tabachnick & Fidell, 2001). The primary goal of the study is to predict the characteristics of those homicide cases that are most likely to be solved, so logistic regression is appropriate. The following section presents the results for the descriptive statistics, chi-square analysis, and logistic regression.

## Descriptive Statistics

Table 1 presents an overview of the descriptive statistics for both the dependent and independent variables included in the study. This data reveals that the majority of homicide victims are male (90.6%), younger than age 30 (59.2%), and not in a gang (76.2%). The crimes typically occurred at night (55.4%), out in the open (89.2%), in a nonisolated area (82.0%), and the victims were not moved (94.6%). Typically, the victims did not have any of their belongings stolen or missing. For example, 95.6% had no identifiable property stolen; 92.1% had no valuable property stolen; and 77.3% had no belongings missing. In terms of how the victims died, data indicates that a significant number were shot (71.0%), had some form of stab wound (25.6%), and had some form of head and face wounds (58.2%). Approximately 22% of all victims displayed some evidence of overkill in the murder.

**Table 2. Descriptive Statistics and Bi-Variate Analysis Results for Independent Variables by Solvability**

	Unsolved		Solved		Bi-Variate Analysis	
	No.	%	No.	%	Chi-Square	p
<b>Homicide Characteristics</b>						
<i>Overkill</i>						
0=No evidence	574	72.4	219	27.6	25.682	.000
1=Evidence exists	121	54.5	101	45.5		
<i>Evidence of a Sex Crime</i>						
0=No evidence	681	68.4	315	31.6	.244	.622
1=Evidence exists	14	73.7	5	26.3		
<i>Victim Found Tied Up and/or Evidence of Being Tied Up</i>						
0=No evidence	683	68.2	318	31.8	1.955	.162
1=Evidence exists	12	73.3	2	14.3		
<i>Identifiable Property Stolen</i>						
0=No evidence	662	68.2	308	31.8	.515	.473
1=Evidence exists	33	73.3	12	26.7		
<i>Valuable Property Stolen</i>						
0=No evidence	634	67.8	301	32.2	2.433	.119
1=Evidence exists	61	76.3	19	23.8		
<i>Belongings Missing</i>						
0=No evidence	489	62.3	296	37.7	61.287	.000
1=Evidence exists	206	89.6	24	10.4		
<b>Victim Characteristics</b>						
<i>Sex</i>						
0=Male	646	70.2	274	29.8	13.851	.000
1=Female	49	51.6	46	48.4		
<i>Age</i>						
0=Older than 30	270	65.2	144	34.8	3.433	.064
1=30 or younger	425	70.7	176	29.3		
<i>Gang Affiliation</i>						
0=Not in a gang	512	66.2	261	33.8	7.519	.006
1=Known gang member	183	75.6	59	24.4		
<b>Time and Location of Offense</b>						
<i>Time of Crime</i>						
0=06:01-17:59	286	63.1	167	36.9	10.800	.001
1=18:00-06:00	409	72.8	153	27.2		
<i>Type of Crime Scene</i>						
0=Open crime scene	620	70.1	264	29.9	8.773	.003
1=Inside a building	75	57.3	56	42.7		
<i>Body Recovery Site</i>						
0=Nonisolated area	537	64.5	295	35.5	33.010	.000
1=Isolated area	158	69.1	25	13.7		
<i>Different Body Discovery and Murder Sites</i>						
0=Same scene	657	68.4	303	31.6	.010	.919
1=Different scene	38	69.1	17	30.9		

	Unsolved		Solved		Bi-Variate Analysis	
	No.	%	No.	%	Chi-Square	p
<b>Weapon Used by Offender</b>						
<i>Weapon Brought to Scene</i>						
0=Weapon of opportunity	96	66.2	49	33.8	.402	.526
1=Weapon selected	599	68.9	271	31.1		
<i>Stab Wounds</i>						
0=No stab wounds	543	71.9	212	28.1	7.807	.005
1=Stab wounds present	152	58.5	108	41.5		
<i>Blunt Force Injury or Blunt Force Wounds</i>						
0=No blunt force	635	69.8	275	30.2	6.964	.008
1=Blunt force present	60	57.1	45	42.9		
<i>Victim Poisoned</i>						
0=Not poisoned	687	68.4	318	31.6	.622	.430
1=Poisoned	8	80.0	2	20.0		
<i>Gunshot Wounds</i>						
0=No gunshot wounds	177	60.2	117	39.8	13.109	.000
1=Gunshot wounds	518	71.8	203	28.2		
<i>Wounds Suggesting Strangulation, Hit, Kicked, or Pushed Against Object</i>						
0=No evidence present	667	68.5	307	31.5	.001	.980
1=Evidence present	28	68.3	13	31.7		
<i>Mutilation</i>						
0=No mutilation	674	68.7	907	31.3	.733	.392
1=Mutilation	21	61.8	13	38.2		
<i>Head and Face Wounds</i>						
0=No head and face wounds	259	61.1	165	38.9	18.412	.000
1=Head and face wounds present	436	73.8	155	26.2		

Cross-tabulations and a chi-square test association between the observed and expected frequencies were run (See Table 2). Percentages reflect whether the cases were solved or unsolved by the particular variable. These results suggest that the majority of cases for all independent variables are likely to go unsolved. The question then becomes whether there are significant differences within these categories that warrant further explanation; a chi-square analysis was conducted to determine whether these relationships exist.

As presented in Table 2, results from this analysis reveal that the following variables are significantly related to case status above the .01 level: victim's gender, victim's gang affiliation, time of crime, type of crime scene, body recovery site, victim's belongings missing, evidence of overkill, stab wounds, blunt force injury or blunt force wounds, gunshot wounds, and head/face wounds. The null hypotheses, therefore, can be rejected, and we can be 99% confident that these findings are not occurring through some sampling error or by chance alone.

Traditionally, cut-offs for inclusion in advance statistical procedures are limited to the .05 significance level; however, for the purposes of this study, the Wald test will be used as the measure of significance for each of the variable's ability to contribute to the model. Because this measure has been classified as conservative in the literature, a cut-off level of .10 for inclusion in the larger model is typically

deemed appropriate (Tabachnick & Fidell, 2001). One other variable, victims' age ( $p=.06$ ), is worthy of inclusion in the larger model.

### **Logistic Regression**

Results from the logistic regression analysis using the enter method are presented in Table 3. These results indicate that the overall model was statistically reliable in distinguishing between unsolved and solved homicides (-2 Log Likelihood=1074.001; Goodness of Fit=1054.179; Model  $X^2=191.203$ ;  $p=.000$ ). The Goodness of Fit model revealed that 72.32% of all cases entered into the overall model were correctly classified; therefore, we can be confident that we are accurately predicting the outcome of approximately in 72% of all homicide cases. The chi-square test of association revealed 12 variables warranting further exploration. The logistic regression analysis revealed that even though an association between observed and expected frequencies did exist, four of those variables did not prove to be predictors of solvability. These variables include gang membership, type of crime scene, blunt force trauma, and gun shot wounds. The Wald statistics did indicate that the strongest predictors of solvability were evidence of overkill, evidence of belongings missing, type of body recovery site, evidence of head and face wounds, and victim being stabbed. The remaining variables were significant at the .05 level or above.

As hypothesized, homicide cases in which the victim was a female were nearly twice as likely to be solved than cases in which the victim was male; however, we initially hypothesized that cases involving younger victims were more likely to be solved than cases involving older victims. This relationship did not hold true. Results from the logistic regression indicate that age is not a predictor of case status.

One concern expressed by local law enforcement officers is the growing presence of gang members in El Salvador. The intricate workings of gang members and the use of retaliation as a method of control is of the utmost concern for all. Results from the logistic regression indicate that the ability to solve homicides may be directly impacted by gang membership. Although the strength of the relationship is somewhat weak, this data still indicates that law enforcement officers have a greater chance of solving homicides when the victim is not an identified gang member.

The time of day the crime is committed also directly impacts the ability to solve the case. These results suggest that crimes committed during the day are more likely to be solved than crimes committed during the evening hours. Although we do not have a direct measure of whether witnesses were present, this finding does support the contention that the presence of witnesses or exposure may directly influence whether a case is solved.

Previous literature exploring the location of the body when recovered suggests that crimes occurring in closed or isolated quarters are more likely to be solved than those in open or nonisolated areas. Although this data reveals no significant relationship between case status and type of crime scene, it does suggest that the body recovery site does predict outcome. Those cases in which the body was found in a nonisolated/public area are more likely to be solved than those located in isolated areas. Again, this finding is to be expected given the greater probability that someone is more likely to witness the event when it occurs in the open.

**Table 3. Predictors of Solvability by Selected Independent Variable**

Variables (n=1015)	B	Wald	df	p	Odds Ratio
<b>Homicide Characteristics</b>					
Evidence of Overkill	.8762	23.53	1	.00	2.4018
Belongings Missing	-1.5515	42.67	1	.00	.2119
<b>Victim Characteristics</b>					
Sex	.5432	4.81	1	.02	1.7215
Age	-.1379	.71	1	.39	.8712
Gang Membership	-.2948	2.28	1	.13	.7447
<b>Time and Location of Offense</b>					
Time of Crime	-.3436	5.24	1	.02	.7092
Type of Crime Scene	.1801	.69	1	.40	1.1974
Type of Body Recovery Site	-1.4109	32.12	1	.00	.2439
<b>Weapon Used by Offender</b>					
Victim Stabbed/Sharp Object Used	.6102	6.11	1	.01	1.8408
Blunt Force Used	.3603	1.86	1	.17	1.4338
Gunshot Wound	.1345	.29	1	.58	1.1439
Head and Face Wounds	-.7596	23.94	1	.00	.4679
Constant	-.1474	.26	1	.60	

-2 Log Likelihood=1074.001; Goodness of Fit=1054.179; Model  $X^2$ =191.203; p=.000. Dependent variable defined as 0=Unsolved; 1=Solved

Three variables were significantly and directly linked to the type of crime committed: (1) evidence of overkill, (2) victim being stabbed, and (3) presence of head and face wounds. It was hypothesized that cases in which overkill existed would more likely result in a closed case because the victim and offender typically share some form of close relationship. This finding was true for this study. Results from this analysis indicate that homicide cases in which evidence of overkill was present were over twice as likely to be solved than cases in which overkill was not present. Likewise, in those cases in which the victim was stabbed, the police were nearly twice as likely to solve them when they involved another wound. Contrary to positive findings, in those cases in which head and face wounds existed, law enforcement officers were less likely to solve the case. This finding does support the hypothesis that homicides involving injury to the victim's face have less chances of being solved. Overall, these findings are not surprising given the investigative circumstances unique to El Salvador and the previous research.

## Discussion

These findings are noteworthy given the earlier literature and the stated hypotheses. Some of the variables that showed no significant relationship to case status were type of crime scene, victim tied at some point, concomitant sex crimes, identifiable and valuable property stolen, victim poisoned, manual killing methods, mutilation, and weapon brought to the scene by the offender. The hypothesized associations between these variables and homicide solvability were mostly based on the instrumental or expressive nature that characterized them, and the particularities that these different motives generally imply. Some murders, however, involve the usual relationship between incident and participant characteristics and motivation, thus considered "deviant homicides" (Decker, 1996). Varano and Cancino (2001) found that these types of murders are seven times more likely to be perpetrated by gang members. Considering this finding and the current gang problem in El

Salvador, the previously mentioned lack of relationship may be explained by gang members and those are not in gangs committing homicides that involve, with similar frequency, the previously mentioned variables. This would cripple the predictive power of these indicators by distorting the basis on which they were theorized; however, this cannot be unequivocally affirmed because the offender's gang affiliation cannot be determined in unsolved homicides.

The analysis also showed that the victim's age does not influence case clearance. This is consistent with the Cruz and Santacruz (2005) survey, which found no association between age and the motives behind violent incidents. As previously mentioned, research in other countries shows that homicides that involve younger people are more likely to be solved. Scholars argue that this is because younger individuals are subjected to higher levels of guardianship and have limited contact with strangers (Regoeczi et al., 2000; Litwin, 2004). This suggests that Salvadoran youths experience the opposite. This issue should be further explored in order to develop effective strategies to address the problem.

As it was predicted, homicides that involve firearms are equally likely to be solved. This further indicates the negative effects of a high level of firearm availability to the public through the black market, which has been fueled by weapons leftover by the El Salvadoran Civil War. It is important to note that attacking this illegal trading has proven effective in reducing gun-perpetrated homicides elsewhere (Braga, Kennedy, Waring, & Piehl, 2001) and, therefore, should be considered by Salvadoran authorities as a viable strategy to reduce violent and lethal crimes.

The statistical analysis in the present study shows that cases that involve female victims, a sharp or pointed object as the murder weapon, or overkill had better chances of being solved. It was hypothesized that overwhelming violence and the selection of a sharp weapon (as opposed to widely available firearms) would be indicative of expressive aggressions. This suggests that most expressive homicides have better odds of being solved in El Salvador. The fact that the role of gender is consistent with previous research indicates that, just as in other studies, Salvadoran women are more likely victims of individuals with whom they share a close relationship, and their homicides are expressive in motivation.

Just as predicted, the absence of witnesses or their unwillingness to collaborate negatively affects the chances of cases being solved. Likewise, the time and location of the offense that diminishes the opportunity for witnesses as well as cases involving gang members as homicide victims negatively influence solvability. The weak capabilities of forensic investigation in El Salvador mentioned earlier may explain these findings. This also may be the reason why homicides in which the victim has suffered wounds to the head or face have lower chances of being solved, as their identification would be delayed, which would reduce the odds of locating witnesses and the quality of the information they could provide. These results further accentuate the need to strengthen the units within the PNC in charge of evidence gathering and processing and development of a national witness protection program. The Salvadoran government is aware of these deficiencies and is committed to overcome them through various initiatives already in progress (see Mejía & Arauz, 2005b).

The present analysis included three variables to indicate concomitant property-related crimes in homicide cases: (1) valuable property stolen, (2) identifiable

property stolen, and (3) belongings missing. It was hypothesized that the instrumental motivations behind these murders would reduce the odds of cases being solved; however, only the last variable proved to have an effect on case solvability, and as predicted, its presence diminishes the chances of cases being cleared. These findings are thus consistent with Santtila et al. (2001) who suggested that stealing the victim's belongings only presents a marginal material gain to the murderer, which implies that he or she is extremely socioeconomically deprived. Santtila et al. also contend that taking identifiable items indicates poor proficiency in the criminal behavior of assailants because such property could link them to the crime. This indicates that murders committed by socio-economically deprived offenders who are criminally experienced are more difficult to solve.

## Conclusions

The present study is an initial exploration of the factors that affect the odds of clearing homicides in El Salvador and supports four general conclusions:

1. The deviant nature of gang-perpetrated murders influences the predicting power of variables found to be significantly related to homicide solvability in other countries.
2. The victim's gender is the only demographic characteristic that affects case clearance.
3. The presence and willingness of witnesses to collaborate is crucial in solving homicides.
4. Concomitant crimes that affected the odds of clearing cases were those that involved property crimes of marginal material gain.

This work is a preliminary examination of homicide solvability factors in El Salvador, which focuses on participant and event characteristics. Further research is needed in homicide clearance. Future investigations need to include variables that measure police practices and department characteristics as well as sociostructural particularities in order to develop more inclusive statistical models to predict the odds of homicide solvability.

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# Regional Centers for Public-Safety Innovation: A Model for Collaboration and Training Delivery Distribution

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## Introduction

In 1994, the United States Congress, in response to the alarming rise in the national crime rate, passed major federal legislation known as the “Violent Crime Control & Law Enforcement Act.” That Act was responsible for the development of the Office of Community Oriented Policing Services (COPS) and authorized an \$8.8 billion expenditure over a six-year period. The originating legislation charged COPS with advancing the concept of “community policing” as a way of reducing violent crime. To attain this goal, 100,000 new police officers were hired across America. To complement this effort, COPS launched three new programs: (1) Accelerated Hiring, Education And Deployment (AHEAD), (2) Funding Accelerated for Smaller Towns (FAST), and (3) Making Officer Redeployment Effective (MORE). COPS went on to award \$200 million to 392 law enforcement agencies for the additional hiring of 2,700 community-policing professionals (DOJ, 2006).

As the COPS office began to accommodate this new initiative, as well as assist local and state government in the deployment of workforce resources, it recognized that merely hiring more police officers would not be enough to accomplish its crime reduction goal. These officers would need training in community policing, problem solving, and collaboration techniques. Based on a combination of theories proposed, most notably by Dr. Robert Trojanowicz and Bonnie Buequeroux (1990) and Herman Goldstein (1990), the COPS office took the time to develop a community policing training philosophy:

Community policing focuses on crime and social disorder through the delivery of police services that includes aspects of traditional law enforcement, as well as prevention, problem solving, community engagement, and partnerships. The community policing model balances reactive responses to calls for service with proactive problem solving centered on the causes of crime and disorder. Community policing requires police and citizens to join together as partners in the course of both identifying and effectively addressing these issues (DOJ, 2006).

## RCPI Network Development and Composition

In 1997, COPS went further in the development of its training initiative and created a nationwide network of regional community policing institutes (RCPIs).

These RCPIs were established and developed via a series of competitive grants. The RCPIs were asked to experiment in the development and delivery of training without the benefit of mutual collaboration. In some respects, the original structure of the regional institutes represented a social experiment to see what issues would emerge. Ironically, the strategy of institutes, working in isolation, was incongruent to the very nature of community policing—collaborative, problem solving partnerships.

According to Dr. Ellen Scrivner (2006),

... the network was indeed envisioned from the very beginning, or I should say “hoped for,” since we were unsure if we would be in business the next year. Those were turbulent days at COPS because Congress kept threatening to shut us down. We prevailed, however, and the network began to take shape. In that regard, the pattern of funding was not accidental. I tried to cover as much of the country as possible—to have training and technical assistance for urban, rural, sheriffs, large and small departments, state police, education, and other community partners. By creating a network infrastructure, if one of the institutes fell by the wayside, I was certain another institute would provide assistance.

Common threads and distinctions among the institutes were planned. Each institute was responsible for delivering a substantive community policing core curriculum, but also had to include within their proposal specialty training. At first, I thought of this analogous to undergraduate and graduate classes in community policing. However, I soon started to change my mind as I saw the richness that was developing across the network. Consequently, the whole project became framed as the capacity for developing basic community policing training within each institute across the country, radiated spheres of influence and excellence in specific areas of training and technical assistance, which were ultimately shared across the network. For example, the RCPIs on the east coast would be exposed to and learn from the specialty trainings on the west coast through RCPI director/trainer meetings. (personal communication, August 2, 2006)

Thus, a network of outstanding organizations emerged and today continues to serve as a model of cooperation and collaboration. The RCPIs not only profess the philosophy of communication, partnerships, and problem solving, they demonstrate and mentor the sprint of community policing at large. The RCPIs had actualized their mission, and the COPS office had realized their vision.

The network settled into a smooth functioning and collaborative organization, primarily funded via the U.S. Department of Justice, Office of Community Oriented Policing Services. As time went on, many of the RCPIs moved beyond the scope of merely providing “community policing” training and into the development of specialized training, just as the COPS office had envisioned. The network now boasts more than 40 core curricula that it uses to customize training to meet the myriad of local, tribal, state, and federal needs. Imbedded in all RCPI organizations are the philosophies of partnerships, collaborations inside and outside the criminal justice system, proactive responses to community problems that emerged via citizens’ concerns, and prevention of criminal activity.

The RCPIs established governing and/or advisory boards respectively, and those boards set the tone and pace for training development based on local issues. Many of the board members were not law enforcement professionals, so they brought new insights and perspectives to the enforcement community. Because of the multidisciplinary board membership, the following emerged:

- A network that could and would accommodate local, state, and federal standards
- A distribution mechanism that was national in scope yet local in access
- Fresh insight into community problems based on residents' perspectives of the problem

Significant results of the network were outcomes that were unique to the local level and based on local priorities. Additionally, federal programs were being addressed with the inclusion of local standards. Global problems found local solutions.

The COPS office started with funding for 35 RCPIs, which were developed to serve the needs of all states and territories within the United States. Some states had more than one RCPI [California (3), Illinois (2), Texas (2), and Florida (2)], and some RCPIs served multiple states. Today, there are 27 RCPIs strategically located across the United States (see [www.RCPInetwork.org](http://www.RCPInetwork.org)) that are available to constituent states, as well as the entire network. In the event that a particular RCPI has a training or technical assistance need, the entire network is available to access the desired resource.

## **Future of the Network**

September 11, 2001, changed government and life in the United States like no other event in the last 50 years. Domestic priorities have been affected significantly by the shifting of national resources into a wartime mode, and many priorities prior to the 9/11 event have been savagely cut or eliminated. Crime prevention and issues relative to criminal justice have not been spared in our country's "war against terrorism" despite the very real connection between certain crimes and acts of terrorism. Crime prevention and terrorism prevention are said to overlap in many instances. Assuming this is true, the real ability to apprehend terrorists via the criminal justice practitioner has not gone unnoticed as evidenced by apprehensions in both the Oklahoma City bombing (Timothy McVeigh and the Olympic Park bombing (Eric Rudolph) by local law enforcement officers.

Although COPS funding has not been spared in the financial reallocation of resources, the RCPI network has continued operations in fiscal year 2006. The evolution of the network, and its collaborative efforts, between 1997 and 2006, has been extremely fruitful in the development and delivery of law enforcement training across the country. It is interesting to note that over time, the federal government has taken a very active role in identifying types and techniques for training delivery by a number of federal organizations under the auspices of the U.S. Department of Justice. The partners in that training development included programs such as the Bureau of Justice Assistance; Project Safe Neighborhood; Volunteers in Police Services; and partnerships between the International

Association of Chiefs of Police, the Police Executive Research Forum, and the National Organization of Black Law Enforcement Officers. It is also interesting to note that prior to this period, collaboration and partnerships were not as common as they are today.

The unique niche that the COPS office had given birth to was the *network* and its capability to *distribute* training quickly based on its involvement with local and state communities and stakeholders. The RCPI network was destined to play an even more relevant role because of 9/11, albeit without the funding base established by the COPS program. Homeland security has become one of the top priorities for the federal government. This being said, there seems to be a consensus that security begins at home—at the local level. Community collaborations' trust building, problem solving, and information sharing are at the heart of community policing. *Residents will only confide in their police if they know and trust them.* These principles are essential to the development of good intelligence in the war against terror. They also apply in natural disaster events wherein the police become overwhelmed and need residents to step forward to preserve public safety and maintain order.

Dr. Philip Lyons of the Texas Regional Community Policing Institute at Sam Houston University observed,

. . . another role for the federal government in the affairs of state and local law enforcement agencies originates from the recognition of the ever-increasing demands placed on such officers by the federal government. Texas Department of Public Safety personnel are perhaps more aware than other law enforcement agencies in the state of just how much the federal purse strings dictate local practice. Moreover, it has become increasingly apparent in the post-9/11 era that intelligence pertaining to terrorist activities is most likely to come to the attention of state and local authorities first. With that recognition has come greater burdens on those agencies to collect, analyze, and communicate that information in the service of protecting the homeland—a primarily federal responsibility. If state and local officers are increasingly expected to serve federal functions, then it seems reasonable to look more and more to the federal government to equip them to do so. (Lyons, 2006)

In short, 9/11 has created the situation in which local law enforcement had to take on new investigative responsibilities in partnership with the federal government at the very time federal resources were being diverted away from the RCPI network due to COPS reduced funding. Moreover, even though new enforcement demands were placed on our public safety professionals, the old demands remained.

As a response to this dilemma, the RCPI network, with the support of the COPS office leadership, has embarked on a course to become even more independent. While maintaining its acronym, the institutes became "The Regional Centers for Public-Safety Innovation" to reflect the inclusion of other nontraditional training issues such as terrorism (and related criminal conduct), public health, natural disaster management, and even animal abuse as it relates to officer safety and interpersonal violence.

The easy transition to an expanded mission of "public safety" represents a design characteristic of the original infrastructure. The network members are able to

reach out to non-law-enforcement resources because of their reputations as collaborators, training development experts, and facilitators with a foot in both the local, state, and federal doors. The network was also created to be flexible and adaptable to environmental changes and thus able to shift resources as needed to meet unexpected challenges.

## Conclusion

The RCPI network's adaptability was immediately demonstrated in the aftermath of September 11, 2001, as members planned training programs designed to respond to the acts of terrorism based on community partnerships. Whether it is assessing a training need, developing curricula, developing instructors and facilitators, or assessing the outcomes of an initiative, the RCPI network remains viable, flexible, proactive, adaptive, and responsive to tribal, community, state, and federal needs. Its unique structure has positioned it as a critical component for challenges of the 21st century.

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# Drug Courts: A “Community” Criminal Justice Program

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The role of law enforcement, courts, and corrections in dealing with drug-related crimes represents a significant challenge that has faced the criminal justice system for several decades. It is well known among all criminal justice agencies that crime and abuse of addictive substances are frequently correlated (Welte, Barnes, Hoffman, Wiczorek, & Zhang, 2005). Research on drug use and crime indicates that drug addicts and heavy drug users have a high likelihood of being involved in violent criminal behaviors (Office of National Drug Control Policy, 2000; 2003). The National Institute of Justice’s Arrestee Drug Abuse Monitoring Program reported that more than 83% of state prisoners scheduled for release in 1999 were involved in alcohol or drugs at the time of their offense (Office of National Drug Control Policy, 2003).

Finding decisive solutions to the drug-crime problem is a continuing struggle, as one failed program has been historically replaced by another. Underlying the problem is that the situations in which both variables (crime and drug abuse) occur are highly diverse. Consequently, the associations between drugs or alcohol and crimes are not fully understood (Kermani & Castaneda, 1996). It is reported that many crimes like murder, assault, prostitution, and robbery are often committed under the influence of drugs and alcohol. Other crimes are motivated by a need to obtain money for drugs (Office of National Drug Control Policy, 2000). For example, crack cocaine produces a short-lived high followed by an intense urge for more crack. Users who have no means of quickly obtaining funds to purchase more crack may resort to illegal activity such as burglary, robbery, or selling stolen goods (Baumer, Lauritsen, Rosenfeld, & Wright, 1998). Situational complexities such as these have contributed to the criminal justice system shifting from one sentencing or treatment model to another in an attempt to discover the “best” program (Gebelein, 2000).

Rehabilitation is one model adopted by the criminal justice system to deal with the “drugs and crime problem.” In the past, however, only a small proportion of criminal offenders ever received rehabilitative treatment through the traditional criminal justice system although many of these offenders exhibited drug abuse problems closely associated with their criminal lifestyles (Burdon, Roll, Prendergast, & Rawson, 2001). Nevertheless, research supports that both “front door” and “back door” rehabilitation programs play an intricate part in the treatment success of drug-abusing offenders (Dynea & Sung, 2000; Wolf & Colyer, 2001).

Several reports have described some front door strategies that are effective in reducing recidivism and the criminal activity associated with drug abusers (Dynea & Sung, 2000; Welte et al., 2005). One front door strategy, the drug court program, has been specifically supported by research as being an effective rehabilitation

program (Peters, Hass, & Murrin, 1999; Sanford & Arrigo, 2005; Sechrest & Shicor, 2001). Through numerous controlled experimental studies conducted over a couple of decades, drug courts have been shown to significantly lower rearrest rates of participants when compared to nonparticipants (Belenko, 1998; Office of Justice Programs, 2006). A few studies, on the other hand, have indicated that arrest rates do not differ significantly between drug court participants and the selected comparison groups (Granfield, Eby, & Brewster, 1998; Miethe, Lu, & Reese, 2000). Overall, however, the research overwhelmingly supports the success of drug court programs. This success, along with the longevity of the drug courts, indicates that the drug court model is not a fleeting criminal justice fad or passing phenomenon. It appears, rather, that it is a strongly embedded program, and law enforcement, courts, and corrections should learn their respective roles to contribute to the positive outcomes. Toward this endeavor, the development and operations of drug courts should be understood by all of the criminal justice system role players including police, judges, prosecutors, defense attorneys, and probation and parole officers.

## **History and General Features of Drug Courts**

During the 1980s and early 1990s, a cocaine epidemic gave way to a crack epidemic. In response, state and federal legislatures passed laws with increasing penalties leading to an increase in arrest rates, court proceedings, and ultimately the prison and jail populations (Goldkamp, 2000). During this same period, it became increasingly clear that incarceration alone did little to break the cycle of illegal drug use and crime, and offenders sentenced to incarceration for substance-related offenses exhibited a high rate of recidivism once they were released. It also became apparent that well designed drug abuse treatment programs were demonstrably effective in reducing both drug addiction and drug-related crimes (Office of Justice Programs, 1999).

These factors of the 1980s converged setting the stage for the establishment of the first drug court program. Using federal funding stemming from President Regan's "War on Drugs," the first drug court was implemented in Miami, Florida, in 1989 (Goldkamp, 2000). The drug court innovation was premised on the idea that the demand for illicit drugs, and the concomitant involvement in crime and re-involvement in the court system, could be reduced through an effective and individualized program of court-supervised drug treatment (Goldkamp, 1994). Offenders were identified early in the adjudication process and either offered the option of access to treatment under direct supervision of the judge or jail/prison time. The primary objective of these new drug courts was to reduce drug abuse and associated criminal activity accomplished through judicial supervision, counseling, therapy, frequent drug testing, and regular contacts with probation officers (Burdon et al., 2001; Drug Courts Program Office, 1997; Goldkamp, 2000).

Cost-efficiency was another objective in the development of the new drug courts. In one decade, between 1980 and 1990, the total number of people in prisons and jails nearly doubled (Bureau of Justice Statistics, 2005). Between 1980 and 1992, drug offenders accounted for three-fourths of the total increase in the federal prison population. By 1999, \$20,000 a year was being spent per inmate for housing. In contrast, \$1,800 to \$4,000 was being spent annually to send someone through a drug court program (Cole, 1999). Consequently, drug courts became an increasingly

popular response for diverting the growing number of offenders with drug abuse problems into treatment, thereby reducing the jail and prison population (Burdon et al., 2001).

The drug court movement proliferated and became widespread shortly after its inception. What started as an experiment in 1989, in the Dade County Circuit Court in Florida, grew into a national movement that altered the way court systems process drug cases and respond to drug dependent offenders (Goldkamp, 2000; Listwan, Shaffer, & Latessa, 2002). By June 2001, nearly 700 drug court programs had been implemented in virtually every state, as well as the District of Columbia, Puerto Rico, Guam, some Native American Tribal Courts, and two federal district courts (Office of Justice Programs, 2001). By December 2005, more than 1,500 drug courts were in operation with 391 more being planned (Office of Justice Programs, 2006).

Generally, all drug courts have been designed to get offenders whose addiction has contributed to their criminal behavior to stop using drugs (Gottfredson, Najaka, & Kearley, 2003). The focus is on treatment and restoration rather than punishment (Goldkamp, White, & Robinson, 2001). Drug court procedures include drug treatment, legal pressure, drug testing, regular judicial review, and the systematic use of sanctions and rewards (Harrell, 2003). Drug courts employ progressive treatment stages, generally divided into a stabilization phase, an intensive treatment phase, and a transition phase. As participants advance through the phases, restrictions are reduced, and they are permitted more independence (Goldkamp, 2000; Terry, 1999).

The general eligibility requirements for drug court may stipulate that the participant be a male or female or be a nonviolent offender convicted as an adult in the same county of the drug court program. Additionally, each participant is commonly required to be emotionally stable and willing to participate in the program (Goldkamp, 2000). Some locations, however, have expanded admission criteria, to include more violent offenders (Saum, Scarpitti, & Robbins, 2001). Generally, the participants represent various backgrounds of the community. Many are multiple drug abusers and have never been exposed to treatment, although they have already served jail time for drug-related offenses (Office of Justice Programs, 1999; Goldkamp, 2000).

Judges are central figures in the drug court treatment program and in supervision of substance abuse offenders as opposed to the traditional practice of convicted offenders interacting only with probation or parole officers (Goldkamp, 2003; Johnson, Shaffer, & Latessa, 2000). Sanctions and rewards are utilized by the judges to motivate the participants to remain in treatment, comply with program requirements, and remain drug free (Burdon et al., 2001). In most courts, the actual sanctions decided by the judge are dependent upon the specific circumstances involved in each situation. The sanctions are often specific, well defined, and immediate, including verbal warnings, sanctioning in front of other participants, fines, or demotion to an earlier phase. Drug courts also use rewards, which often take the form of verbal encouragement from the judge, praise from other participants and drug court personnel, decreased supervision and drug testing, and advancement to the next phase (Burdon et al., 2001).

Although drug courts may share an emphasis on substance abusing offenders, they may differ in several ways. They may differ in the problems they target. They may emphasize reducing drug-related crimes in a certain geographical area, or they may focus on decreasing the numbers in an overcrowded correctional institution (Goldkamp, 2000). The target population may also vary in the nature and degree of treatment difficulty (drug abusing juvenile delinquents, female offenders, misdemeanants, and convicted felons). In addition, drug courts may differ in the sequence of treatment stages, the therapeutic approaches, the supplemental services, and the duration and arrangement of treatment methods (Goldkamp, 2000).

Regardless of the organizational or operational differences, drug courts are now recognized among criminal justice professionals as specialized problem-solving courts that are designed to improve traditional criminal court practices in sentencing drug-abusing offenders. Rather than the offender being sentenced to the usual punitive incarceration, the drug court program is viewed as a “front-end” alternative for substance abuse treatment services. The traditional adversarial process of the criminal justice system is greatly reduced in drug court programs in favor of a collaborative method among law enforcement, courts, and corrections personnel (Belenko, 1998; Goldkamp et al., 2001; Wenzel, Turner, & Ridgely, 2004).

## **Drug Courts Compared to Community Policing**

Drug court professionals have suggested that the drug court model stemmed from community-based criminal justice philosophies and that the drug court is actually a type of community court. It is broadly viewed as arising from the same vein of innovative thought as community policing, which began a decade before drug courts (Dempsey, 1994; Drug Courts Program Office, 1997). Both are predicated on the belief that it is necessary for community and criminal justice agencies to work collaboratively in order to control and reduce the problems associated with crime (Dempsey, 1994; Gebelein, 2000).

The drug court as a community program is operationally and philosophically similar to the community policing program in several aspects. Both require involvement and collaboration of the community and other components of the criminal justice system in order to achieve their objectives. Community policing arose out of a need to address a nationwide policing problem (lack of public support) just as the creation of drug courts addressed a national problem (drug-crime correlation). Also, like drug courts, community policing emphasizes the problem-solving approach to preventing crime, which focuses on the underlying causes of crime rather than the traditional reactive incident-driven approach. Both community policing and drug courts require a substantial change in the way the role players think. Police officers and drug court personnel must make a paradigm shift from responding to incidents or cases according to a rigid conventional protocol to focusing on problems and adapting strategies to address the needs of diverse clients and communities. Community policing and drug courts acknowledge the limited capacity they each have on their own in preventing future crimes. They know the importance of working together in using resources, gathering knowledge, and sharing information to solve the same crime problems that confront both of them. In using the problem-oriented approach,

both utilize the scientific method as an ongoing process for addressing problems. In both programs, the problem is defined, the evidence and data are analyzed, responses and strategies are implemented based on the analysis, the outcomes are assessed and evaluated to determine the effectiveness of the response or program, and the evaluative feedback is used to determine changes that may be needed in the treatment or program (Bennett & Hess, 2004; Dempsey, 1994; Drug Courts Program Office, 1997).

Community policing, in actuality, can and should work cooperatively with drug courts toward the goal of alleviating the conditions that cause drug-related crimes. With the successful application of community policing, the traditional “war on drugs” program would be redirected toward other solutions derived from the problem solving approach. The drug court’s philosophy of reducing crime through treatment of offenders with problems of drug abuse is a philosophy that is consistent with the community policing goals. Consequently, community policing programs and community /drug courts can achieve their common criminal justice goals through continuing commitments of supportive partnerships in an ongoing process of problem solving (Bennett & Hess, 2004; Dempsey, 1994; Drug Courts Program Office, 1997).

## **Challenges for “Community” Drug Courts**

Although the problem solving “community” approaches have proved to yield positive outcomes in drug courts and community policing, weaknesses do exist in the operation of the programs. One limiting factor in the application of the problem solving community approach is the lack of information, data, and evidence concerning complex crime problems. Inadequate data leads to faulty analyses and ultimately to flawed or attenuated solutions, thereby causing a lack of trust in the program’s effectiveness. Another limiting issue is the well-known management phenomenon of resistance to change and innovation exhibited by agency personnel when a new program is implemented. Rather than accepting and incorporating the innovation, personnel generally resist change and tend to rely on the traditional operations. Consequently, finding a solution to the crime problem is hampered and becomes a continuing process of attempted “treatments” rather than a one-time “cure.” Again, the public loses confidence in the program’s potential for achieving its stated purpose.

A study conducted by Bichler and Gaines (2005) highlights the difficulties encountered by an administration when implementing a collaborative community program. In their study on police officers’ application of community policing strategies, police officers were asked to identify problems in the community and determine what strategies or tactics could be realistically used to respond to the problems. Drug sales and drug-related disorders constituted the majority of the problems identified by the police officers; however, the officers did not deem the drug sales and related disorders to be resolvable by prevention techniques. Rather, increased conventional enforcement through tactics such as buy and bust operations and increased arrests were typically suggested as the means of dealing with these problems. In some situations that involved private commercial property, the officers suggested that the owners be held responsible for helping enforce the loitering and littering laws. When offering solutions to crime problems, the study found that officers were more likely to suggest increased use of traditional law

enforcement strategies for larger areas of crime as opposed to a specific street address or when the issue was complicated or multidimensional. Interestingly, both of these situations, larger areas of crime and multidimensional crimes, are ideal prospects for community policing and the problem solving approach. Conspicuous in the Bichler and Gaines study was that officers' suggestions contained few tactics that involved community or agency partnerships. When asked about the reason for the lack of community policing solutions, the officers offered the explanation that partnerships or collaborative efforts were not posed as viable solutions because their experience had shown that other agencies were uncooperative. In summary, in order for "community" programs to be effective, criminal justice personnel must be trained or retrained to think in a problem solving partnership mode while accepting the challenge to sustain the work necessary for success.

## Concluding Remarks

Today, nearly every major city in America utilizes some form of drug court and community policing program (Bichler & Gaines, 2005; Gebelein, 2000). Neither of the programs, however, is a panacea for eliminating crime, although research supports limited successes of both programs. Criminal justice professionals warn that expectations or claims about the programs should not be unrealistic or overly optimistic since responsive counterattacks are inevitable. For the drug-crime problem, there is no silver bullet, nor can a single program or agency eliminate the problem (Gebelein, 2000). In response to the "no quick fix" dilemma, the criminal justice system must not fall prey to Martinson's (1974) "nothing works" article, which detailed the criminal justice system's inability to control crime through rehabilitative measures. Defeatism and pessimism can only lead to failure, so the response must be resolute and resilient. *Something works* when interagency cooperation is sustained and dedicated people work toward the mission.

Critical to the success of any community criminal justice program or drug court is the collaboration among criminal justice components and community organizations (Wiseman, 2005). As the name implies, *community* policing, *community* courts, and *community* corrections require participation, collaboration, and cooperation of all the stakeholders at the local, state, and federal levels. Crime cannot be drastically reduced through the work of a single organization or agency alone, regardless of the size or number of personnel of the organization or agency. Law enforcement, courts, and corrections must interconnect in the pursuit of their objectives to achieve more positive outcomes. To be successful, community agencies at all levels and of all types must join together with a continuing commitment to define, analyze, and solve the crime problem. It is only through an ongoing collaboration with goals rooted in reality and agencies willing to accept their fair share of responsibility that crime can be considerably reduced for the entire community.

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# Interagency Offender Reentry Programs Offer “Win-Win” for Communities

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Offenders are being released from prison in record numbers,<sup>1</sup> and the majority are returning to their communities with multiple and complex problems, such as substance abuse, lack of job skills and employment opportunities, lack of affordable housing, and poor physical and mental health. The majority of these released offenders are rearrested within three years.<sup>2</sup> In response to such challenges, fresh approaches to offender reentry—most notably, multi-agency, multi-disciplinary partnerships—have begun to emerge. An increasing number of jurisdictions are inviting victims and victim service providers to take an active role in these partnerships.

In 2005, the National Center for Victims of Crime—with support from the Fund for New Jersey, the New Jersey State Parole Board, and the New Jersey Institute for Social Justice—convened focus groups to examine the potential contribution of victim service providers to reentry initiatives.<sup>3</sup> The National Center’s report on the project, *Bringing Victims and Victim Service Providers into Reentry Planning in New Jersey* (National Center for Victims of Crime, 2005), considered how reentry initiatives that mobilize victim advocates, victims, parole officers, and law enforcement can help to ease offenders’ transition to community life—both for the offenders and for the victims of their crimes.

The focus groups agreed that incorporating victims’ perspective into offender reentry planning not only helps victims but can also strengthen efforts to reduce recidivism and enhance public safety. They identified several areas in which collaboration and information sharing between professionals who work with offenders and those who serve victims might boost the effectiveness of the offender reentry process.

## Partners in Reentry Planning and Implementation

Most victim service providers who participated in the project saw themselves as untapped resources and potential partners in reentry initiatives. A logical role for victim service providers is to participate in multiagency community reentry partnerships that bring together law enforcement, corrections, parole, treatment providers, and other professionals to support successful reentry into society. Such partnerships, built on a concept already endorsed by law enforcement,<sup>4</sup> aim to reduce the risks associated with offender reentry through “pre-release reentry planning, effective surveillance and monitoring in the community, repairing the harm done to victims, and strengthening individual and community support systems” (Herman & Wasserman, 2001). The victim service providers felt they could contribute effectively to planning and implementing many phases of these processes.

For many victim service providers, the most obvious role in this process is contributing to “impact of crime” programs—often during the institutional phase—to impress upon offenders the consequences of their crimes for victims and their communities. Victim service providers may contribute to these programs not only by participating but also by helping to design curricula, train the instructors, and identify victims to participate (Herman & Wasserman, 2001). The victim service providers praised such programs, particularly the New Jersey Department of Corrections “Focus on the Victim” program that invites victims and victim service providers to speak about the impact of crime on their lives, as important vehicles for offender rehabilitation.

Providing counseling and treating any victimization offenders may have experienced is another way for victim service providers to help improve offenders’ chances for successful reentry. It is widely recognized that before their incarceration, many offenders had been victims of abuse or other crimes (Harlow, 1999; Widom, 2000). Because many of the barriers to reentry—substance abuse, unemployment, depression—are known to be common consequences of victimization, addressing an inmate’s own history of victimization may improve the chances for his or her successful reentry.

## **Partners in Professional Education**

Inattention to victim safety and concerns was a problem raised by focus group participants. Such inattention can weaken public support for reentry, lead to a risk in victim harm, and, ultimately, impair an offender’s ability to reenter successfully. One remedy for this problem is for victim service providers and parole officers to share information, particularly about victims’ needs—(i.e., safety and security, adequate notice and effective notification, and information about the offender and the system). This information would be useful in all phases of offender reentry.

## **Safety**

After offenders are released, parole officers may not have a clear understanding of victims’ interests and concerns. In particular, parole officers could benefit from understanding the dynamics of domestic violence, both for public safety and promotion of the offender’s successful reentry. It is vital, for example, that they appreciate the risks that any prisoner with a history of domestic abuse poses to a victim upon his release, whether or not he or she was incarcerated for a domestic violence offense or another crime (American Probation and Parole Association, 1999).

Parole officers also need to be aware of special conditions such as restitution orders, orders of protection, mandated treatment to address substance abuse or violent behavior, and restrictions on where offenders can work or live (Herman & Wasserman, 2001). Victims themselves can be an important source of information about the offender’s compliance with conditions, which parole officers can use to discourage offenders from reoffending and encourage successful reintegration (Herman & Wasserman, 2001). Victim service providers can increase parole officers’ understanding of these issues, both through formal training and by collaboration on reentry teams.

## **Notification**

Participants observed troubling weaknesses in the victim notification system. Victims often learn informally, after the event, about their offender’s release from prison—

for example, through someone in the community or as a result of an unexpected encounter with the offender. The failure of the system to notify victims in advance undermines efforts of victim advocates to help victims prepare emotionally for their offender's return and stay safe in circumstances in which the offender's return puts the victim at risk. To help reduce these problems, victim service providers can help law enforcement with door-to-door notification of the presence of sex offenders in neighborhoods (Center for Sex Offender Management, 2000). They can encourage their communities to use victim notification systems, such as VINE,<sup>5</sup> which automatically notifies victims of changes in offenders' status and is active 24 hours per day. They can also suggest how to increase the consistency and reach of notification systems, propose agencies to include in the system, and suggest outreach to ensure that victims have the opportunity to participate in the notification system and keep their contact information up to date so they can be reached.

## Promising Models

The National Center for Victims of Crime's report on the New Jersey project also cites several innovative reentry programs in other states, particularly in Vermont and Washington, where victim service providers are already playing an important role in planning and implementing offender reentry. In the Reentry Partnership Initiative, a Vermont pilot program, inmates undergo a comprehensive assessment that guides their enrollment in educational programs during their incarceration. Offenders create an offender responsibility plan that serves as the basis for their reentry. The program also features a reentry panel, a group of citizens who monitor progress while the offender is incarcerated, receive reports on treatment progress, and meet with inmates via video conferencing. Offenders meet with this panel before their release and after release for 60 days. The program involves networking; partnering; and collaborating with citizens, victims, victim services groups, law enforcement agencies, housing agencies, workforce development personnel, and community treatment providers who work together to support the reentry process (National Center for Victims of Crime, 2005).

In Washington State, the Victim Wrap Around Services program, managed by the Washington Department of Corrections (DOC), assembles teams of professionals (i.e., DOC staff, victims and advocates, law enforcement, and treatment providers) to collaborate on offender reentry while keeping victims safe. Before the offender leaves prison, the victim is linked to a network of team members to help with any emerging need. Once the offender is released, victim advocates may help victims access community services and, if needed, obtain protection orders—which DOC, law enforcement, and the courts collaborate to strictly enforce. Victim advocates and victims also play a key role in the state's Victim Awareness Education Program, which educates inmates about the impact of their crime on victims. DOC also has a Victim's Council that provides victims and victim advocates a voice in managing offenders and preparing offender accountability plans (Washington State Department of Corrections, 2006).

The DOC staff includes a community victim liaison to coordinate wrap arounds and serve as a bridge between DOC and crime victims and their advocates. Victim advocates also serve as Regional Community Victim Liaisons throughout the state, managing and coordinating interagency planning to increase offender compliance with victim-related sentence conditions. The regional Community Victim Liaisons

facilitate safety planning wrap around meetings when high-risk offenders return to the community from prison (Washington State Department of Corrections, 2006).

## Partners for Public Safety

The New Jersey Reentry Project participants concluded that including victim service providers in offender reentry programs makes sense both for victims and their communities.

Victim service providers can help law enforcement with victim and door-to-door neighborhood notification, provide information that helps police and parole officers to discourage reoffending, help prepare offenders for reentry, and help ensure victims' safety after offenders are released. Working with law enforcement and other professionals in reentry partnerships, victim service providers can serve as a resource for reducing recidivism and increasing public safety.

To read the complete report, visit the National Center for Victims of Crime website at [www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=40545](http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=40545)

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## Endnotes

- <sup>1</sup> Nearly 650,000 offenders are released from U.S. state and federal prisons each year (U.S. Department of Justice: Office of Justice Programs, 2006).
- <sup>2</sup> In a 15-state study, more than two-thirds of released prisoners were rearrested within three years (U.S. Department of Justice: Bureau of Justice Statistics, 2002).
- <sup>3</sup> Focus groups included victim witness coordinators from county prosecutors' offices; representatives of state agencies such as the Department of Corrections, the Juvenile Justice Commission, and the Division of Women; representatives from the New Jersey Coalition for Battered Women; and executive directors and staff from private nonprofit entities serving homicide survivors, victims of domestic violence and sexual assault, and child sexual abuse.
- <sup>4</sup> At a 1999 summit meeting, the International Association of Chiefs of Police endorsed the "vision of a 'seamless continuum' of response and support for crime victims that can be realized only through collective effort toward common goals." Participants recommended partnerships of victim assistance professionals, first responders, prosecutors, corrections and probation officers, parole staff, policymakers and funders, community members, and victims, to realize this ideal (International Association of Police Chiefs, 2000).
- <sup>5</sup> The National Victim Notification Network™ (VINE) allows crime victims across the country to obtain timely and reliable information about criminal cases and the custody status of offenders 24 hours a day—over the telephone, through the Internet, or by e-mail (see [www.appriss.com/VINE.html](http://www.appriss.com/VINE.html)).

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