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# INVESTIGATION AND PUNISHMENT OF POLICE MISCONDUCT

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## INTRODUCTION

One of the most serious concerns facing law enforcement is the misuse of power and authority or misconduct. Misconduct is defined as: "mismanagement, especially of governmental or military responsibilities; intentional wrongdoings, specifically deliberate violation of a law or standard especially by a government official; malfeasance; or improper behavior." (1) Police misconduct is a broad area, including such violations as excessive and deadly use of force, improper searches and seizures, unlawful arrest and imprisonment, and graft. This paper discusses the historical legislative basis for police liability regarding these areas, investigation and punishment of police misconduct, and prevention of misconduct.

## LEGISLATIVE BASIS

The federal government, through the Constitution, guarantees specific rights to any cititzen or other person within the jurisdiction of the United States. Charges of police misconduct often include alleged violations of some of these rights. Examples include the Fourth Amendment's prohibition against unreasonable arrest and unreasonable search and seizure; the Fifth Amendment's right against self-incrimination and prohibition against the taking of life, liberty or property without due process of law; and the Sixth Amendment's right to assistance of counsel. Police misconduct may also entail alleged violations of the Eighth Amendment's

prohibition against cruel and unusual punishment and the Fourteenth Amendment's right to due process and equal protection under the law. Likewise, these protections are all afforded law enforcement officer, and investigations of police misconduct may not encroach upon the officer's constitutional rights.[2]

After the Civil War, Congress began to greatly broaden the scope of the judicial authority. Among the legislation passed were several civil rights acts. The Act of 1871 provided a broad civil rights jurisdiction for all claims of deprivations of federally secured rights "under color of" state law. This jurisdiction was promoted by the activities of the Ku Klux Klan at the time and the inaction and powerlessness of the states to control such activities. [3] Included in the Act of 1871 is Title 42 U.S.C. Section 1983, which reads as follows:

> Civil Action for Deprivation of Rights: Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State of Territory of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [4]

Even though Section 1983 was enacted in 1871, it was rarely used until the 1960s. It was resuscitated by the United States Supreme Court in the case of *Monroe v. Pape*, 365 U.S. 167 (1961). In *Monroe v. Pape*, the plaintiff and his family sued 13 Chicago police officers and the City of Chicago, alleging that the law enforcement

officers had broken into their home without a warrant, forced them out of bed at gunpoint, made them stand naked while the officers ransacked the house, and subjected the family to verbal and physical abuse. The police then allegedly took Monroe to the police station, where he was held incommunicado and interrogated for 10 hours before being released without being charged. Plaintiffs claimed that the defendants' actions constituted a deprivation, "under color of law," of their constitutional guaranteed against unreasonable searches. The Federal District Court dismissed the complaint and the Court of Appeals confirmed it. The Court held that the definition of "under color of law" for Section 1983 purposes was the same as that already established in the criminal context, and also concluded that because Section 1983 provided for a civil action, the plaintiffs need not prove that the defendants acted with a "specific intent to deprive a person of a federal right" (365 U.S. at 187). (5)

In order to file a Section 1983 suit, four basic elements must be present, these are:

1. The defendant must be a natural person or a local government,
2. The defendant must be acting under "color of state law,"
3. The violation must be of a constitutional or federally-protected right
4. The violation must reach constitutional level. (6)

A police officer is liable if all four of the elements are present. The absence of any of these means that there is no liability under Section 1983, but the officer may be liable, however, under some other provision of law, such as under state tort or the Penal Code, but not under Section 1983. Where a deprivation of a constitutional right cannot be shown, consideration must be made of alternative remedies in state court. Not every action by a police officer which may constitute a tort under state law establishes a federal cause of action for violation of civil rights under Section 1983. [7]

A national study conducted by the International Association of Chiefs and Police (IACP) concluded that approximately 40 percent of all civil liability cases are filed against the police based on claims of misconduct. [8] According to one survey of police departments, the number of civil suits filed against the police from 1967 to 1971 increased by 124 percent. In 1976, there were over 13,400 civil suits filed against law enforcement officers in the United States. Between 1967 and 1976, the yearly number of civil suits brought against law enforcement officers increased by over 500 percent. Studies conducted by the IACP and other organizations indicate that within this time frame, one in 34 police officers were sued. Studies like these predicted that by the 1980s, there would be over 26,000 civil lawsuits filed against the nation's police annually. According to one legal scholar, the police are currently

faced with more than 30,000 civil actions annually. [9] Actions may be brought against the police regarding such issues as use of force, searches and seizures, arrests and imprisonment, and graft.

## EXCESSIVE USE OF FORCE

The charge of police brutality is one of the most frequent citizen complaints made against individual officers and police organizations. Police brutality is an ambiguous term used to cover a variety of police practices. When a citizen charges police brutality, he may be referring to a number of actions:

- Profane and abusive language,
- Commands to move or get home,
- Field stops and searches,
- Threats,
- Prodding with a nightstick or approaching with a pistol,
- The actual use of force. [10]

Although any of the above acts may at times be illegal and unethical, only the unreasonable and unnecessary use of physical force is actually police brutality.

The police occupation provides the individual police officer with numerous opportunities for police brutality. Instruments of force and violence are a necessary part of the officer's occupational equipment. Police officers may need them to effect an arrest or to defend themselves, and society recognizes that the use of force is part of the policeman's legal mandate. Unfortunately, some officers go beyond their

legal mandate and use unreasonable and unnecessary force to accomplish legal and nonlegal ends. (11)

There are a number of possible reasons why an officer might engage in acts of brutality. The individual might be the pathological personality who enjoys physically abusing and hurting others and has in fact become a police officer because of the potential opportunities for violence. Every experienced police officer has probably come in contact with such individuals in his or her career. These violent individuals are a small minority of the police occupation; but, unfortunately, they do exist. Some instances of police brutality are also the result of fear with the officer overreacting to what are, or what are perceived to be, potentially dangerous situations. These individuals believe that physical force is an absolute necessity in the "street jungle." In other instances, this use of unnecessary physical force is the result of verbal abuse and provocation. Demonstrators often try to provoke officers into the use of force. Police officers do not have the legal right to strike an individual who has insulted them or called them a profane name, but sometimes officers may be pushed beyond endurance. Officers may then find their problems compounded if they perjure themselves in court in order to protect their jobs. (12)

The use of unnecessary and unreasonable force can occur for any of the above-mentioned reasons, but the largest percentage of all acts of police brutality

are the result of occupational socialization and peer group support. The police peer group may define the excessive use of force as acceptable in certain circumstances; such as to command respect from an unruly prisoner, to obtain information, to punish certain classes of deviants (sex criminals, hardened criminals), or classes of perceived deviants ("hippies," radicals, hillbillies, punk kids, etc.). Additionally, individuals who actually resist arrest are particularly vulnerable targets of police brutality. (13)

## POLICE-CAUSED HOMICIDES

There is no reporting system with respect to police-caused homicides and no accurate count of the number of citizens shot and killed by the police each year in the United States. Although the FBI collects information on killings by police officers in the supplementary homicide reports filed by law enforcement agencies with the Uniform Crime Reporting Section, it does not publish these data due to reservations with respect to their quality. (14)

In the absence of any centralized reporting system, researchers have often relied on the *Vital Statistics of the United States* to measure the number of police caused homicides. These data are based on death certificates which have been completed by coroners (or medical examiners) and submitted to the state health department. In turn, the various state health agencies transmit these reports to the

National Center for Health Statistics (U.S. Public Health Service) which published the information in the *Vital Statistics*. Because there is a category on the death certificates entitled "death by legal intervention - police," these reports should provide an accurate account of the number of police homicides in the U.S. Unfortunately, this is not the case. (15)

According to the *Vital Statistics*, the number of police-caused homicides in the U.S. between 1965 and 1979 ranged from a low of 265 to a high of 412 per year. However, Sherman and Langworthy observed that based on an examination of data supplied by police agencies in 13 jurisdictions, *Vital Statistics* may underreport the number of police killings by as much as 51 percent. This system of reporting has so many flaws that the information generated is unreliable with respect to both the total number of police killings and the relative incidence of police-caused homicide from one city to another. (16)

More recently, researchers have relied on data voluntarily supplied by police departments in urban areas. These studies have provided reliable information for large cities. However, the number of citizens killed in the nation as a whole remains unknown. (17) The most important finding to emerge from this body of research is that the number of police-caused homicides has declined substantially in recent years. (18)

An unjustified killing by a police officer can result in a number of tragic consequences. Most of important of all, a human life is needlessly lost. [19] The use of excessive force during an arrest, an investigatory stop, or any other "seizure" of a person at liberty, violates that person's Fourth Amendment rights and is actionable under Section 1983. [20]

## LEGAL PRECEDENTS

It had long been established that the use of excessive force violated some constitutional right, but until *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989), precisely what right was violated had not been clarified by the Supreme Court. [21] In *Graham*, the court addressed the use of excessive force in detaining a diabetic suspect. The Court held that "*all* claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourteenth Amendment and its "reasonableness" standard . . . ." (490 U.S. 386, 395 (1989)). [22]

Under *Graham*, determining whether a police officer's conduct passes the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

actively resisting arrest or attempting to evade arrest by flight." Because the standard is an objective one, the officer's intentions, whether good or bad, are irrelevant. (*Id.*, 386, 396, 397-99). [23]

Although a plaintiff protected under the Fourth Amendment need only show that the conduct of the officers was "objectively unreasonable," a plaintiff protected under the Fourteenth Amendment must allege and prove conduct that is malicious, sadistic, or "shocks the conscience." (*Rochin v. California*, 342 U.S. 165, 172 (1952)). [24] In determining whether a Fourteenth Amendment excessive force violation has occurred, "a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, a and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." (*Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.). *cert. denied, John v. Johnson*, 414 U.S. 1033 (1973).). [25]

The Court's conclusion that the Fourth Amendment governs all use of force against persons at liberty follows from its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). [26] In reviewing the constitutionality of a state statute permitting the use of deadly force to prevent the escape of all felony suspects, the Court reasoned that if a criminal suspect "poses no immediate threat to the officer and no threat to

the others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." On the other hand, the Court held that the deadly force may be used when "necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." (27)

An officer must have probable cause to believe that the fleeing suspect is dangerous, and the use of deadly force must be necessary to effect the seizure. A suspect should be given verbal warning and an opportunity to surrender before deadly force is used. If verbal warnings are not feasible, or if the fleeing suspect ignores them, the officer must then consider other available options. In doings so, it is not necessary that all possible options be considered, only those that offer a reasonably safe means of seizing the suspect. (28)

In *Ellis v. Wynalda*, 999 F.2d 243 (7th Cir. 1993), an officer responded to a robbery and ordered the plaintiff to stop. The plaintiff threw a bag at the officer and started to run and the officer then shot the plaintiff in the back as he was fleeing. The Court held that the shooting was not justified because no evidence existed that the plaintiff had a gun, had committed a dangerous felony, or was otherwise dangerous. (29)

In *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987), the Court held

that a valid Fourth Amendment claim was asserted where the plaintiff alleged that the police officer used excessive force to break up a domestic quarrel. The officer placed the decedent in a choke hold and shot him in the back when he offered only instinctive resistance. (30)

A Fourth Amendment violation was by proof when police responded to a report of a child who had locked himself in a bathroom with a knife in *McKinney by McKinney v. DeKalb County, Ga.*, 997 F.2d 1440 (11th Cir. 1993). The child was sitting in a closet with a knife in one hand and a stick in the other. The police attempted conversation and after ten minutes, the child threw the stick at them. While the child was trying to get out of the closet, one officer shot the child five times. (31)

The Court noted in *Graham* that reasonableness must be judged from the perspective of a reasonable police officer on the scene, not based on hindsight, and should take into account the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation. (32) Relying in part on this concept of reasonableness, the firing at the driver of a truck to disable it was considered to be constitutionally reasonable as a matter of law in *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). The truck had been "careering through traffic" for 50 miles, forced several motorists off the road,

posed an immediate threat of serious physical harm to innocent motorists, and had failed to stop in response to other measures taken by the officers. (33)

The use of instruments other than firearms may constitute the deployment of deadly force. (34) The improper use of handcuffs tear gas, MACE, claws, flashlights (when used as weapons), and other police equipment may create liability. (35) The following section discusses issues related to the improper use of handcuffs.

## HANDCUFFS AND OTHER WEAPONS

An injury to the restrained person by the improper application or use of restraints can create a liability under Section 1983. (36) Injury can occur when either the handcuffs are placed on the person too tightly - that is the officer failed to double-lock the handcuffs and they inadvertently or intentionally tightened, causing injury to the person's wrists - or the cuffs remain on the person for an unreasonable amount of time. (37)

If an officer over-tightens or fails to double-lock the handcuffs, or leaves them on for an extended period of time, that person can be severely injured. This type of injury is usually referred to as "handcuff neuropathy." Similar to carpal tunnel syndrome, handcuff neuropathy is damage to the person's radial, ulnar, and/or median nerves caused by the compression of the handcuffs. This nerve damage is manifested in loss of strength and weakness of grip, numbness, loss of

flexation, diminished light touch sensation, a tingling sensation in the fingers, and pain in the wrist, hand, and/or fingers. Such an injury can be long term or even permanent. Since this injury is usually classified as "serious bodily harm," it can be argued that the officer used deadly force, [38] defined as force intended or likely to cause death or serious bodily harm.

The officer's use of force must be objectively reasonable, based upon the totality of the circumstances known to him at the time. His use of restraints must be in compliance with federal case and statutory law. In the normal restraint of a person as the result of a lawful temporary detention or arrest, the restraint used by the officer will be considered a use of force. [39]

In *Calamia v. City of New York*, 879 F.2d 1025 (2d Cir. 1989), tight handcuffs kept on for several hours amounted to excessive force. [40] Also in *Hansen v. Blac*, 885 F.2d 642 (9th Cir. 1989), the abusive use of handcuffs stated a cause of action. [41]

*Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984) is where the plaintiff was four times subjected to a chokehold by a police officer. His arms were bruised and his face scraped, the handcuffs that were applied to his wrists had raised welts, and he suffered a sore throat and a hoarse voice for weeks following the incident. There was no permanent injury to the plaintiff. [42]

Even though the beating of a suspect with a flashlight did not "shock the conscience" in *Davis v. Forrest*, 768 F.2d 257 (8th Cir. 1985), the expense and time of a trial were spent by all involved. (43)

The National Institute of Justice (NIJ) discourages hog-tying people or placing them in postures that hamper respiratory action. Positional restraint has been known to kill restrained individuals, with death occurring in as little as five minutes. (44) In *Owens v. City of Atlanta*, 780 F.2d 1564 (11th Cir. 1985), an arrestee died from positional asphyxia as a result of being placed in a "stretch" hold position in a jail cell. The Court ruled that the method of restraint did not violate constitutional rights. (45)

The National Institute of Justice also does not recommend the use of thumbcuffs, they will either be too loose allowing the restrained person to remove them easily, or if they are tight enough to control the subject, they are likely to be so tight that injury to the thumbs can be caused. (46)

OSHA Bloodborne Pathogens Standard (March 6, 1992) requires that contaminated surfaces and equipment must be properly decontaminated. This means that if bodily fluids (blood, urine, saliva, etc.) are on the backseat of the squad car, the handcuffs or other restraints, the officer must decontaminate the surface and equipment before re-use. If he cannot immediately decontaminate the

articles, he must treat them as "regulated wastes" (items that are caked with dried blood or other potentially infectious materials) and mark them accordingly. (47) Failure to follow OSHA Standards can result in large fines and penalties from OSHA, as well as possible liability if a suit were to arise from the non-compliance.

## SEARCH AND SEIZURE

Charges of police misconduct often allege violations of Fourth Amendment rights. The Fourth Amendment provides that it is "the right of the people to be secured in their person, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." (48)

In *Fisher v. Volz*, 496 F.2d 333,341 (3d Cir. 1974), the court stressed the significance of the Fourth Amendment's protections:

> "High on the list of constitutional rights is the right of innocent citizens to be free from unreasonable intrusions into the privacy of his home. A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home. Permitting reliance by the officer solely on exigent circumstances offers too may opportunities for abuse, provides little comfort to a citizen peacefully in his home, and affords insufficient protection against invasion of his privacy. A requirement that the officer must also have probable cause to believe that the suspect is in the dwelling will not unduly restrict the effectiveness of police action but will reduce the obvious risks of abuse. It offers police considerable latitude but also requires a necessary amount of restraint. It should

> enable the police to act reasonably but not oppressively, promptly but not recklessly, lawfully but not offensively. Law observance by the police cannot be divorced from law enforcement. When official conduct feeds a sense of injustice, raises barriers between the department for the law, the difficulties of law enforcement are multiplied." (49)

There are three types of seizures of persons: voluntary contact, investigative detention, and arrest. In a voluntary contact, it is a non-seizure of a person; the person can leave at any time. During an investigative detention, it is a limited seizure of a person; the officer detains the person for questioning regarding a reasonable suspicion of their activities, or to question regarding activities of others witnessed. An arrest is the physical seizure of a person. (50)

## PERSONAL PROPERTY

While a search warrant reduces liability, there are exceptions to the search warrant requirements. Searches incidental to arrest are one exception to the requirement. When an arrest is made based on probable cause, the officer can search the body and immediate surrounding area for any contributory evidence. In consensual searches, the officer has asked for permission to do a search, with the person responsible for the property giving consent for the search to be done. It is highly suggested that the consent be in written form, to prevent future liabilities. During a search based on exigency, there must be no time available to get a warrant and the officers must have good reasons not to wait; there must be a need for

immediate aid; or during hot pursuits. To search an unabandoned car based on exigency, there must be probable cause to do the search. If the car is abandoned, the owner has given up all rights to the property, including search and seizure. (51)

Another exception to the search warrant is when an officer does a plain view search. In order for the plain view search to be legal, the officer must be within the protected area which contains the contraband. The protected area and space is where there is a reasonable expectation of the privacy of a citizen. There must be prior justification for the search to occur. An officer cannot search just because there was a stop made for other legal (or illegal) reasons. The contraband must be discovered inadvertently, and it must be immediately apparent. (52)

During a Terry stop/frisk, a warrant is not necessary. *Terry v. Ohio,* enables an officer to stop, detain, and even frisk a suspect if a reasonable suspicion is presented. In order to prove that a reasonable suspicion was present, the officer must be able to articulate the facts of the events. As soon as possible, the officer should write down everything: suspect's movements, actions, and words; the sequence of events; and the reasoning behind the officer's decision to investigate further. The officer has the right to frisk a suspect's outer clothing for weapons, and inside clothing if the officer fears a reasonable danger. If a weapon is found, the officer has the right to arrest, if allowable in that state based on a concealed

weapons charge. A more thorough search incidental to arrest can then be made. If a reasonable suspicion for drugs is present during the frisk, a search for contraband can be made according to identifying potential contraband by its sound, shape, feel, and smell. (53)

When a search warrant is available, the execution of the warrant is "to provide for legal and thorough searches, observe constitutional rights of all people, minimize the level of intrusion involved in searches, provide for officer safety, and establish a record of action taken." (54)

In order for a warrant to follow policy, certain procedures should be adhered to. Uniform and equipment requirements state that at least one uniformed officer should be present, with the rest of the officers wearing raid or other identifying jackets. Execution of the warrants should be done promptly. During the preparation for the search, the group should be briefed on the facts of the warrants and updated on any new information or facts regarding the warrant. Everything should be documented, and a video of the proceedings should be started.

During the entry of the dwelling, the officers should keep a low profile approach. A double check of the warrant should be made prior to entry proceedings. The entry should be recorded, with all exits covered. The uniformed officers should go first and give notice of intent before using force to enter the

dwelling. On premise activities include: planning the search, assigning duties, securing locations, and recording and repairing damages (if any). (55)

The search must be legal, thoroughly constitutional, minimally intrusive, safe for all the officers, and fully documented. In a search that is not executed properly, a Fourth Amendment violation occurs. In *Wagner v. Bonner*, 621 F.2d 675 (5th Cir. 1980), a search was considered unreasonable because the police conducted the search at 2:00 am of every room of the appellant's house based on an out-of-county misdemeanor warrant which the police knew had a 20-25% chance of being incorrect. (56)

**BODILY SEARCH**

Without notable exceptions, any person detained or arrested by the police will undergo a frisk and/or search. The intrusiveness of the search will depend upon the circumstances of the police action, but many departments have followed a policy of conducting a strip search (including, in some cases, physical inspection of body orifices) as part of the standard arrest procedure. Litigation challenging strip searches are conducted in a broad, indiscriminate manner, without regard to the justification for the initial detention of the suspect. (57)

The appropriate constitutional standard would forbid indiscriminate strip search practices. There must be probable cause to believe that a weapon or

contraband is secreted on one's body, and should be a precondition to an intrusive strip or body cavity search. (58)

## DRUG AND MONEY

Strip searches, x-rays, and body cavity examinations may not be employed to detect the presence of drugs unless appropriate criteria are met. (59) During a Terry stop, the officer may frisk the suspect for drugs, if a reasonable suspicion is present. Articulable factors justifying a search for drugs would include the suspect hanging around a known drug trafficking neighborhood, the suspect's physical condition, and/or a personal knowledge of the suspect's drug use. During the search, the officer can use sound, shape, feel, and smell to locate the contraband. (60)

Although warrants provide insulation for police officers conducting drug operations, the provisions of the Fourth Amendment also apply to the manner in which these warrants are executed. A search warrant does not guarantee that the officer who exceeds the scope and authority of that warrant will not be held liable. The court may impose liability if police officers exceed their authority of that warrant by using excessive force, conducting intrusive searches, or confiscating personal property that does not evidence criminality. (61) Most police actions are controlled by the provisions of the Fourth Amendment, which requires that all searches and seizures be reasonable and based on probable cause.

Confiscation of property during a drug raid must be limited to illegal substances and evidence directly related to the commission of a crime. In the absence of discovery of a controlled substance or other direct evidence of a crime, personal property should not be confiscated by police officers. Although money could be used as indirect evidence of drug trafficking, if no controlled substances are found, officers should leave the money alone. If money or property is confiscated, the officers should give the suspect a receipt of all property seized. Property should be returned following a dismissal of the charges, unless clear exceptions are provided for by state law. (62)

## ARREST AND IMPRISONMENT

### DEFINITION

An action for false arrest and/or detention (false imprisonment) may be brought under U.S.C. Section 1983 for violation of the Fourth and Fourteenth Amendments. (63) False imprisonment involves the unlawful restraint against a person's will and must be a total restraint. Either physical or psychological force can be used to accomplish the detention. The victim must be aware of the restraint, but does not have to be removed from the location. (64)

An arrest warrant is not needed if the officer can prove that there was probable cause present to insure an arrest. (65) In a warrantless arrest, in order to

prove a constitutional violation, the plaintiff must show that he/she was arrested without a warrant, and without probable cause. (66)

## LEGAL CAUSES CONCERNING UNLAWFUL ARRESTS

In *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir. 1994), several dark-skinned Hispanic males were detained only because they were driving a dilapidated station wagon in an affluent community, and using an expensive video camera. They were held entitled to a direct verdict on the issue that they were arrested without probable cause, and not subjected to a permissible Terry stop. (67)

In *Centanni v. Eight Unknown Officers*, 15 F.3d 587 (6th Cir. 1994), the plaintiff was held four hours at the police station in order to prevent her from alerting a suspect of an impending arrest. She was held entitled to a summary judgment on the issue that she was arrested without probable cause, and also not subjected to a permissible Terry stop. (68)

The detention of a suspect at an airport based solely on the fact that he was black and refused to make eye contact with the officers was not based on reasonable suspicions in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993). (69) Courts have also ruled that there is no probable cause where an officer makes an arrest based on his "observations, training, and experience," if he or she cannot supply specific and articulable facts. (*Rivera v. Murphy*, 979 F.2d 259 (1st Cir. 1992).) (70)

A plaintiff may also have a valid cause of action when arrested under a statute or ordinance which is unconstitutional. (71) In *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987), the plaintiff had been arrested under an ordinance that prohibited "loitering and prowling." The court held that the statute was unconstitutional. The court noted that while the officer would have a qualified immunity defense to the claim that wrongfully invoked the ordinance, which was not declared unconstitutional until after the arrest, the officer still had to justify the fact of the arrest under applicable constitutional principles. As the plaintiff had simply been walking in the middle of the street at night, the court ruled that the officer did not have a sufficient basis even to make a Terry stop and that the arrest was unconstitutional. (72)

**ARREST MADE WITH A WARRANT**

Where an arrest is made with a warrant, establishing liability against the police officer will be substantially difficult. One category of such cases involves persons who are arrested on a warrant meant for another, or persons who are arrested on a warrant which have been withdrawn or "cleared" prior to the time of the arrest. (73)

In *Baker v. McCollan*, 443 U.S. 137 (1979), the plaintiff was arrested on a valid warrant intended for his brother. Despite repeated statements of innocence, he

spent eight days in jail and claimed that the sheriff was liable for not having established an effective identification system. (74) Due process satisfied by a facially valid warrant and detention under a warrant requires neither a probable cause bearing nor effective indentification procedures. (75) In *Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993), the plaintiff's driver's license and other information was in conflict with the description of a person wanted in another state. Failure to take steps to remedy the misidentification was sufficient evidence for deliberate indifference. (76) In *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991), the police detained the plaintiff without verifying identity, despite discrepancies between the name and social security number of the person named on the warrant and the plaintiff. (77)

Where the officers in fact know that they are holding an innocent person, even where they have a facially valid warrant for his arrest, the plaintiff should have a cause of action. (178) In *Murray v. City of Chicago*, 634 F.2d 365 (7th Cir. 1980), the plaintiff's purse and checkbook were stolen, and the theft was reported to the police. Six to twelve month later, some of the stolen checks were cashed at various retail stores, and the plaintiff was arrested. All but one charge was dismissed, but thinking that all the charges had been dismissed, the plaintiff did not appear at the next hearing and a warrant was issued for her arrest. Learning of this development,

the plaintiff appeared and the remaining charge against her was dismissed. Several months later, the plaintiff was arrested at her home by two Chicago police officers, pursuant to the invalid warrant. The plaintiff was taken to headquarters, forced to strip naked and submitted to searches conducted and observed by male police officers. She was imprisoned six to seven hours before being released. The court ruled that the police officers were acting in good faith, but that if the policy, custom, or practice of the city could be established to show that other unwarranted arrests have occurred frequently, the city could be held liable. (79)

A different situation is presented where the police officers arrest the person they intend to charge with a crime and that individual is properly named in a facially valid warrant, but the plaintiff alleges that there was no probable cause to support the issuance of the warrant. (80) Powe was a victim of an armed robbery. The robber took Powe's wallet and identification. When later arrested for another charge, the robber used Powe's identification, entered a plea of guilty, and was sentenced to two year's probation under Powe's name. He then violated the conditions of probations and an arrest warrant was issued. Powe was stopped for a traffic violation some time later, and when the police officer learned that there was an outstanding warrant for him, placed him under arrest. Powe was able to substantiate his story and was released. However, he was arrested three months later under

similar circumstances. The court ruled that the municipality must be held liable under Section 1983 if the factfinder determines that its procedures led to the issuance of an invalid warrant, and thereby, to unlawful arrests. Given the allegations contained in Powe's complaint, the court stated that such a conclusion would be permissible. (81)

Where an arrest is made under a warrant, but the warrant was secured on the basis of false statements made to the magistrate by the police officer, the plaintiff should have a cause of action against the officer, but only where the false or withheld information is material to the probable cause determination. In such an action the questions of whether the officers were truthful at the time they applied for the warrant will be a jury issue. (82) In *DeLeon v. Bevers*, 922 F.2d 618 (10th Cir. 1990), a detective investigating the death of a child omitted all mention, in her report to the district attorney, of medical opinions which conflicted with her theory that a baby-sitter was responsible. The court affirmed a jury verdict against the detective on the ground that the omissions constituted the provision of false and misleading evidence on the district attorney, leading to the plaintiff's arrest. It has been held that negligence or mistake resulting in errors in statements made to a magistrate is not sufficient to establish liability against an officer. (83)

**GRAFT**

Gratuities seem to be part and parcel of a police officer's job. Although the formal code of ethics disapproves of gratuities, most individuals feel there is nothing wrong with businesses giving "freebies" to the police officers, such as free admission to events or gifts. Many officers believe that these are small rewards indeed for the difficulties they endure in police work. Many business people offer gratuities, such as half priced meals, as a token of sincere appreciation for the police officer's work. (84) The police are often tempted with fringe benefits that some may assume are merely poor compensation for the less desirable aspects of the job. (85) Cohen refers to all these behaviors (corruption, graft, bribery, theft, and gratuities) as exploitation and describes exploitation as "acting on opportunities, created by virtue of one's authority, for personal gain at the expense of the public one is authorized to serve." (86) Cohen believes that gratuities are dangerous because what might start without intent on the part of the officer may become a patterned expectation. Many believe that gratuities are only the first step in a downward spiral. (87) Some authors are pessimistic: "For police, the passage from free coffee at the all night diner and Christmas gifts to participation in drug-dealing and organized burglary is normally a slow if steady one." (88) Many police develop along what Sherman calls a moral career. Individuals pass through various stages of rationalization to more serious misdeeds in a graduated and systemic way. Once an

individual is able to get past the first moral crisis, it becomes less difficult to rationalize new and more unethical behaviors. (89)

One should understand that for the police, life is not always black and white, but rather shades of gray. To accept protection money from a prostitute may be rationalized by the relative lack of concern the public shows for this type of lawbreaking. (90) The police routinely deal with the seamier side of society - not only drug addicts and muggers, but middle-class people who are involved in dishonesty and corruption. The constant display of lying, hiding, cheating, and theft creates cynicism and threatens even the strongest code of ethics, especially when these behaviors are carried out by judges, prosecutors, superiors, and politicians. (91) A small-town police department was considered relatively free from corruption, but even in this department, widespread patronage and petty bribery occurred because of the functional and beneficial aspects of this graft. For instance, a "security" firm was more or less given carte blanche to operate in legal and illegal ways to control burglaries in particular areas of the city. The police also overlooked gambling, after-hour liquor violations, and other minor infractions in exchange for information and cooperation. (92) It might be instructive to look at other occupations. Professionals such as doctors and lawyers do not have strong ethical restrictions against gift giving or gratuities. Gratuities seems to be more problematic when the

profession involves discretionary judgments regarding a clientele. [93]

The Texas Penal Code states that "a person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding;

(3) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official; or,

(4) any benefit that is a political contribution as defined by Title 15, Election Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or to withhold a specific exercise of official discretion would not have been taken or withheld but for the benefit; notwithstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subsection." [94]

An offense under this section is a felony of the second degree.

In the acceptance of an honorarium, a public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties. This does not prohibit a public servant from accepting transportation and lodging expenses permitted under Section 305.025 (b)(2), Government Code, in connection with a

conference or similar event or from accepting meals in connection with such an event. An offense under this section is a Class A misdemeanor. (95)

A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency. A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency. Any offense under this section is a Class A misdemeanor. (96)

## INVESTIGATION

### ADMINISTRATIVE

Every law enforcement agency must have a statement of process for invesigating andprocessing complaints lodged by citizens against peace officers in their employment. This process must be readily available, and simple to follow .(97) After a complaint has been filed, the department has the responsibility to investigate the allegation. The investigators receiving factual complaints from citizens must translate this information into a violation of the department's rules and regulations and city or county personnel rules and regulations. The officers being cited in the

complaint have a right to know the charged violation in order to effectively respond to the allegations. (98)

Once the complaint has been received and reviewd by the Internal Affairs (IA) department, the investigator must then decide to proceed with the investigations as strictly administrative for disciplinary actions, or if the allegations warrant a criminal investigation for civil proceedings. The decision as to the type of investigations must be made prior to interviewing the employee charged.(99)

If the investigation is being conducted administratively for disciplinary action (including termination).(100) With respect to the Fifth Amendment, the Supreme Court held in *Garrity v. New Jersey*, 385 U.S. 483 (1967), that statements compelled during the course of an internal investigation cannot be used as evidence in a criminal trial.(101) A practice which has evolved as a result of *Garrity* is for the IA investigator to give a "Garrity Interview," where sworn statements or depostitions of the accused officer are taken by the investigator. The officer is "ordered" (on the record) to answer all questions truthfully during the interview. The officer is also told (on the record) that his/her statement will be used during the internal disciplinary process but cannot be used in a criminal proceeding.(102) The Garrity disclaimer should be added to every statement the officer signs. That disclaimer keeps the statement from being used against the accused employee in a

criminal prosecution. However, it can still be used as evidence to sustain a disciplinary action.[103]

The Garrity Disclaimer reads as follows:

> On _____, at _____, I was ordered to give this statement by _____. I give this statement at his order as a condition of my employment. In view of possible job forfeiture, I have no alternative but to abide by this order.
>
> "It is my belief and understanding that the department requires this statement solely and exclusively for internal purposes and will not release it to any other agency. It is my further belief that this statement will not and cannot be used against me in any subsequent proceedings other than disciplinary proceedings within the confines of the department itself."
>
> For any and all other purposes, I hereby reserve my constitutional right to remain silent under the FIFTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION and any other rights PRESCRIBED by law. Further, I rely specifically upon the protection afforded me under the doctrines set forth in *Garrity v. New Jersey*, 385 U.S. 493, and *Spavack v. Klein*, U.S. 551, should.[104]

Recent federal case law suggests that once a statement or testimony has been granted immunity, any witnesses who have devised information from that statement/testimony may be tainted and thus precluded from testifying at the criminal proceeding.[105]

It is of paramount importance that the investigation be thorough and impartial. Importantly, this function is merely fact-finding - the IA investigator should not be given authority to draw a formal conclusion on whether or not the allegation is true.

The IA investigation is procedurally very similar to a criminal investigation.[106] Physical evidence, if any, is collected and analyzed, witnesses are interviewed, applicable records are obtained for evidentiary use, and the accused officer is interviewed. The investigator then collate the information into a logical case report with supporting evidence and statement/depostion.[107]

The significant distinction between the IA investigation and a criminal investigation is the rules of evidence. Where there is clear recognition that an officer facing an administrateve disciplinary hearing has procedureal due process rights, the extent and precise nature of those rights remain in debate. Procedural due process particularly comes to issue during the course of the complaint investigation and transgresses throughout the adjuciation of the complaint. Of particular concern during the investigation is the Fourth Amendment prohibition against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination.[108]

Generally speaking, during the course of a disciplinary investigation, the Fourth Amendment guarantees apply to an officer at home or off-duty just as they would another citizen. However, lockers at the police station, a police car, and other elements related to on-duty performance may not be protected. Moreover, it appears that even though an unlawful search may occur, any furits of that search

may be used in a disciplinary hearing but not in a criminal trial. Some departments have establihsed detailed procedures on conducting searches as part of internal investigations which include a provision that searches must be consistant with current criminal procedure. In these cases, the fruits of an unreasonable search may not be used in the disciplinary proceedings.(109)

The adjudication process is the point where a determination of the facts is made. All evidence during the course of the investigation is submitted to the adjucication mechanism for purpoes of determining the allegation can be sustained. The process may be a review by a commanding officer, a supervisor, a panel of officers, a citizen review board, or a hybrid of these standard options.(110) The adjudication procedure in most agencies does not issue a finding of the officer's "guilt" or "innocence." Instead, it simply attempts to determine, based on the evidence presented, whether or not the complaint of allegation against the officer can be sustained. The reason for this is twofold: first, administrative disciplinary hearings are conducted under relaxed rules of procedure, evidence, burden of proof, and depostion. As such, a finding of "guilty" may go beyond the permissible scope of constitutional limits. Second, the approach of "sustaining" or "not sustaining" complaints may afford the department some insulation from liability.(111)

If a complaint is sustained after the review, then the reviewing body or other

designated person or group (typically, but not always, represented by the department's chain of command) will assess the sanction for the rule violation, disciplainry alternatives usually depend on the seriousness and circumstances surrounding the rule violation, aggravating and mitigating factors, and the officer's personal history. Potential sanctions for the sustained allegations will be discussed later.(112)

During the investigation, it is important that minimum standards of due process are attached to the proceedings. These due process rights are not ironclad nor must they meet the stringent formality found in a criminal case. Moreover, other procedures may apply to an agency in light of applicable laws, contracts, and custom.(113)

The minimum standards of due process typically include:

- Timely and adequate notice,
- A chance to make an oral statement or argument,
- Confrontation of adverse witnesses,
- Cross-examination of adverse witnesses,
- Disclosure of all evidence relied on,
- A decision based on the record of evidence,
- A right to retain an attorney,
- A publicily compensated attorney for the indigent,
- A statement of findings of fact,
- A statement of reasons or a reasoned opinion,
- A impartial deciding officer.(114)

## CRIMINAL INVESTIGATION

Police employees who commit criminal acts could face both adminstrative disciplinary actions and criminal prosecution. Employers treat police employees suspected of criminal conduct as they would any civilian under similar suspicion. As long as a valid *Miranda* waiver is obtained, any statements given to investigators can be used in both criminal and administrative hearings. The drawback here is that a police department may have a case where an employee invokes *Miranda* protection. An employee cannot be disciplined for invoking a constitutional protection. Therefore, a police department may not be able to impose immediate discipline unless a case can be supported by independent evidence. The advantage to giving *Miranda* is that if a statement is obtained, there is a much greater chance securing a criminal conviction. Naturally, the statement could also be used as grounds for internal discipline.(115)

## CONCURRENT INVESTIGATIONS

A suggested approach to the problem of concurrent investigations is to conduct two separate proceedings independent of each other. There would be separate investigators, one for the criminal investigation and one for the adminsitrative investigation. A criminal investigator would give *Miranda* warnings and if a statement was obtained, the investigation would conclude. If, however, the

employee invokes his *Miranda* rights, a separate internal affairs investigator could then compel the employee to answer questions by giving *Garrity* immunity. However, any statements given *Garrity* immunity would have to be kept confidential and separate from the criminal investigator to avoid the challenge of being tainted by the immunized statements.(116)

## PUNISHEMENT OF POLICE MISCONDUCT

### INDIVIDUAL OFFICER

In an administrative investigation, once the complaint has been sustained, there are several types of punishments that can be imposed on the officer. The severity of the punishment depends upon the seriousness of the action, the personal history of the officer, and the circumstances surrounding the action. These punishments include:

- Supervisory Counseling
- Reprimand
- Mandatory Training
- Reassignment
- Punitive Probation
- Punitive Suspension
- Demotion/Loss of Rank
- Termination of Employment. (117)

The next section discusses each of these sanctions.

During supervisory counseling, the supervisor and the officer discuss the

problem, which is usually related to some performance factor or procedure. The purposes of the counseling are both of a corrective and instructive nature to help remedy a minor problem before it manifests into some form of misconduct. The supervisory counseling is typically not part of the officer's personnel record; however, the supervisor should maintain a record for reference in case it is necessary for future disciplinary problems. While this alternative is not a product of the formal disciplinary process, it points to a disciplinary alternative which is frequently used. Supervisory counseling is what is commonly referred to as an "oral reprimand." (118)

A reprimand for the record is when the officer is officially admonished for his/her behavior. The admonishment is in written form, usually from a division commander, with a copy of the reprimand in the officer's personnel file. The purpose of the reprimand is to serve as a record (and notice) of the incident and a warning about future misconduct. The reprimand may be considered in promotional evaluations as well as in punishment decisions in any further misconduct incidents. (119)

If an officer's rule or procedural violation was a product of misfeasance, a reasonable alternative may be to provide the officer with additional mandatory training on the subject(s) of issue related to the misconduct. It is conceivable that

the improper behavior was a function of not being adequately prepared to perform the required functions of the job. As such, the department must recognize some of the responsibility and afford a course of remedial action. (120)

The sanction of reassignment is used most appropriately in cases where an officer has been involved in misconduct associated with his/her current assignment. Reassignment is used frequently in conjunction with some other form of disciplinary action. The reassignment may involve taking an officer out of a specialized position, or in the case of patrol, moving the officer to another shift and/or location. The alternative is appropriate in cases where the circumstances of the working environment contributed to the misconduct. In cases where potential liability may result from the officer's action, a change of assignment for a specific period of time could insulate the department from a negligent retention situation. (121)

Punitive probation is when the officer remains on duty receiving salary and benefits, however, his/her status is significantly altered because a subsequent sustained misconduct allegation of the same nature may result in suspension or termination. Punitive probation has generally been applied on a limited basis. It has been used most frequently for officers who have gone through alcohol rehabilitation programs, officers who have chronically missed work, officers who have received an unusually high number of "minor" complaints (e.g., discourteous or

unprofessional, etc) and similar circumstances. [122]

Punitive suspension occures when an officer is barred from work without salary for a designated period, usually not exceeding four weeks. During the suspension period, the officer carries no authority as a police officer and in many jurisdictions cannot even work an "off-duty" job that may require police authority. While the officer has no authority or salary, typically personal benefits are still accrued. [123]

Loss of rank refers to demotion from a formally recognized organizational position which has defined authority over other organizational members. Rank does not include "grades," which are typically salary increments within a rank or "position classification," which describes a particular functional responsibility but no specific hierarchial authority. As a penalty, loss of rank is a significant sanction because it represents a loss of earnings, a loss of status (in both formal and informal organization), and a liability in career growth. Most frequently, an employee will be demoted because he/she abused the authority of the rank or the misconduct was of a nature to question the individual's effectiveness as a leader. [124]

Termination is complete severance from the police department including salary, benefits, and reciprocal responsibilities between the officer and the department. It is a decision that faces the greatest challenge in the administrative

review process and in subsequent court proceedings. Even though termination is a difficult and costly decision for a police department, it is the only real alternative in certain serious cases. (125)

## SUPERVIOSRY PUNISHEMENT

Police misconduct can be organizational as well as individual. As an individual act, misconduct is the misuse of authority by an officer in which the officer or another benefits. Such misconduct remains on an individual level until it is condoned, supported, or encouraged by the police organization. If the misconduct is known or should have been known to the administrative staff and no disciplinary action is taken, the misconduct becomes organizational or institutional rather than individual. The key question in claims of organizational misconduct is whether the police agency took appropriate steps to control the actions of its individual officers once put on notice of their conduct. Thus, the issue of control becomes critical in balancing officer and agency response to public needs in an effort to maintain trust and confidence in the police. (126)

There are seven general areas from where supervisory liability for negligence may arise. These are:

1. Negligent Failure to Train
2. Negligent Hiring
3. Negligent Assignment
4. Negligent Failure to Supervise
5. Negligent Failure to Direct

6. Negligent Entrustment
7. Negligent Retention. [127]

The next section discusses these areas and some legal cases which apply.

The usual allegation in the case of negligent failure to train is that the employee has not been instructed or trained by the supervisor or agency to a point where he possesses sufficient skills, knowledge for the activities required of him in the job. The rule is that administrative agencies and supervisors have a duty to train employees and that failure to discharge this obligation subjects the supervisor and agency to liability if it can be proved that such violation was the result of failure to train or improper training. [128]

In *McClelland v. Facteau*, the Tenth Circuit held that a police chief may be held liable for civil rights violation for failure to train or supervise employees who commit an unconstitutional act. Plaintiff was booked by the New Mexico State Police at a local jail facility, and while there, was beaten by the officers, as well as denied the use of the telephone and access to an attorney. In holding the officers liable, the court said that in order for the liability to attach, there must be a breach of an affirmative duty owed to the plaintiff and the action must be the proximate cause of the injury. In this case, it was well known that instances of constitutional violations were occurring in the department because they had been thoroughly aired by the press. Additionally, the jail itself was under lawsuit in two instances of

wrongful death. (129)

Negligent hiring stresses the importance of proper background investigation before employing anyone to perform a job. Liability ensues when an employee is unfit for appointment, such unfitness is known to the employer or the employer should have known about it through background investigation, and when the act is foreseeable. In one case, the department hired a police officer despite a record of pre-employment assault convictions, a negative recommendation from a previous employer, and a falsified police application. The officer later assaulted a number of individuals in separate incidents. He and the supervisor were sued and held liable. In another case, the court held a city liable for the actions of a police officer who was hired despite a felony record and who appeared to have been involved in many street brawls. Liability was based on the complete failure of the agency to conduct a background check prior to the hiring of the applicant. (130)

Negligent assignment means assigning an employee to a job without ascertaining whether or not the individual is adequately prepared for it, or keeping an employee on a job after the employee is known to be unfit. Examples would be a reckless driver assigned to drive a government motor vehicle or leaving an officer who has a history of child molestation in a juvenile detention center. The rule is that a supervisor has an affirmative duty not to assign or leave a subordinate in a position

for which he is unfit. In *Moon v. Winfield*, liability was imposed on the Police Superintendent for failure to suspend or transfer an errant police officer to a non-sensitive assignment after numerous disciplinary reports had been brought to the supervisor's attention. In that case, the supervisor had five separate misconduct reports before him within a two week period and also a warning that the officer had been involved in a series of acts indicating mental instability. The court held that supervisory liability ensued because the supervisor had authority to assign or suspend the officer, but failed to do so. (131)

Failure to supervise means negligent abdication of the responsibility to properly oversee employee activity. Examples are tolerating a pattern of physical abuse of inmates, racial discrimination, and pervasive deprivation of inmate rights and privileges. One court has gone so far as to say that failure on the part of the supervisor to establish adequate policy gives rise to legal action. Tolerating unlawful activities in an agency might constitute deliberate indifference to which liability attaches. The usual test is: does the supervisor know of a pattern of behavior but fail to act on it? The current law on liability for negligent failure to supervise is best summarized as follows: To be liable for a pattern of constitutional violations, the supervisor must have known of the pattern and failed to correct or end it. . . Courts hold that a supervisor must be "casually linked" to the pattern

showing that he or she had knowledge of it and that failure to act amounted to approval and hence tacit encouragement that the pattern continue. (132)

Failure to direct means not telling sufficiently the employee of the specific requirements and proper limits of the job to be performed. In one case the court refused to dismiss an action for illegal entry, stating that it could be the duty of the police chief to issue written directives specifying the conditions under which field officers can make warrantless entries into residential places. The court held that the supervisor's failure to establish policies and guidelines concerning the procurement of search warrants and the execution of various departmental operations made him vicariously liable for the accidental shooting death of a young girl by a police officer. The best defense against negligent failure to direct is a written manual of policies and procedures for departmental operations. The manual must be accurate, legally updated, and form the basis for agency operations in theory and practice. (133)

Negligent entrustment refers to the failure of a supervisor to properly supervise or control employee's custody use, or supervision of equipment or facilities entrusted to him on the job. Examples are improper use of vehicles and firearms which result in death or serious injury. In *Roberts v. Williams*, an untrained trusty guard was given a shotgun and the task of guarding a work crew by a convict farm superintendent. The shotgun discharged accidentally, seriously

wounding an inmate. The court held the warden liable based on negligence in permitting an untrained person to use a dangerous weapon. In *McAndrews v. Mularchuck*, a periodically employed reserve patrolman killed a boisterous youth who was not armed. The city was held liable in a wrongful death suit. Courts have also held that supervisors have a duty to supervise errant off-duty officers where an officer had property, gun, or a nightstick belonging to a governmental agency. The test of liability is deliberate indifference. The plaintiff must be able to prove that the officer was incompetent, inexperienced, or reckless, and that the supervisor knew or had reason to know of the officer's incompetence. The supervisor's defense in these cases is that proper supervision concerning use and custody of equipment was exercised, but that the act occurred anyway despite adequate precautions. (134)

Negligent retention means the failure to take action against an employee in the form of suspension, transfer, or termination, when such employee has demonstrated unsuitability for the job to a dangerous degree. The test is: was the employee unfit to be retained and did the supervisor know or should have known of the unfitness? The rule is that a supervisor has an affirmative duty to take all necessary and proper steps to discipline and/or terminate a subordinate who is obviously unfit for service. This can be determined either from acts of lesser misconduct indicating a pattern of unfitness. Such knowledge may be actual or

presumed. In *Brancon v. Chapman*, the court held a police director liable in damages to a couple who had been assaulted by a police officer. The judge said that the officer's reputation for using excessive force and as an officer with mental problems was well-known among the police officers in his precinct. Hence, the director ought to have known of the officer's dangerous propensities and fired him before he assaulted the plaintiffs. This unjustified action was held to be the cause of the injuries to the couple for which they could be compensated. The defense against negligent retention is for the supervisor to prove that the proper action was taken against the employee and that the supervisor did all he or she could to prevent the damage of injury. This suggests that supervisors must know what is going on in their department and must be careful to investigate complaints and document those investigations. (135)

## DAMAGES PAYABLE

The concept of special damages is the repaying to the plaintiff for financial losses. Special damages are frequently referred to as "out of pocket" damages because the plaintiff must be able to show that the amount involved has been spent or will be spent in the future. (136) Medical costs are "out of pocket" expenses. They include doctor bills, hospital expenses, medications, orthopedic braces, dental bills, transportation in order to obtain medical treatment, and any other expenses

related to the care and treatment required because of the defendant's actions. Treatment by a psychiatrist is also included. The defendant is not allowed to offset insurance reimbursement the plaintiff may have received, although the insurance company may be able to recover from the plaintiff. In cases where the plaintiff will be permanently disabled or require additional treatment in the future, the estimated cost can be included in the "out of pocket" award. (137) Special damages also cover property damages. The fair market value of items destroyed can be recovered. Repair bills for items that were damaged can also be reimbursed. Lost wages are covered. If the plaintiff had to take time off from work because of the wrongful acts of the defendant, special damages will include these lost wages. If the plaintiff was able to take time off and not lose any salary, the wages that were paid as sick leave, vacation pay, or some alternate form of compensation are also recoverable. The reason for this is that the plaintiff has lost the right to take time off for other purposes and, in the long run, has lost as much as if the loss of pay occurred at the time of the wrongful act. In the case of a permanent or partial disability, estimated future loss of earnings is recoverable. Wrongful death suits are based on the expected income of the deceased that, with reasonably certainty, would have been earned during the deceased's normal life expectancy. Future promotions, retirement and the level of support provided the family prior to the death are also considered.

The spouse is entitled to support for life; children until they reach majority. (138)

General damages are meant to compensate for non-economic injuries. They cover such things as inconvenience, mental anguish, humiliation, pain and suffering. These are harder to calculate, but the jury is expected to come up with a dollar value for them. If the plaintiff receives physical injury, there will usual be "pain and suffering." The award will be based on both the severity of the pain, the amount of inconvenience, and the duration of each. Mental anguish, humiliation, and inconvenience are calculated in the same way. The key considerations, once the defendant's liability has been established, are the severity and the duration of the problems. Permanent scarring or disfigurement resulting from physical injuries are also in this category. The emotional strain of the disfigurement can be the basis for general damages. The location and type of scar will be important. (139)

Punitive damages are intended to punish the wrongdoer. Unlike general and special damages, they are not based on the extent of the injury to the victim. Two things are taken into consideration: the wrongfulness of the defendant's conduct and the wealth of the defendant. Only wrongful acts committed intentionally or with reckless disregard for obvious dangers to others merit punitive damages. Intentional torts of assault and battery, false imprisonment, and intentional infliction of emotional distress fit into this category, as do intentional violations of civil rights.

Punitive damages are not awarded in ordinary negligence cases. Generally speaking, the more morally wrong, the higher the punitive damages. When outrageous conduct is involved, the award may be staggering. (140)

Some statutes contain their own method of calculating damages. These are called statutory damages. For example, under California's Unruh Civil Rights Act, a plaintiff successfully proving violent acts motivated by hatred can recover three times the amount of actual injuries, a civil penalty of $10,000, and attorney fees. This demonstrates two types of statutory damages. The first (three times the amount of the actual injuries), is based on the victim's special damages. This type recognizes that the plaintiff is entitled to more than mere reimbursement and gives a precise formula for computing the award. One of the reasons for this type of award is to make the outcome more predictable. It may also be enacted if it is believed that juries may be reluctant to make reasonable awards. The second type of award (a civil penalty of $10,000), emphasizes a legislative concern that the right involved is important even if the actual injuries are small. It recognizes the fact that most people who receive minor injuries probably will not bother suing, especially if their "out of pocket" expenses are small. When the legislature imposes a relatively large civil fine, it actually encourages people to sue to vindicate their rights. (141)

## PREVENTION

Ways to prenvent police liability involve proper training and supervision. When a police officer goes through training, he/she must show that they understand what they have just learned. The training should cover practical applications of techniques, following a discussion of how and when each particular technique is used. Training could be provided by the department.

Proper supervision also aids in reducting chances of liability for police misconduct. Police supervisors must monitor the activity of the officers they supervise and respond to those incidents that may involve actions that necessitate supervisory control and review, such as use of force. Once at the scene, the supervisor is responsible for taking charge and directing the actions of all police personnel, including controlling the use of force to ensure that only reasonable and necessary force is used and that the use of force is curtailed once a situation or suspect is under control. Field supervisors at the scene must ensure that all use of force by themselves and their subordinates is documented. The supervisor must include the reasons for the use of such force, as well as whether or not such force was justified under the circumstances and by department policy. The immediate supervisor on the scene should take immediate corrective action (retraining, modifying behavior, minor discipline) for minor censurable conduct, such as improper touching, pushing, improper search techniques, etc., and must recommend

that corrective action be taken in more serious cases. This should be indicated in his or her report of the incident. Some form of tracking system for all use-of force incidents must be implemented and kept current so that trends and patterns of inappropriate conduct may be detected and corrected through counseling, supervision, training, or appropriate discipline. (142)

## CONCLUSION

There are many types of police misconduct, including improper use of force, search and seizure, arrest and imprisonment, and graft. Not every type is necessarily a major problem, but small problems can grow into larger problems, if proper measures are not taken to either prevent them from happening at all through training and supervision, or to stop them in the beginning through disciplinary actions. Should they manifest into larger problems, two types of investigations can be performed: administrative and criminal. It is almost inevitable that police officers will be part of some type of misconduct, whether it be as minor as accepting discounts from merchants, to something as major as murder, unless law enforcement departments give this topic serious attention.

Misconduct is a problem that every law enforcement agency faces and must deal with. Given the complex nature of the unenviable tasks they must perform, it is simply impossible for law enforcement officers to flawlessly perform their duties:

mistakes are inevitable. But not every case of misconduct reported is a result of the actions of a "bad" officer: most cases are from the average, well-intentioned officer who just made a "bad" decision. Given the split-second decision time frame that law enforcement officers have, officers may occasionally choose the wrong alternative when under the pressure of a life or death situation, whether it be their own life, or that of someone else.

## END NOTES

1. Webster's Ninth New Collegiate Dictionary. Springfield, MA: Merriam-Webster Inc., 1988: 758.

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