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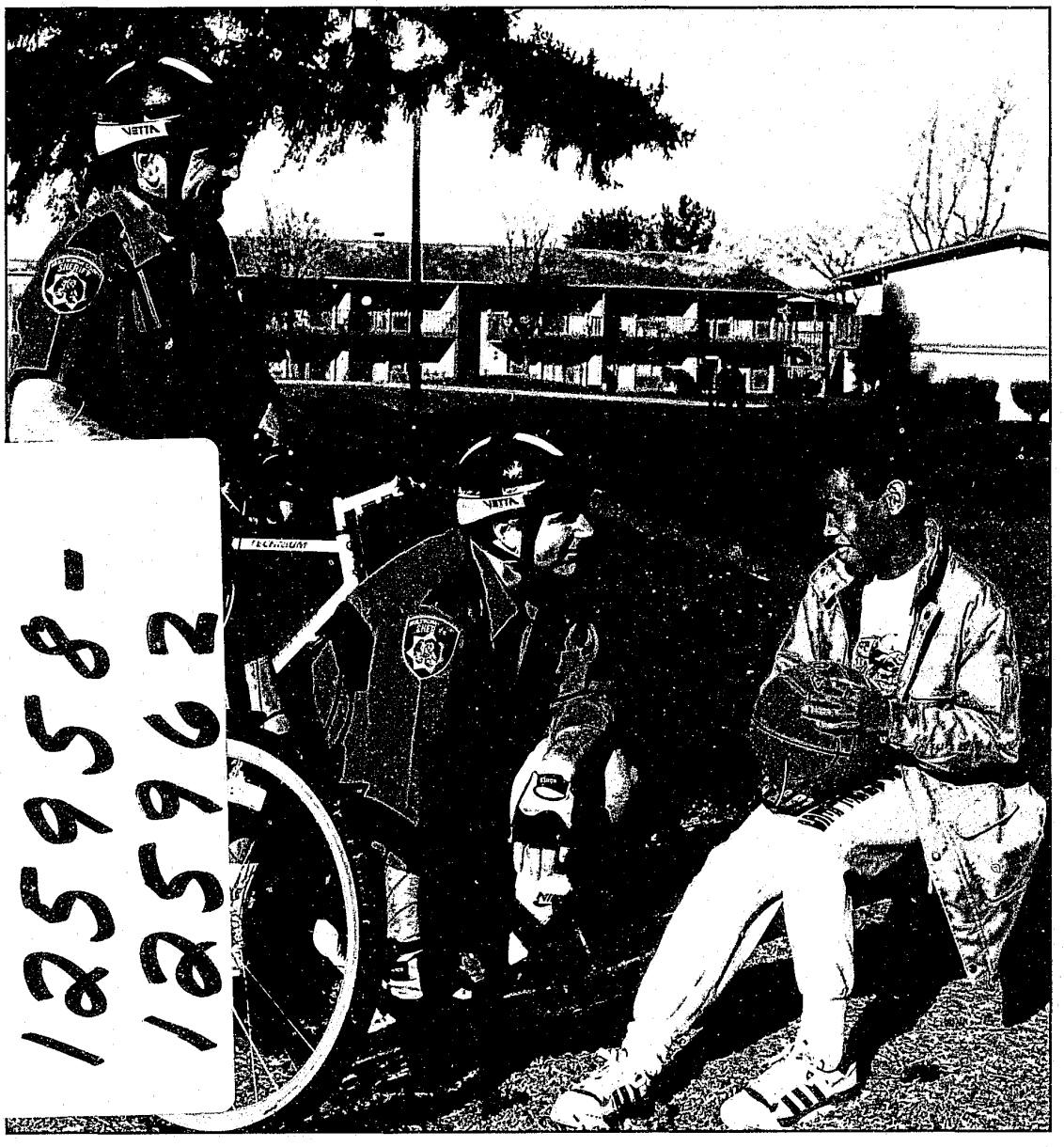

Focus on Police and the Community

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Features

Focus on Police and the Community

The Cover: *SAT officers on patrol stop to make friends with a youth from the neighborhood. See article p. 2.*

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Deliberate Indifference

The Standard for Municipal and Supervisory Liability

By
MICHAEL CALLAHAN, J.D.

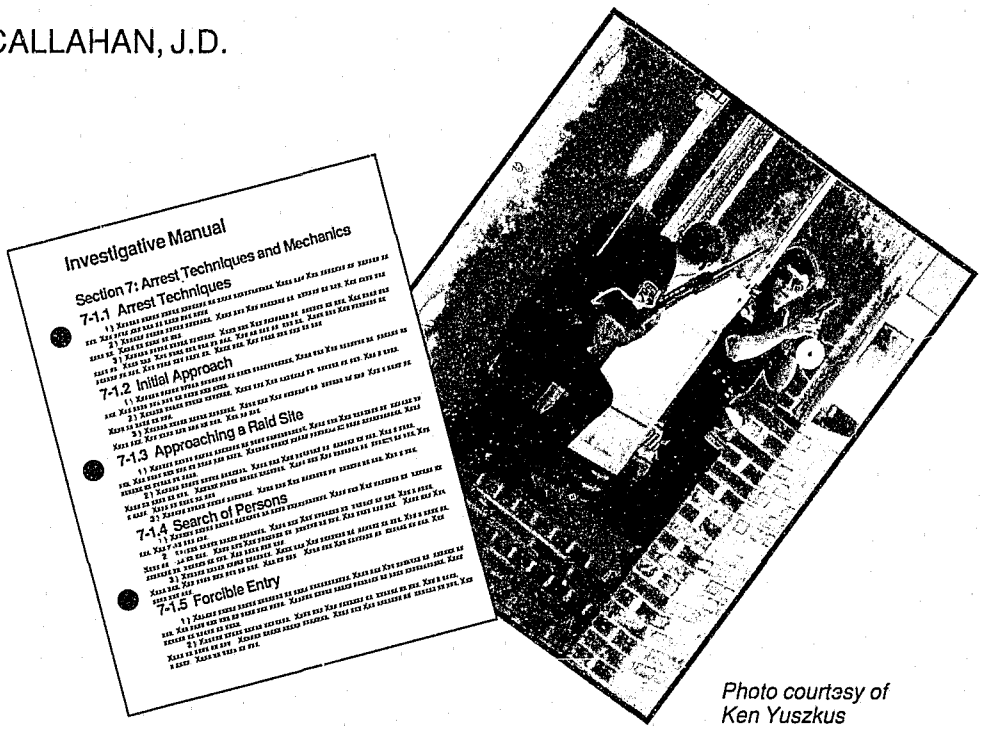

Photo courtesy of Ken Yuszkus

This article discusses the potential liability of municipal corporations and police supervisory officials for the unconstitutional conduct of lower echelon police personnel. The article specifically focuses on the extent of liability for deficiencies in training and supervision. The standard of liability for municipalities and supervisors and the type and amount of proof required to meet that standard will be examined. Also, practical suggestions will be offered to reduce exposure to this type of liability.

The Genesis of Municipal Corporate Liability

The U.S. Supreme Court, in *Monell* v. *New York City Department of Social Services*[1] ruled that a municipal corporation may be liable under 42 U.S.C. Sec. 1983[2] (hereinafter §1983) for adopting and executing a formal policy that results in a constitutional deprivation. Moreover, the Court ruled that liability can occur for constitutional violations caused by municipal "customs" or informal policies, even though they have not been officially approved by city policymakers. The Court made clear that liability is based solely on the unconstitutional conduct of municipal policymakers and rejected the idea that liability could be based on the theory of respondeat superior, which imposes liability on an employer for the wrongful action of an employee regardless of the ab-

> ***"...inadequate police training can serve as the basis for liability only where the failure to train amounts to deliberate indifference by city policymakers...."***

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sence of fault on the part of the employer.

Following *Monell*, Federal courts faced many §1983 suits directed against cities that were based on a claim that the city had adopted a "custom" or policy of inadequate training or supervision of police officers. During much of this period, there was considerable judicial disagreement concerning the standard by which municipalities should be judged in these suits,[3] as well as the type and amount of evidence needed to prove an inadequate training or supervision case.[4] The Supreme Court resolved much of that uncertainty in its 1989 decision in *City of Canton, Ohio* v. *Harris*.[5]

Supreme Court Adopts Deliberate Indifference Standard

In *Canton*, the plaintiff was arrested for a traffic offense, and after refusing to cooperate, was carried to the patrol wagon because she could not or would not walk on her own. Upon arrival at the police station, she was discovered on the wagon's floor and responded incoherently when a shift commander asked if she needed medical attention. During booking she fell off a chair several times and was allegedly left on the floor to prevent further injury. No medical attention was summoned by the police. After being released, she was transported by private ambulance to the hospital where she was diagnosed as suffering severe emotional ailments and was hospitalized for a week. She sued under §1983, alleging that the city deprived her of a constitutional right to medical care by failing to adequately train officers at detention facilities in deciding when prisoners required medical attention.

Trial evidence disclosed that it was city policy to give shift commanders sole discretion to decide when a prisoner needed medical care and that these commanders received no special medical training to assist them in that decision. The jury returned a $200,000 judgment against the city, and the U.S. Court of Appeals for the Sixth Circuit affirmed[6] that the proper standard for municipal liability regarding inadequate training is gross negligence.

In a landmark decision, the U.S. Supreme Court reversed that lower court ruling and held that inadequate police training can serve as the basis for liability *only* where the failure to train amounts to *deliberate indifference* by city policymakers to the constitutional rights of persons contacted by police officers. By adopting the higher deliberate indifference standard, the Court rejected the gross negligence standard that had been adopted by many lower Federal courts.[7] The Court explained that inadequate training meets the deliberate indifference standard only when the need for more or different training is obvious and the failure to implement such training is likely to result in constitutional violations.

The Court offered two examples of what would constitute deliberate indifference. First, where city policymakers know that officers are required to arrest fleeing felons and are armed to accomplish that goal, the need to train officers in the constitutional limitations regarding the use of deadly force to apprehend fleeing felons is obvious, and the failure to do so amounts to deliberate indifference. Second, deliberate indifference could be based on a pattern of officer misconduct, which should have been obvious to police officials who fail to provide the necessary remedial training.

Lower Court Decisions

Several Federal appellate cases have been decided since *Canton* involving claims of inadequate training and supervision.[8] For example, in *Bordanaro* v. *Mcleod*,[9] an off-duty police officer allegedly had an altercation with patrons at a motel bar and then notified on-duty officers that he needed assistance. The entire night shift allegedly responded to the motel, eventually firing two shots and forcing entry into a motel room where several occupants were allegedly beaten, resulting in the death of one of the occupants. A §1983 suit filed against the officers, the city, the police chief, and the mayor resulted in a jury verdict of approximately $4.3 million.

The U.S. Court of Appeals for the First Circuit affirmed the finding against the city based on a finding of deliberate indifference. The court concluded that the injuries were proximately caused by an unconstitutional "custom" of breaking down doors without warrants based, in part, on the testimony of a police sergeant that the department had a long-standing practice of making such entries. Although there was no direct evidence that the chief or mayor were aware of this practice, the court observed that the practice was so widespread that they should have known about it and corrected it. Their failure to do so amounted to deliberate indifference.

Moreover, the court observed that department rules and procedures issued in 1951 failed to address current standards of search and seizure, hot pursuit, and the use of deadly force. Little or no inservice training was provided regarding the use of force after basic training, and no training was required for officers who were promoted to supervisory rank.

With regard to a finding of deliberate indifference in supervision, the court observed that the department placed many citizen complaints against officers in a dead file without investigation and that discipline was often haphazard, inconsistent, and infrequent. Moreover, discipline for the motel incident took over a month to occur, and the officers involved were suspended only after indictment. A full internal inquiry did not begin until a year after the motel incident. The court also found that the department's method of background checks on officer applicants was superficial and that psychological tests required by local ordinance were often not given to applicants.

He later sued under §1983 alleging unlawful arrest and the use of excessive force caused by the county's unconstitutional failure to train its officers. The court ruled in favor of the county and rejected the plaintiff's excessive force and inadequate training claims because trial evidence disclosed that training regarding use of force was extensive and included a 2-day seminar for each prospective recruit on use of force. Since 20 percent of basic training and 10 percent of inservice training involved the use of force, the court concluded that there was no deliberate indifference regarding use-of-force training.

Regarding plaintiff's claim that inadequate training in auto theft investigations led to his unlawful arrest, the court found that the training was deficient to the extent that officers were not told that conflicting identification numbers on the same

> ***"...police managers...are not vicariously liable for the misconduct of subordinates, unless their actions as a police supervisor are the cause of a constitutional injury."***

In contrast to *Bordanaro*, the U.S. Court of Appeals for the Ninth Circuit reached a different result in *Merritt* v. *County of Los Angeles*.[10] The plaintiff was arrested by county officers after they discovered conflicting vehicle identification numbers on an exotic car he was driving. vehicle do not always mean that a car is stolen, since there are some situations where conflicting numbers have a legitimate explanation. Nonetheless, the court emphasized that the arresting officers were confronted with a very rare instance in which the existence of conflicting

numbers should not have played a prominent role in the arrest decision. The court concluded this failure to train was not obvious and that "[i]n light of the rarity of such occurrence, this particular deficiency...is certainly not one...which a jury could reasonably infer... amounted to deliberate indifference...."[11]

Personal Liability for Police Supervisors

Federal appellate cases hold that police managers are only personally liable for their unconstitutional action or inaction and are not vicariously liable for the misconduct of subordinates, unless their actions as a police supervisor are the cause of a constitutional injury.[12] These cases reveal that the standard by which supervisors are judged is deliberate indifference and that "...the standard of individual liability for supervisory public officials will be found no less stringent than the standard...for the public entities they serve."[13]

Several recent cases illustrate the potential civil liability risks confronting police managers.[14] In *Gutierrez-Rodriguez* v. *Cartagena*,[15] plaintiff and his girlfriend were parked late at night in a lovers' lane. Four officers, not in uniform and in an unmarked car, arrived under the command of a supervisor, who allegedly ordered them to approach plaintiff's car with guns drawn. When the plaintiff attempted to drive away, the four officers allegedly fired at the car without identifying themselves and without warning. One shot severed plaintiff's spine, causing him to become a paraplegic. Plaintiff sued the officers and various police officials under §1983, alleging that their supervisory actions and omissions contributed to his injury. The jury returned a joint compensatory judgment against all defendants in the amount of $4.5 million and punitive damages against the supervisory officials. The U.S. Court of Appeals for the First Circuit affirmed the lower court holding and ruled that the proper standard to judge supervisory liability is deliberate indifference.

> ***"...the standard of individual liability for supervisory public officials will be found no less stringent than the standard...for the public entities they serve."***

The court noted that the supervisory liability for the unconstitutional failure to supervise was based on knowledge that the officer involved was the subject of 10 recent abusive conduct citizen complaints, including the complaint that the officer held a gun to a person's head while other officers beat him, for which the officer only received a 5-day suspension. The court found that despite these complaints, supervisors continued to permit the officer to lead men on the street and to give him good performance ratings. The court also found evidence of deliberate indifference in the fact that supervisors refused to consider past complaints in evaluating each new one against this officer, and they used a disciplinary system that permitted officers under internal inquiry to refuse to talk without fear of administrative penalty. Moreover, witnesses to an alleged incident of police abuse were intimidated by a requirement that they appear at the station to give a signed sworn statement, and if a complaint were withdrawn, the internal inquiry was terminated with no input from the officer's immediate supervisor as to whether disciplinary action was appropriate.

In another case, *Dobos* v. *Driscoll*,[16] the plaintiff alleged that he was driving with his family when another automobile repeatedly struck the side of his car. The plaintiff forced the other driver to the curb, and shortly thereafter, a State trooper arrived and verbally berated the plaintiff in front of his family. When the plaintiff objected, he was arrested, handcuffed tightly, and driven away by the trooper without explanation to his family. When the plaintiff's wife arrived at the lockup and noticed her husband shaking and that his hands were red and swollen, she asked for medical help and was allegedly told that if she continued to insist on medical help, her husband would be removed to a mental hospital in a straight jacket. The plaintiff alleged that the trooper

used profanity in further berating him and tore up his bail information papers. The plaintiff sued the officer and all his supervisors under §1983 alleging a failure to supervise. The jury returned a $400,000 verdict against the defendants, and the Massachusetts Supreme Judicial Court affirmed.

The court noted that a police supervisor is not liable simply because a subordinate employee who works for him violates someone's rights. Instead, supervisors are only liable where they personally cause constitutional injury by being deliberately or consciously indifferent to the rights of others in failing to properly supervise a subordinate employee. The court found evidence of deliberate indifference in the fact the trooper's supervisors had not reviewed his disciplinary history prior to reinstating him to road duty; the trooper's personnel file disclosed many instances of previous disciplinary problems, including a written recommendation from a former supervisor that he be assigned to permanent desk duty and no longer be permitted on the road. The file also reflected that he physically abused a girlfriend, drove recklessly, and threatened to hit a stranded motorist with a kel-light. The court observed that the trooper's supervisors were aware that he had a poor disciplinary record, and nonetheless, failed to review his personnel file before agreeing to return him to road duty. The court explained that they knew, or should have known, that his disciplinary record would be relevant in determining his fitness to contact members of the public during road duty, and the failure to examine that record amounted to deliberate indifference.

In another case, *Davis* v. *City of Ellensburg*,[17] the court ruled that a police supervisor did not act with deliberate indifference. After being detained by three officers, a suspect began to retch and drool. The officers called for an ambulance and a paramedic removed a marijuana-filled baggie from the suspect's throat with forceps. He later died from brain damage. A suit followed under §1983, alleging that the police chief failed to properly supervise the arresting officers.

The U.S. Court of Appeals for the Ninth Circuit observed that the chief was aware that one officer had a drinking problem and had beaten his wife and that the other officer suffered anxiety problems after being shot at and finding a suicide victim. In response, the chief ordered both to seek professional help. A psychologist found both men fit for duty, but recommended that one be retained only if he could remain alcohol-free. The chief monitored that officer's sobriety by regularly checking with two other officers. The court ruled that the chief's response to the problems of the officers was an appropriate exercise of supervisory responsibility and that there was no deliberate indifference.

> ***"The failure to discipline or dismiss officers who develop a track record of unconstitutional conduct may result in supervisory and municipal liability."***

Suggestions to Minimize Liability

Police departments should carefully review training practices related to high-risk activities, such as the use of deadly and nonlethal force, warrantless arrests and searches, vehicle pursuit, and prisoner safety in detention facilities. Training policies should be reviewed to ensure conformance with current constitutional standards. No training practice should fall below minimum State standards. If a pattern of abuses by officers begins to develop, training in that area should be enhanced. All officers should be required to attend regular inservice training in these high-risk areas.

Supervisory policies relating to citizen complaints and departmental disciplinary actions should be periodically reviewed. Specific procedures for investigating citizen complaints should be established and carefully followed. Investigations should be initiated

promptly upon receipt of a complaint, and the results of that investigation and any recommended disciplinary action should be in writing and retained in an appropriate file. Final disciplinary decisions should be in writing and fully documented. No disciplinary decision should be made in a vacuum and prior discipline should be considered. Disciplinary decisions should be consistent and commensurate with the degree of abusive conduct. The failure to discipline or dismiss officers who develop a track record of unconstitutional conduct may result in supervisory and municipal liability. Complete insulation from liability is impossible, but these prophylactic management initiatives will help reduce the risk significantly. LEB

Footnotes

[1] 436 U.S. 658 (1978).

[2] 42 U.S.C. 1983 provides: "Every person who under color of any statute, ordinance, regulation, custom or usage, of any state...subjects...any...person...to the deprivation of any rights...secured by the Constitution...shall be liable to the party injured in an action at law...."

[3] Some Federal appellate courts adhered to a deliberate indifference standard, e.g., *Fiacco* v. *City of Rensselear*, 783 F.2d 319 (2d Cir. 1986); *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983). Others adopted a less-stringent standard of gross negligence, e.g., *Wierstak* v. *Heffernan*, 789 F.2d 968 (1st Cir. 1986); *Bergquist* v. *County of Cochise*, 806 F.2d 1364 (9th Cir. 1986).

[4] Compare *Sarus* v. *Rotundo*, 831 F.2d 397 (2d Cir. 1987); *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983) and *Herrera* v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981), which require proof of a pattern of similar misconduct, with *Voutor* v. *Vitale*, 761 F.2d 812 (1st Cir. 1985) and *Kibbe* v. *City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. dismissed*, 107 S.Ct. 1114 (1987) (no pattern required).

[5] 109 S.Ct. 1197 (1989).

[6] *Harris* v. *Cmich*, 798 F.2d 1414 (6th Cir. 1986) (unpublished opinion).

[7] The adoption of the deliberate indifference standard makes it more difficult for plaintiffs to win §1983 actions because it eliminates jury consideration of differences in training programs unless plaintiff can prove that the need for more or better training was obviously needed.

[8] Inadequate training cases include *Santiago* v. *Fenton*, 891 F.2d 373 (1st Cir. 1989); *Williams* v. *Borough of Westchester, Pennsylvania*, 891 F.2d 458 (3d Cir. 1989); *Clipper* v. *Takoma Park, Maryland*, 876 F.2d 17 (4th Cir. 1989); *Bennett* v. *City of Grand Prarie, Texas*, 883 F.2d 400 (5th Cir. 1989); *Hill* v. *McIntyre*, 884 F.2d 271 (6th Cir. 1989); *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989); *Dorman* v. *District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989); *Graham* v. *Davis*, 880 F.2d 1414 (D.C. Cir. 1989). Inadequate supervision cases include *Powell* v. *Gardner*, 891 F.2d 1039 (2d Cir. 1989); *Leach* v. *Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989); *Davis* v. *City of Ellensburg*, 869 F.2d 1230 (9th Cir. 1989).

[9] 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 75.

[10] 875 F.2d 765 (9th Cir. 1989).

[11] Id. at 771.

[12] *Al-Jundi* v. *Estate of Rockerfeller*, 885 F.2d 1060 (2d Cir. 1989); *Revene* v. *Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989); *Reid* v. *Kayye*, 885 F.2d 129 (4th Cir. 1989); *Hansen* v. *Black*, 885 F.2d 642 (9th Cir. 1989); *Taylor* v. *List*, 880 F.2d 1040 (9th Cir. 1989).

[13] *Sample* v. *Diecks*, 885 F.2d 1099 (3d Cir. 1989). *See also*, *Jones* v. *City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Bolin* v. *Black*, 875 F.2d 1343 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 543; *Howard* v. *Adkinson*, 887 F.2d 134 (8th Cir. 1989); *Pool* v. *Missouri Department of Corrections*, 883 F.2d 640 (8th Cir. 1989); *Redman* v. *County of San Diego*, 896 F.2d 362 (9th Cir. 1990).

[14] A discussion of the qualified immunity defense is beyond the scope of this article. For a discussion of the significant protection from personal liability offered by that defense, see Schofield, "Personal Liability—The Qualified Immunity Defense," *FBI Law Enforcement Bulletin*, March 1990.

[15] 882 F.2d 553 (1st Cir. 1989).

[16] 537 N.E.2d 558 (1989), *cert. denied*, 110 S.Ct. 149.

[17] 869 F.2d 1230 (9th Cir. 1989).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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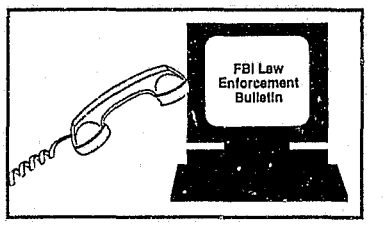

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