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Law Enforcement

City of Canton v. Harris and the Deliberate Indifference Standard

By Geoffrey P. Alpert*

While citizens may have no enforceable right to governmental services, the political mandate of government is the performance of certain functions to assist its citizens. When a government acts to provide a service, it also assumes an obligation to provide its employees with the requisite training needed to perform those services. Defining what training is necessary and essential requires a balance between the government's duty and the citizen's rights. The application of this balance to governmental services, including police, has serious implications.

The successful completion of the police mission, of course, depends on several factors. Of these various factors, training is the most essential, and in most departments it has improved significantly over the years.[1] In 1965, fewer than 15 percent of all police agencies provided their recruits with any instruction.[2] Today, departments that have committed resources to training and have experimented with alternative approaches achieve their goals with less difficulty than departments that have accorded training a lower priority.

It follows, therefore, that it is necessary to maintain a quality system of teaching that includes instruction at the police academy, an officer field-training program, and mandatory in-service training on current and significant issues. There must also be articulable evaluation criteria to establish the fitness for duty of each officer assigned to the streets.[3] Finally, an accountability system should be established and enforced.

Inadequate, incompetent, or *no* training at all increases the probability of inappropriate or improper police action, which in turn increases the probability of negative publicity, criticism, and injury to officers and citizens. It also raises the specter of civil litigation. This column will examine the relationship between improper police training and federal civil rights violations in the context of the 1989 United States Supreme Court decision *City of Canton v. Harris*.[4]

Satisfactory training systems enhance the probability that an officer and his department will act responsibly to achieve their operational goals. Obviously, this in-

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[1] G. Alpert & R. Dunham, *Policing Urban America* (1988).

[2] J. Kuykendall & R. Unsinger, *Community Police Administration* (1975).

[3] Stage II Review Team has reported that police recruits forget approximately 50 percent of the information provided to them at the academy during their first six months of service. Stage II Review Team, *Police Probationer Training* 72 (1987); see M. Brown, *Working the Street* (1981).

[4] 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989).

sulates the officers and their departments from criticism and condemnation from politicians or the public. However, even when all levels of training are conducted well and officers are supervised and controlled, there is still no guarantee of prudent behavior toward the public.[5] Judicial oversight and intervention are still necessary.

Federal Judicial Intervention

The wisdom of judicial intervention by federal courts in the administration of municipal governmental agencies has been debated since Congress passed the "Ku Klux Klan" Act of 1871.[6] Title 42, Section 1983 of the U.S. Code has been used to challenge unconstitutional actions of various state agencies by plaintiffs seeking federal intervention to protect their civil rights.[7] Although claims of constitutional violations based on 42 U.S.C. § 1983 have switched in emphasis from efforts at ending vigilantism to methods of overseeing the operation of state agencies, the common theme of federal intervention remains. As one authority has observed: "Federal supremacy is necessary if there truly is a commitment to protection of Federal constitutional rights: 'the very essence of the scheme of ordered liberty,' as Frankfurter deemed the Bill of Rights in *Adamson v. California,* 332 U.S. 46 (1947)."[8]

Recourse to Section 1983 challenges the judgment and discretion of municipal administrators at a constitutional level. Unlike state tort claims, the use of Section 1983 allows for (1) larger jury pools; (2) more succinct rules of discovery, evidence, and procedure; and, most important, (3) attorney's fees to the prevailing party.[9] Not only has there been a significant increase in lawsuits filed in federal court, but the scope of these suits has been changing dramatically. One commentator suggests several positive aspects of this possible increase in liability, including a greater emphasis on psychological screening of police applicants and training and duty-of-fitness tests for officers with potential problems, as well as stronger and more direct supervision.[10] These developments have raised several interesting and important issues that

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[5] Barker, "An Empirical Study of Police Deviance Other Than Corruption," 6 J. Police Sci. & Admin. 264-272 (1978).

[6] Schmidt, "Section 1983 and the Changing Face of Police Management," in *Police Leadership in America* 226-236 (Geller ed. 1985); H. Barrineau, *Civil Liability in Criminal Justice* (1987).

[7] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[8] McCoy, "The Impact of Section 1983 Litigation on Policymaking in Corrections," 45 Fed. Probation 17-23 (1981).

[9] Nader & Schultz, "Public Interest Law With Bread on the Table," 71 A.B.A. J. 74-77 (1985); Americans for Effective Law Enforcement, *Survey of Police Misconduct Litigation 1967-1971* (1974).

[10] Schmidt, note 6 *supra,* at 235.

can be reduced to the single question addressed by the Court in *Canton v. Harris*[11]: At what point does inadequate police training reach the level of a constitutional violation for which a municipality will be held liable?

Improper Training and the Degree of Fault

An allegation of improper training often arises after an incident in which a police officer has seriously injured an individual. If he seeks to recover in tort, the plaintiff must decide under which legal theory to pursue his claim: (1) negligence, (2) intentional tort, or (3) constitutional tort.[12] A plaintiff choosing a constitutional theory has had to prove an unconstitutional "regulation, custom or usage"[13] as defined by the court in *Monnell v. New York Department of Social Services*.[14] Typically, the plaintiff has to prove that the officer acted wrongfully and that there exists a causal relationship between the harm done and an unconstitutional custom, practice, or policy of the police department. In other words, it is the municipality that must cause the violation and corresponding harm. Neither the theory of respondeat superior nor vicarious liability (i.e., responsibility based wholly on the conduct of others) will attach under Section 1983. As the Court noted in *Monnell,* "It is only when the 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under Section 1983."[15]

Since *Monnell,* the Court has had difficulty articulating the requirements necessary to determine the causal link between a custom, practice, or policy and an alleged constitutional violation.[16] In *Canton v. Harris,*[17] the Court attempts to resolve important aspects of "the contours of municipal liability."[18]

Establishing the Level of Claim

In *Canton v. Harris,* Geraldine Harris was arrested by officers of the Canton, Ohio, police department and transported to the police station. At the station she was found sitting on the floor of the transport wagon and was asked if she needed medical attention. She responded with an incoherent statement. After Harris was helped inside the station for processing, she slumped to the floor several times. The police left Harris on the floor so that she would not fall again and hurt herself, but no medical help was ever requested for her. After approximately one hour, Harris was released from custody and transported by an ambulance, provided by her family, to the hos-

[11] 57 U.S.L.W. at 4270.

[12] As Barrineau, note 6 *supra,* at 5, explains, negligence refers to unreasonable risk of harm, while intentional torts refer to voluntary acts or omissions that to a substantial certainty will injure another. The term "constitutional tort" is defined by the language of 42 U.S.C. § 1983 at note 7 *supra.*

[13] 42 U.S.C. § 1983.

[14] 436 U.S. 658 (1978) (stating that governmental bodies can be sued under 42 U.S.C. § 1983).

[15] *Id.* at 694-695; see also City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 267 (1987).

[16] See City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); City of Los Angeles v. Heller, 475 U.S. 796 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

[17] 57 U.S.L.W. at 4270.

[18] *Id.* at 4272.

pital where she was diagnosed as suffering from several emotional ailments. Harris was hospitalized for a week and received outpatient treatment for an additional year.

The Court ruled on a set of facts alleging that the Canton city police failed to provide medical assistance to the respondent. The Court vacated the judgment of the court of appeals and remanded the case for further proceedings consistent with its opinion, which stated as follows:

> We hold . . . that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under Section 1983.[19]

The Court has furnished us with a test of deliberate indifference without articulating a specific meaning.[20] However, limited guidance is provided by the Court when it states the following:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program.[21]

The Court informs us that an injury that results from a police-citizen encounter (even when the injury could have been avoided by better training) does not necessarily make a successful Section 1983 claim.[22] In fact, we are notified that well-trained officers may make mistakes and such errors will not rise to the level of a constitutional violation.

Defining Deliberate Indifference

Concurring in part and dissenting in part, Justice O'Connor, with Justices Scalia and Kennedy, joins the essential elements of the Court's majority opinion.[23] Justice O'Connor agrees that " 'it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' "[24] Ac-

[19] *Id.* at 4273.

[20] See Pembaur v. City of Cincinnati, 475 U.S. 469, 483-484 (1986); Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 243-245 (1983).

[21] Canton v. Harris, 57 U.S.L.W. at 4274.

[22] *Id.*

[23] The Justices take exception to footnote 11 (57 U.S.L.W. at 4274), which reads as follows:

> The record indicates that city did train its officers and that its training included first-aid instruction. See App. to Pet. for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand.

They suggest that the Court apply the deliberate indifference standard to the facts of the instant case and not remand for further proceedings.

[24] *Id.* at 4275 (opinion of Justice O'Connor).

cording to Justice O'Connor, this could happen in two ways. First, a city could fail to train its employees in a duty that is clearly constitutional.[25] Second, it may rise to a constitutional violation when policymakers "are aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion."[26] In her second example, when municipalities are made aware that police officers confront a particular situation on a routine basis and that they often react improperly, such action may reach a constitutional violation.

The Court's second method of demonstrating deliberate indifference links training needs to tasks the particular officer must perform.[27] By creating such a link, the Court is requesting the determination of the extent and priority of police work. In other words, task analyses and empirical assessments of police duties may be used to establish training requirements.[28] The facts of the present case, involving the identification of the medical needs of an arrestee, would certainly be clarified by data on the need for police officers to perform this task and the training available to assist them. The Court wisely remanded that question of fact to the lower courts, but in doing so created the one area of dissent.[29] In her dissenting opinion, Justice O'Connor emphasized that "the diagnosis of mental illness is not one of the 'usual and recurring situations with which [the police] must deal,' "[30] but this is an empirical question that needs an empirical answer.[31]

The Court has defined deliberate indifference by balancing policy, actual performance demands, and training. However, the formula to compute that balance is not specified and therefore will likely be reduced to the testimony and conclusions of expert witnesses.[32]

The Essence of Indifference

At a time when some police departments are arguing over nuances in training techniques and curricula, others still argue over the *value* of training itself. The de-

[25] *Id.* Justice O'Connor suggests that the diagnosis of mental illness is not one of the " 'usual and recurring situation[s] with which [the police] must deal' " and notes that the lack of training in the instant case does not demonstrate deliberate indifference.

[26] *Id.*

[27] *Id.*

[28] This mirrors some of the requirements established in Chapter 21 of the *Standards Manual of the Commission of Accreditation for Law Enforcement Agencies* (1985).

[29] Canton v. Harris, 57 U.S.L.W. at 4274.

[30] *Id.* at 4275.

[31] See J. Loewen, *Social Science in the Courtroom* (1982); Alpert, "Needs of the Judiciary and Misapplications of Social Science Research," 22 Criminology 441 (1984); P. Finn & M. Sullivan, *Police Response to Special Populations* (NIJ Research in Brief 1988); G. Murphy, *Improving the Police Response to the Mentally Disabled* (Police Executive Research Forum 1986).

Further, in a recent survey conducted by the author, police officers in Columbia, South Carolina, reported that approximately 60 percent of the offenders with whom they come in contact are impaired by drugs or alcohol and a full 16 percent are impaired by some mental disability.

[32] See Fyfe, "The Expert Witness in Suits Against the Police" (pts. 1-2), 21 Crim. L. Bull. 244, 253, 515, 526 (1985); Alpert, note 31 *supra*, at 441.

cision in *Canton v. Harris* protects those municipalities that have predicted the tasks required of their officers and have provided them with a reasonable policy and some level of training. Municipalities that remain mired in the debate over the value of training per se remain vulnerable to successful lawsuits for constitutional violations.[33]

Most suits in which deliberate indifference is alleged must be based on information about training needs and foreseeability. For example, allegations concerning the excessive use of force and deadly force[34] or improper pursuit or emergency driving,[35] and many other police activities, may have unanticipated empirical inferences.[36] It is unfortunate that these empirical realities are often interpreted by the testimony of expensive and sometimes biased experts rather than a detached, objective panel.[37]

Several states permit individuals with a furnished uniform, badge, gun, and police car to serve as police officers without *any* training. In South Carolina, municipalities often deploy individuals as police officers with a legislative mandate limited to training the individual within the first twelve months of service.[38] This individual has the ability to enforce laws, use force, (including deadly force), initiate high-speed pursuits, and perform all tasks and functions of authentic police officers. Absurdly, this standard was recently upheld.[39] Although challenged as to the relationship between the sheriff and the county council, the state court declared the sheriff had the ability to maintain as deputy sheriffs individuals who have not passed the minimum requirements for law enforcement officers under state law. In 1989, these and other untrained individuals are permitted, encouraged, even required to perform as police officers. There should be little question, after *Canton v. Harris,* as to how a federal court would rule if an individual re-

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[33] Apparently, it will be the experts who will ultimately influence the trial court.

[34] Bayley & Garofalo, "The Management of Violence by Police Patrol Officers," 27 Criminology 1 (1989). This study points out the relative rarity of violence, even verbal aggression, in police work.

[35] Alpert, "Questioning Police Pursuits in Urban Areas," 15 J. Police Sci. & Admin. 298 (1987). This research suggests that pursuit driving can be controlled by a combination of a strong policy and appropriate training, supervision, and control.

[36] Petersilia, "The Influence of Research on Policing," in R. Dunham & G. Alpert, *Critical Issues in Policing* 230 (1989).

[37] P. Anderson & T. Winfree, *Expert Witness: Criminologists in the Courtroom* (1987).

[38] S.C. Code Ann. § 23-23-40 reads as follows:

> No law enforcement officer employed or appointed . . . by any public law enforcement agency . . . shall be empowered or authorized to enforce the laws . . . unless he has *within one year* after his date of appointment completed the minimum basic training requirements.

[39] Cannon v. Flynn, No. 88-CP-10-1652, slip op. at 11, 12, 17 (S.C. Ct. Com. Pleas 1988) reads, in part:

> The statute (§ 23-23-40) requires that all persons hired as law enforcement officers shall within one year successfully complete the established minimum basic training requirements. This basic requirement is not a condition for employment . . . [and] that the Sheriff of Berkeley County has the sole authority to hire and discharge his deputies and that

ceived an injury from one of these officers and filed a lawsuit under Section 1983.

In contrast, many police departments require two to three times the level of training ordered by state minimum standards before individuals can be sworn and serve as police officers. For example, Metro-Dade Police Department in Miami requires approximately 1,000 hours of training while the State of Florida requires less than 400 hours.[40]

A Continued Warning

Unfortunately, dangerous differences in training standards exist among police departments. Consequently, police behavior continues to differ significantly from department to department. These gaps demonstrate the varying requirements established and the levels of responsibility set by the municipal governments. Over the past several decades, commissions, blue-ribbon panels, and advisory councils have suggested and then demanded enhanced police training. In fact, some state courts and federal circuits anticipated the issues argued in *Canton v. Harris* and themselves acceded to the "deliberate indifference" rule on failure to train.[41] Other departments and municipalities have taken advantage of the knowledge gained and improvements made in training and have raised themselves to adequate or appropriate levels. Regrettably, however, many have remained mired in the past. It is unfortunate that these departments require judicial intervention to compel them to rethink their training priorities and curricula. It is more unfortunate that changes may be made only to avoid the damaging consequences of a new constitutional standard rather than because the municipalities recognize their responsibilities.

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§ 23-23-40 is not applicable to the Sheriff or his deputies.

[40] It is in these departments that debates and experiments are conducted to evaluate the best methods for training and the most effective techniques improving their officers' performance.

[41] For a list of the precedents, see City of Canton v. Harris, 57 U.S.L.W. 4270, 4273 nn. 6, 7, 8 (U.S. Feb. 28, 1989).