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# JAIL SUICIDE UPDATE

Summer 1992

JAN 26 1993

Volume 4 • Number 2

## ACQUISITIONS

*In previous issues of the Jail Suicide Update, we have periodically discussed the relationship of jail suicide and liability. In again revisiting the topic of jail suicide litigation, we present the following article by Fred Cohen, Professor of Law and Criminal Justice at the State University of New York at Albany. Following his extensive review and analysis of current federal caselaw, Professor Cohen writes — "the plaintiffs must show that the defendants acted under color of state law — usually not difficult to do — and that the decedent or survivor was deprived of some federally protected right — usually quite difficult to do — and that denial of such a right creates liability — now almost impossible to do."*

*In explaining that the federal courts are reluctant to find defendants liable in cases in which the potential for suicide should have been known or identified by jail officials, Professor Cohen bluntly states that the "distressing aspect of modern caselaw is the premium it appears to place on ignorance; a premium which is anti-therapeutic and life threatening." He concludes the article by calling upon the federal courts to become more pro-active in fashioning and enforcing rules designed to reduce custodial suicide.*

## Liability for Custodial Suicide: The Information Base Requirements

by Fred Cohen

With the adoption of certain procedures and with changes in operations and structure, it is conceivable that custodial suicides could be eliminated. This would entail such measures as regular strip and body cavity searches; unremitting visual and auditory surveillance, including cells which afford no privacy; extraordinary measures as to clothing and personal possessions; in-depth screening and counseling; and broadly-shared risk information.<sup>1</sup>

A person who is constantly observed and deprived of any device which may be used to cause death is an unlikely candidate for suicide. However, the tariff for such an approach in terms of over-inclusiveness, the end of all individual privacy and most attributes of human dignity, and the dubious allocation of limited dollars should be viewed as prohibitive. The elimination of custodial suicide is not a reasonable objective whether viewed from a cost-benefit analysis or as a matter of social policy. If that is so, we may then ask what policy objectives are reasonable and attainable concerning custodial suicide? What role do the courts have in fashioning and enforcing rules designed to *reduce* — not eliminate — custodial suicide and to provide just compensation where liability is established?

The primary thrust of this article is a review and analysis of recent caselaw on custodial suicide. Emphasis is on federal caselaw and on jails and police lockups. While state law claims and prison suicide cases will be alluded to, the great majority of attempts and successful suicides occur in short-term custodial facilities and most of the reported decisions involve federal litigation and federal constitutional standards.

Without some actual or constructive knowledge of an individual's potential for committing suicide, custodians simply have no liability and the litigation may never reach the complex questions

associated with a particular facility's preventive measures. In the space allotted, I have opted to emphasize the problems related to the information base, although the reader will find references to a broader array of key legal questions. I have also opted to state my personal views on some of the key issues, especially regarding a judicial tendency to place a premium on ignorance of suicide-relevant material.

### Overview

Custodial suicide litigation seeking damages may occur in the federal courts in the form of a Civil Rights Action or in the state courts in the form of a wrongful death action.<sup>2</sup> As a federal action — and these constitute the vast majority of the reported cases — the plaintiffs must show that the defendants acted under color of state law — usually not difficult to do — and that the decedent or survivor was deprived of some federally protected right — usually quite difficult to do — and that denial of such a right creates liability — now almost impossible to do. The federal courts have made the liability requirements for custodial suicide so onerous, that many plaintiffs' claims will not escape a motion for summary judgment.

The custodian's legal duty will always be preventive.<sup>3</sup> The plaintiff's claim invariably will charge the defendants with a particular failure to act (or omission): a failure to properly screen; failure to convey information relevant to suicide potential; failure to recognize signs and symptoms of suicide; failure to provide a safe environment; failure to train; failure to act promptly or properly after the act of suicide; failure to search or remove implements or material suitable for suicide; design failure; failure to provide appropriate treatment (nearly always limited to prison versus jail cases); and so on.

The reported federal decisions are beginning to coalesce around the requisite standards of liability and certain general legal rules are now regularly repeated. They are:

1. Custodians — whether they be police at a lockup; sheriffs at a jail or correctional officials at a prison — are not insurers of the life and safety of those in their charge. While there clearly are constitutional duties to preserve life and to provide medical or mental health care, these duties will not translate into some guarantee of safety, health, or the continuity of life.
2. The standard for liability in the federal courts is deliberate (sometimes referred to as reckless) indifference which, at a minimum, means culpability beyond mere negligence. The defendants must be shown either to have had knowledge of a particular vulnerability to suicide or be required to have known; this knowledge must create a strong likelihood, as opposed to the possibility, of suicide; and this "strong likelihood" must be so obvious that a lay person would easily recognize the need for some preventive action.<sup>4</sup> Parenthetically, the courts seem to be unaware of the fact that they are borrowing the "obvious to a layman" phrase from prison and jail mental health cases which state that a mental illness or medical need is serious if it would be obvious to a lay person that treatment was needed.<sup>5</sup>

A custodial suicide *per se* is *not* conclusive proof of deliberate indifference. If it were then custodians would in fact be required to provide suicide-proof institutions.<sup>6</sup>

3. The general right of detainees to receive basic medical or mental health care does *not* place upon jail officials the responsibility to screen every detainee for suicidal tendencies.<sup>7</sup> A high percentage of detainees arrive at a lockup or jail under the influence of alcohol or some other drug and judicial decisions now hold that being "under the influence" *alone* does not enhance the custodian's duty to screen or to take extraordinary suicide preventive measures.<sup>8</sup>

By failing to mandate some screening the federal courts — perhaps inadvertently — have placed a premium on custodial ignorance. Custodians may now be in the untenable position of being held to higher standards when they possess suicide-relevant knowledge. Should this position actually retard efforts to obtain information or the use of the increasingly popular, effective, and easy to use suicide screening instruments regularly favored in the *Jail Suicide Update*, it should be regarded as bad policy and as anti-therapeutic.<sup>9</sup>

4. Absent a threat to commit suicide that is, or should be, taken seriously or knowledge that the individual has in fact attempted suicide in the recent past, the courts are extremely reluctant to impose liability.<sup>10</sup>

Indeed, the Eleventh Circuit Court of Appeals recently stated, "In the absence of a previous threat or an earlier attempt at

suicide, we know of no federal court in the nation that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference."<sup>11</sup>

As stringent as that standard is, some courts will not find liability even after a suicide threat which clearly should have been taken seriously. In *Zwalesky v. Manistee Co., Mich.*,<sup>12</sup> an intoxicated, violent, threatening detainee, who was hitting his head against the police car's protective screen, threatened suicide. He fulfilled the threat within an hour and a half of detention and the court granted immunity to the defendants. That is, no special precautions seemed in order.

*Zwalesky* aside, the law seems clearly established that custodians must take some measures to prevent suicide once they know, or should know, that a suicide is highly probable. There is, however, a continuing lack of clarity concerning what those measures must be.<sup>13</sup>

The nature of the risk normally defines the legal duty. Thus, appropriate measures will range from removal of personal items to surveillance, use of double-celling, counseling, and so on.

### The Foundational Law

Why may one party be held liable for another person's intentional act of self-destruction? This question is not answered by referring only to the various human and environmental factors which may be important contributing factors in explaining or predicting suicide. Understanding the cause of an event need not create a basis for blame.

And it is *blame* that the federal courts insist upon. Following the lead of the Supreme Court, the federal courts read the Eighth and Fourteenth Amendments as aimed at official abuse of power and not simply inaction or inadvertence.<sup>14</sup>

The legal foundation for governmental liability is having an individual in actual physical custody. In *DeShaney v. Winnebago County* the Supreme Court held that while government has no affirmative obligation to provide services, when government holds a person against their will there is a corresponding duty to assume some responsibility for their safety and general well-being.<sup>15</sup> A special relationship marked by dependency thus arises and the custodian and his inmate are no longer strangers.<sup>16</sup>

If a person in confinement manages to slit his wrists the custodian is plainly under a duty to take reasonable steps to staunch the bleeding and to rapidly obtain medical care. This post-injury duty stems from the fact of custody and obvious need and it does not somehow depend on who created the medical urgency.<sup>17</sup>

Does the post-injury duty to ameliorate the harm or to have taken measures to prevent self-injury depend on the legal basis for custody? Jails and lockups, after all, will house persons awaiting booking, bail, trial, transfer to a prison as a probation or parole violator, transfer to a mental institution, in "protective custody" or serving a relatively short sentence.

The short answer to the question just posed is: The legal basis for custody is not determinative of the custodian's duty to prevent suicide or to take reasonable steps in the face of a suicide attempt.

In *Buffington v. Baltimore Co., Md.*,<sup>18</sup> police held the decedent in what they termed protective custody and then claimed that this released them from any custodial obligations to prevent harm. The Court of Appeals answered, "Nothing in the Court's rationale [citing to *DeShaney*] for finding that some affirmative duty arises once the state takes custody of an individual can be read to imply that the existence of the duty somehow turns on the reason for taking custody."<sup>19</sup>

Suppose a detainee is being held illegally in that he was arrested without a warrant and not promptly brought before a magistrate for arraignment? The Eighth Circuit, correctly in my view, recently held that illegal incarceration for seven days cannot constitute proximate causation for a custodial suicide absent some evidence that the defendants knew or should have known that some preventive action was necessary.<sup>20</sup>

The failure to promptly arraign — known as a *Gerstein*<sup>21</sup>-*Riverside*<sup>22</sup> violation — may have evidentiary consequences; there might be a recovery of nominal damages for the illegal detention; but without more there is no liability for a suicide.

What might constitute the "more" necessary for liability? First, the entire package of liability issues which are determinative of any custodial suicide must be present. Second, I am convinced that liability could attach if the decedent became increasingly agitated due to his illegal confinement; that he might have been released on bail if promptly arraigned and that this agitation was proved to be the trigger for the suicide.<sup>23</sup>

One final point on the actual custody issue: There are a few state court decisions which establish a tort law basis for liability for suicide when there is no actual custody. For example, in *Eisel v. Board of Education*<sup>24</sup> a Maryland court held that school counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent.

This, of course, is based on a state court's interpretation of state law as it relates to a wrongful death and survivor action. The court understood that this was a novel holding; and that it is rare to find liability for noncustodial suicide in the analogous situation of therapists, church pastors who counsel and lawyers who advise.<sup>25</sup>

The Supreme Court has clearly established that in our context the Cruel and Unusual Punishment Clause of the Eighth Amendment applies only to persons in confinement after conviction of a crime while the Due Process Clause of the Fourteenth Amendment applies to the custody-related claims of detainees.<sup>26</sup> Conviction provides a lawful basis for punishment which may not be cruel or unusual while a person who has not been convicted may not be punished at all.<sup>27</sup>

As a general proposition, the same criteria are applied under the Fourteenth Amendment and under the Eighth Amendment to resolve claims to medical and psychiatric care as well as to custodial suicide. As one court recently put it in a custodial suicide case, "The Fourteenth Amendment right of pretrial detainees, like the Eighth Amendment right of convicted prisoners, requires that government officials not be deliberately indifferent to any serious medical needs of detainees."<sup>28</sup>

If there are any differences between the convicted and the unconvicted, one would think that the unconvicted have a stronger claim to legal protection. While that may occur at some unconscious level of decision-making, the reported decisions recognize that while jails and prisons are different places with different populations and missions, the constitutional criteria for resolving custodial suicide cases are the same.<sup>29</sup> As I will develop later, I believe the courts have ignored some major differences in the duty owed persons in jail and prison and missed the opportunity to impose appropriately different obligations. In particular, I refer to prevention and treatment obligations.

Before turning to an elaboration of constitutional criteria, one further point of foundational law deserves mention. Consistent with the great bulk of the literature and reported cases, I have been using the term pretrial detainee to refer to all persons in penal confinement prior to conviction. This approach is not entirely accurate and courts may recognize this in the near future.

There is a point in the criminal justice process where a person is no longer an arrestee but where he also may not yet be a detainee. That point would follow a lawful arrest<sup>30</sup> and include confinement during the booking process and while awaiting arraignment. It may also include confinement where the arrest was illegal in not being based on probable cause.

If this interim status is accorded a distinct status then a custodial suicide claim might be brought under the Fourth Amendment and subject to search and seizure analysis. This, in turn, may make it somewhat easier to establish a claim if it is judged by a reasonableness, as opposed to deliberate indifference, standard.

Put somewhat differently, an interim status suicide claim may go forward on proof that exceeds negligence but still falls short of the more onerous standard of deliberate indifference. At the least, this could allow a plaintiff's claim to escape summary judgment and reach a jury.<sup>31</sup>

### Theories of Liability and Deliberate Indifference

There are three major theories of liability presently utilized in custodial suicide cases and all must eventually link themselves to the demanding test of deliberate indifference.<sup>32</sup>

These theories are: (1) failure to provide medical or mental health care for a serious medical or, more likely, psychological disorder; (2) failure to provide a non-life threatening (or safe) environment; and (3) failure to train. With the Court's

recent decision in *Wilson v. Seiter*,<sup>33</sup> and its earlier decisions in *Estelle v. Gamble*<sup>34</sup> and *City of Canton v. Harris*,<sup>35</sup> deliberate indifference is the state of mind requirement for prison (and presumably jail) conditions cases, failure to train claims, and medical/psychiatric claims.<sup>36</sup>

The reported decisions are confused on the precise boundaries of these competing theories and this is especially so for a "failure to protect" claim and a failure to provide medical/psychiatric care claim. When courts analyze a custodial suicide case along mental health care lines they seem implicitly to accept suicide as caused by some mental aberration. "Sane persons do not ordinarily kill themselves," stated one early court.<sup>37</sup>

In civil commitment law, modern statutes require a finding of mental illness and that as a result the individual creates a substantial danger of causing serious harm to himself or others. Suicide ideation, and certainly a recent attempt to commit suicide, would serve as an adequate basis for a "dangerous to self" commitment in most jurisdictions.<sup>38</sup>

Professor David Wexler argues that persons who attempt suicide are by no means always mentally incompetent at the time of the attempt. Should we save only those who appear to be incompetent and allow the competent the choice of dying at their own hand? Should we honor future valid consents from a rescued, but ungrateful, incompetent?<sup>39</sup>

The fact that custodial suicide cases present interesting questions concerning committability and that viewing suicide exclusively as an act of madness or incompetence is dubious will not affect the custodian's duty to preserve life. That duty flows from custodial obligations and, as noted earlier, does not depend on the basis for custody, the cause of the harm or threatened harm, or the acceptance of any particular theory as explaining the harm or threat thereof.

However, if one accepts suicide as invariably a sign of serious mental illness, the *nature* of the custodian's duty changes. This may have significant consequences for the duty owed the individual and its duration. The duty owed, in turn, may also be seen as varying with the nature of the facility.

A serious mental illness calls for treatment. A suicide threat calls for prevention and then, perhaps, treatment. However one ultimately defines treatment it has longer term objectives and it is more involved than the prevention of self-destruction. The latter evokes an insulating function and carries with it no implications for "getting better." Treatment, on the other hand, clearly is an intervention designed to relieve needless pain or suffering and to ultimately ameliorate or cure a particular condition.<sup>40</sup>

Jails and lockups are inherently short-term holding facilities. Longer-term treatment based on a medical model of causation for suicide seems far more appropriate for prison yet it is regularly and uncritically incorporated into the reported decisions involving short-term facilities.

I am not arguing that mental illness is more or less likely to explain suicides or suicide attempts in prison. I am arguing that longer-term confinement breeds longer term obligations along with the additional time to arrive at more discriminating causal assessments. Thus, with more time for more discriminating diagnosis and assessment and a longer-term relationship, I would expect mental illness as cause *and* response to be more at home in prison than jail.<sup>41</sup>

In the Introduction I noted the significance in the federal courts of the deliberate indifference standard as a basis for custodial liability for suicide. The defendants must be shown to have had knowledge of a particular vulnerability to suicide or be required to have known and there must be an obvious and strong likelihood of suicide.<sup>42</sup> Here I will explore some of the more interesting recent decisions on this point. Recall that without the requisite information base, a custodian has no special, preventive obligations and the litigation will never reach an evaluation of the soundness of prevention practices.

In *Zwalesky v. Manistee Co.*,<sup>43</sup> the decedent was arrested on a complaint of spousal abuse. He was drunk, swore and yelled in the police car, banged his head on the car's screen, and threatened to kill his relatives *and himself*. The decedent was placed in a so-called detoxification cell and about ninety minutes later was discovered to be dead, hanging by his shirt from a conduit pipe in the cell.

The trial judge granted summary judgment for all the jail-connected employees finding they were immune from suit because there was no showing of any clearly established right possessed by the decedent which reasonable public officials should have known.<sup>44</sup>

*Zwalesky* involves the twin theories of liability discussed above: denial of medical care and denial of the right to be free from unsafe confinement. The court states that the right actually being asserted is the right of a detainee to be screened for suicidal tendencies and to have appropriate preventive measures then taken. The general right to medical care, says the court, is not sufficient to establish a clear constitutional right to be screened for psychological problems.<sup>45</sup>

The court, of course, ignores the fact that this individual — who may be in the interim status between arrestee and detainee — actually threatened to do violence to others and himself. Thus, this is not a case raising the general issue of psychological or suicide screening and it is not a case where nice distinctions of underlying cause are involved.<sup>46</sup> Indeed the case fits so many of the standard factors on the jail suicide profile developed by the National Center on Institutions and Alternatives (NCIA), as well as the most demanding informational requirements for an alert, that it dramatically illustrates the strictures of deliberate indifference and judicial confusion on liability theories.<sup>47</sup>

The court goes on to hold that the exercise of professional judgment does not require prison (or jail) officials to make accommodations for potential suicide attempts and that the failure to include (suicide prevention) procedures to process incoming detainees does not violate any clearly established constitutional rights.<sup>48</sup>

This is about as tough as it gets for plaintiffs and about as forgiving as it gets for custodians. This should not have been analyzed as a general screening case and it need not have involved any immediate claims to medical or psychiatric care. The most reasonable claim would have been to the standard and inexpensive measures associated with a suicide watch and removal of any implements of potential self-destruction.

If this suicide victim had survived and then been convicted and sentenced to prison, I would then argue that, at a minimum, the suicide-attempt information should accompany him to prison; that prison authorities have a diagnostic-evaluative obligation at reception and that if suicide ideation continued, it would be reasonable to then diagnose a serious illness calling for appropriate mental health care and a protective environment.

In *Belcher v. Oliver*, the Fourth Circuit adopted the position that, "The general right of pretrial detainees to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies."<sup>49</sup> In so doing, the court aligned itself with earlier decisions by the Third, Fifth, Sixth, Ninth and Eleventh Circuits. At first blush such a position may seem to be unduly harsh and not sufficiently protective of persons in confinement. However, millions of persons are processed annually through jails and lockups and many are held only for a brief time while awaiting arraignment, release on bond, a relative, and so on. Courts are reluctant to allow highly intrusive searches of arrestees without reference to the reason for arrest, the special characteristics of the arrestee, and the projected duration of confinement.<sup>50</sup> An approach which apportions privacy protection based on such factors may also support an approach which, in effect, limits obligations to develop certain information.

However, once again, I believe that courts generally misapprehend the issues. Even if we stipulate to the correctness of "no general duty to screen," that does not mean there is no duty to screen or assess persons presenting certain characteristics or who are members of a particular group which may be said to be more vulnerable to suicide, especially those who are under the influence of a mind-altering substance at the time of confinement.

Reasonable people may well disagree about what characteristics or signs in what combination should create the duty to develop further information but it does not seem reasonable to adopt the *Belcher* "no duty at all" position and then shut down the debate.

In the context of a decision to deprive a person of their liberty, serious questions are — and should be — raised about the ability of experts to predict dangerousness to self or others.<sup>51</sup> In our context, liberty invariably has been taken and the question is the preservation of life and health.<sup>52</sup> With jail and lockup suicides tending to occur in isolation; early in the confinement; by relatively young, white, males who are "high;" who have not been screened and who then "hang up" in the early hours; how much effort and training would it take to use these factors as a trigger for additional screening and/or special precautions?<sup>53</sup> Very little, it would seem.

Any errors in screening and short-term precautions impose little cost on the facility and hardly any dignitarian costs on the person in custody. Yet, the courts are moving in a direction which positively discourages the development of information or expertise.

In *Freedman v. City of Allentown, Pennsylvania*<sup>54</sup> we encounter a variation on the *Belcher* formula. *Belcher*, and the several cases in line with it, deals with the duty to develop information, where *Freedman* deals with scars observed on the confined individual's wrists and inside the elbows and neck — signs generally indicative of prior suicide attempts — and the obligation of an officer to *interpret* these signs as a suicide signal. The court states, "we will assume that a reasonably competent prison official should have known and identified these marks as 'suicide hesitation cuts'. . . . Even if so, the failure to recognize them as such, without more, amounts only to negligence and therefore fails to support a claim."<sup>55</sup>

Judge Brotman, dissenting in part, points out that a detective questioned Freedman for over two and one-half hours and asked about scars which decedent then displayed. Characterizing the majority's position as an unilluminating conclusion, the dissent goes on to state:

I remain unconvinced that Detective Balliet's inability to recognize the tell-tale signs of a high suicide risk individual can never amount to 'recklessness.' I fail to see how the majority can be so resolute in its position without knowing the extent of the police officer's background and training in detecting suicide risks and in suicide prevention, in addition to his prior experience with prisoners who have taken their own lives or attempted unsuccessfully to do so. None of the information concerning the officer's knowledge, experience and professional competence would likely be known even to the most diligent civil rights plaintiff at the pleadings stage, and, therefore, he should be entitled to adduce such pertinent facts through discovery.

For example, discovery might reveal that Detective Balliet was a veteran police officer who had received extensive training in suicide prevention and had become well-versed in detecting the indicia of suicidal propensities. It is not unlikely that such a veteran officer would have seen bodily markings similar to the ones on the decedent's body in the course of his duties, nor is it improbable that he would have come into contact with a prisoner bearing such markings who had committed or attempted to commit suicide. Surely a reasonable jury could conclude that a police officer possessing such knowledge, training and experience acted 'in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.' See *W. Page Keeton, Prosser and Keeton on Torts* Sec. 34, at 3213 (5th ed. 1984).<sup>56</sup>

Nonetheless, the majority view prevails and plaintiff's case is dismissed. Here, then, we have obvious and objective signs

which might easily have alerted the custodians to the need for effective preventive measures. The majority, however, refuses to impose a constitutional duty of knowledge in the interpretive sense on police officers and presumably jailers.

Does the majority approach place a premium on ignorance or does it encourage possible life-saving information? Obviously, the majority opinion favors ignorance and, not so obviously, so does the dissent. Judge Brotman's speculation about discovery possibly producing information on training and expertise and thus creating the potential for deliberate indifference may also be taken to mean that if no such training or indicia of competence was forthcoming then the officer's ignorance bars recovery.

Have we reached a point in time when jail and lockup suicides are so prevalent<sup>57</sup> and the steps necessary to prevent, or to drastically reduce, these tragedies so well known and affordable that a constitutional obligation of at least minimal training is now in order? I believe so but not only is support for this lacking in the leading decisions, the courts actually reward ignorance.

In *City of Canton v. Harris*,<sup>58</sup> the Supreme Court outlined the conditions under which a municipality might be liable for a custom or policy of failure to train. The municipality itself, not its agents, must be the direct cause of the violation and the failure to train must amount to deliberate indifference to the rights of persons with whom the agency comes into contact. There must be a deliberate choice to follow a course of action from among various alternatives and there must be a direct link between a specific deficiency in training and the ultimate injury. Failure to train claims will not succeed simply by showing that harm might have been avoided with more or better training.

Putting a lethal weapon into the hands of a police officer with no training in its handling and no clear policy on deadly force is probably the clearest example of a potentially successful failure to train lawsuit. I would suggest that with so many custodial suicides, with so much predictive information available and usable by anyone sufficiently competent to work in corrections or law enforcement, and with prevention measures available at no significant cost, it is time for *Canton* to be applied in this area. At a minimum, where a facility has experienced a custodial suicide then this should be taken as prima facie evidence of a need for some training.

Returning to the *Freedman* scenario, the issue there will be characterized as information interpretation. That is, the officer had relevant information — the multiple, severe scars — and the issue was his alleged failure to understand its significance. We might again note that even if this information was translated into an awareness of a high probability of suicide potential, plaintiffs would, of course, still be required to prove that the response, or lack thereof, was constitutionally deficient; i.e., deliberately indifferent.

The *Freedman* information characterization problem has arisen in other recent cases. In *Bell v. Stigers* an 18 year old DWI arrestee told the booking officer that he thought he would shoot himself. The booking officer apparently bantered with the youth and replied that it was too bad, but he did not have a gun

handy. The officer did not check a suicide box on the booking form and he also failed to remove the young man's belt when placing him in a solitary cell. The decedent was found hanging about an hour later, cut down and survived with permanent brain damage and physical injuries.<sup>59</sup>

The trial judge had refused the defendant's request for summary judgment after listening to a tape of the exchange with the booking officer and finding a note of despondency in the youth's voice.<sup>60</sup> The Court of Appeals, however, with one dissent, held, "A single off-hand comment about shooting oneself when no gun is available cannot reasonably constitute a serious suicide threat."<sup>61</sup>

The court held that the "off-hand" comment along with the detainee's fitting a suicide profile cannot support the "strong likelihood of suicide" requirement for liability. At best, there is negligence here and summary judgment was ordered.<sup>62</sup>

In another decision, a life-threatening, domestic violence scene ended with the arrest of plaintiff's paramour who was drunk at the time. The plaintiff told the arresting officer that earlier she heard the decedent say, "If only I had the guts." She interpreted that to mean, "If only I had the guts I would shoot myself with this gun."<sup>63</sup>

The plaintiff did tell the arresting officer of her interpretation of decedent's earlier words. The officer knew of the violence and intoxication yet no suicide precautions were taken. Jail officials violated their own rules on cell monitoring and were disciplined for their dereliction in the wake of the decedent's suicide.<sup>64</sup>

The court, however, granted the defendants summary judgment characterizing the earlier threat as a vague reference to suicide, analogous to the *Bell v. Stigers* "off-hand" comment about wanting a gun. The court seems to vacillate between treating the decedent's reference to 'having the guts' either as an ambiguous suicide threat or a suicide threat that was reasonably clear but not actionable absent any clear history of suicide attempts or suicide ideation.<sup>65</sup>

*Kocienski v. City of Bayonne* is yet another variation on the *Freedman* information interpretation problem.<sup>66</sup> Here, the plaintiff's sister, one Garity, was arrested and jailed on theft charges. About 10 hours thereafter she committed suicide, hanging herself with her panty hose.

Garity had a history of contacts with the defendant police department, including earlier information that she was suicidal and may have overdosed on drugs. Two weeks previously, the plaintiff obtained a restraining order to protect her from possible violence at the hands of her sister. The order had the word "psychiatric" clearly written on it. Plaintiff left the order with the police department and called the next day to make certain her sister's last name was on the order. The suicide occurred soon thereafter.<sup>67</sup>

The court held that an officer's failure to discern suicidal tendencies from the face of the restraining order — i.e., the word "psychiatric" — is at most negligence. Referring to

*Freedman*, the court states, "that the failure to recognize signs far more indicative of potential suicide than that which [the officer] 'failed' to recognize has constituted negligence only."<sup>68</sup>

Thus, in the context of the deliberate indifference standard, the federal courts place a minimal burden of information interpretation on the police and other custodial officials. The information aspect of the deliberate indifference test has yet other dimensions to which we now turn.

*Freedman* itself includes one such additional dimension. *Freedman* held that there was no constitutional duty imposed on a trained police officer to recognize large and prominent scars as "hesitation marks" and it also held that no liability attached due to the failure of decedent's probation officer, who knew of *Freedman's* prior suicide attempts, to inform the detective questioning the decedent.<sup>69</sup> Even if the officer was at the jail during the questioning and chose not to convey the information about suicidal tendencies, this does not amount to showing reckless indifference to *Freedman's* rights.<sup>70</sup>

This aspect of *Freedman* relates to a continuing problem that I will refer to as a "hand-off" problem. Hand-off problems occur, for example, where there is a shift change and the incoming staff are not given suicide-relevant information by the outgoing shift; where an arresting or transporting officer has such information and does not pass it along; where a known suicide risk simply moves through the conveyor belt of the criminal justice system and there is no intra- or interagency sharing of such information. The hand-off problem speaks directly to the "should have known" aspect of the deliberate indifference test: defendants knew or *should have known* of a particular vulnerability to suicide.

In *Buffington v. Baltimore Co., Md.*<sup>71</sup> the record is clear that police officers had received repeated and unambiguous information that James Buffington was drunk, in possession of firearms and dangerously suicidal. At booking, James was handcuffed to the rail near the booking desk in accordance with local practice. Officers Gaigalas and Tucker came on duty shortly thereafter and took James to an isolation cell without removing his clothing and with no monitoring. The young man hung himself in less than an hour.

Officer Gaigalas admitted that he knew James was suicidal when he took him to the cell after previously giving a contrary deposition which he now admits was deliberately and knowingly false.<sup>72</sup>

This is one of the few cases where the plaintiffs prevail in a custodial suicide claim and it is basically because the new shift officers were in fact informed of James' suicidal tendencies but then did everything wrong. As plaintiff's expert Joseph Rowan testified, "I strongly feel that this is the worst case of handling of a suicide case that I have ever seen."<sup>73</sup>

In *Buffington*, the threat of suicide was clear, it was repeated to the authorities but then ignored. Suppose that law enforcement officials, like the probation officer in *Freedman*, simply fail to convey information they have concerning suicide risks?

In the frequently cited *Partridge v. Two Unknown Police Officers of Houston*,<sup>74</sup> a young man was arrested on burglary-theft charges and became hysterical during on-scene questioning. The boy's father told a sergeant on the scene that his son had experienced a "nervous breakdown" and he pointed out two medical bracelets on the boy's wrists. In response, it was suggested that the father contact a psychiatrist or get a letter. The boy was agitated and violent while being transported in the patrol car. He banged his head on the partition but calmed down a bit at the station. The arresting officers communicated none of this to anyone at the jail. The young man was placed in a solitary cell and three hours later hanged himself with his socks. Booking officers were unaware of clinical records kept four doors away showing a suicide attempt during an earlier arrest.

The Fifth Circuit, in a revised opinion, viewed the above facts as stating grounds for a cause of action and over-ruled the lower court's dismissal of the complaint. The court's analysis turns almost exclusively on deliberate indifference to medical/psychiatric needs with virtually no discussion of the need to protect such an arrestee or detainee from himself.<sup>75</sup> Even under this analysis, the court assumed that police will and should communicate unambiguous suicide information about an arrestee to jail staff.

In *Partridge*, we focus on the arresting officers making the direct hand-off of the arrestee to booking officers. In *Freedman*, the probation officer appeared not to have any direct role in the interrogation and subsequent processing of the decedent. Information relevant to suicide prevention was possessed in both cases but it is possible to distinguish the obligation to convey such information based on the direct versus indirect hand-off roles of the participants.

In *Lewis v. Parish of Terrebone*, a most bizarre set of circumstances culminated in the suicide death of a man placed in isolation as punishment for striking a deputy who had driven him back to the jail after a mental examination at a hospital.<sup>76</sup> Prior to the assault, the deputy placed an envelope containing the examining psychiatrist's advice on a desk near the defendant Warden.<sup>77</sup>

The envelope remained unopened until Lewis was found dead. It contained a diagnosis that he was suicidal and that specified suicide precautions should be taken. There were other facts actually known to the Warden that also were strongly suggestive of suicide. The failure to inform himself, however, of an available medical opinion seemed most persuasive in upholding a jury verdict for Lewis' survivors.<sup>78</sup>

Thus, where there is clear and unequivocal information regarding a person's suicidal tendencies — and that information must relate to a fairly recent attempt or an unequivocal threat — and no special precautions are taken, plaintiffs have a fair chance to escape summary judgment and prevail before a jury. Where the suicide-relevant information is even slightly ambiguous, the courts tend to treat a failure to alert or a misinterpretation as negligence, at best.



What I have termed the information "hand-off" problem certainly is not clearly resolved by the reported decisions. In *Elliott v. Chesire Co., N.H.*<sup>79</sup> for example, a young man with a long history of mental health problems, and most recently diagnosed as schizophrenic, assaulted his mother. Trooper Ranhoff responded to the parents' call for police and while he was told that the son had mental health related problems and was schizophrenic, the Trooper was not told of his two prior threats to commit suicide.<sup>80</sup>

The Trooper, however, did not inform the intake officer of what he knew of the arrestee's mental illness and the intake officer asked no questions on point. A few days later — after some very strange and suicide-suggestive behavior — the boy committed suicide while in custody.

With regard to the Trooper, the reviewing court finds that he did not know of the decedent's prior suicide threats nor did the boy's demeanor suggest suicide. The court simply ignores the mental health information and diagnosis of schizophrenia that was known to Ranhoff.<sup>81</sup>

*Elliott* seems to straddle the *Freedman* information interpretation category and the "hand-off" category. Clearly, not every schizophrenic is a custodial suicide risk and not every narrative of mental health problems suggests a suicide alert.

However, when an arresting officer has information of the sort possessed by Ranhoff and fails to hand it off to a booking officer, and where that officer asks no suicide screening questions, this surely is extremely poor practice. Whether it is deliberate indifference, of course, is another matter. Courts are inclined to label it negligence.

With the courts tending to reward ignorance, a pernicious practice may be developing. A psychologist on contract to a jail informed me that when asked to do a work-up on an arrestee or a detainee, he will never use the word suicide in a report. He may order further tests, seek to obtain medication, or even prescribe a watch but it will not be called a suicide watch.

He believes that by using the word suicide he may be exposing himself and his colleagues to an easily avoided liability. Is he correct? In *Dobson v. Magnusson*<sup>82</sup> an escapee was returned to prison and a sergeant placed the prisoner on a 15 minute suicide watch. A psychologist then examined Dobson and found no indication of an intent to die although "he might engage in injurious behavior."<sup>83</sup> He continued the 15 minute watch as a precaution.

The requisite check-ups were not made and in that interim a distraught Dobson committed suicide. The court states, "We agree with the district court, however, that it (missing two checks) could not be thought so faulty as to indicate indifference, deliberate or otherwise. If this watch had been. . . a suicide watch, we might feel differently. . . ."<sup>84</sup>

Interpreting information, sharing information, and whether or not a diagnosis or precaution uses the term suicide are significant aspects in the application of the deliberate

indifference standard. There are two other aspects to the information issue that need further refinement and exploration.

The first relates to the question of whether, and if so when, custodians have a duty to pursue suicide-relevant information. The second, relates to the issues of constructive and imputed knowledge. These issues are also part of the "knew or *should have known*" aspect of deliberate indifference.

It is now well established in the federal circuits that a detainee's right to medical care does not require that every detainee be screened for suicidal tendencies. Earlier I critiqued this rule and suggested that it was too encompassing and was flawed in being based wholly on a medical model of suicide.<sup>85</sup> Here, I do not refer to the development of suicide-relevant information — as in screening or diagnosis — but to obtaining and using existing information.

*Hinkfuss v. Shawano Co., Wisc.*<sup>86</sup> is a good example. The decedent was arrested on a charge related to domestic violence, his 25th arrest since 1975. Lanczyk complained about needing medication for his cancer but none was obtained prior to his committing suicide in his cell by hanging.

Lanczyk, obviously known to local authorities, had attempted suicide at this jail before. Plaintiffs argued that if the jailers had consulted and understood the master jail file, as local procedure required, the prior attempt would have been noted and basic preventive procedures employed.<sup>87</sup>

The court holds that if this is true, the most it establishes is negligence. Plaintiffs cast this part of their liability theory in terms of a failure to train on consulting and utilizing such records. As noted earlier, the *City of Canton v. Harris*<sup>88</sup> test on failure to train is very narrow and the court finds that there is no showing of a violation of an existing statute or rule and no showing of a custom or policy establishing deliberate indifference to the training needs of jail personnel.<sup>89</sup>

Does this position place a premium on ignorance? Again, it would seem so. Whether the liability theory is cast in terms of training or the duty to provide a non-life threatening environment, the mental element of deliberate indifference must be shown. Booking officers at a jail or lockup are the gatekeepers for the custodial system. They must regularly process persons who have a variety of needs and problems, including those who are suicidal. Suicide and suicide attempts are such a regular feature of short-term custodial facilities that one may reasonably argue that it is reckless — a disregard of an unjustifiable risk of the most serious type of human tragedy<sup>90</sup> — to not consult existing jail files or to possibly not understand the significance of an entry showing a prior suicide attempt.<sup>91</sup>

Every one of the standards promulgated by national organizations calls for such policy and procedure as well as some form of screening and training.<sup>92</sup> Obviously, proposed standards are not the equivalent of law or necessarily a statement of minimum obligation. In this situation, however, the breadth of agreement and the relative ease with which tragic consequences are avoidable, is a powerful argument for judicial acceptance of this aspect of the standards.

I turn now to the issue of constructive and imputed knowledge. By constructive knowledge, I refer specifically to the "should have known" aspect of deliberate indifference. I would argue, for example, that if easily accessed records show prior attempts at suicide or self-destructive behavior then a custodial agency should be held to the "should have known" standard. *Hinkfuss* is a good example of what I view as a good case for such constructive knowledge.

Where there is either constructive or actual knowledge of a high degree of risk for suicide the question then arises as to whether, and if so when, such knowledge should be imputed when it is not actually passed along. Imputing the knowledge of one government agency to another in a day of vast bureaucracies may be unreasonable.<sup>93</sup> On the other hand, imputing such knowledge within an agency that is divided as to function but where those functions regularly interact may well be workable.

For example, sheriff departments and police departments are engaged in such functionally-distinct activities as road and street patrol and the management of custodial facilities. When these officers exchange custody of a person, then what is, or should be, known that is relevant to suicide should be imputed from one to another.<sup>94</sup>

### Conclusion

There are several aspects of custodial suicide either not touched on here or dealt with only briefly: complex questions of immunity; post-suicide attempt duties<sup>95</sup> and evidence preservation; the significance of prior suicides at a given facility; jail design liability; and the number of cases dealing with the appropriateness of the response when there is a particular vulnerability to suicide.<sup>96</sup>

Space does not permit coverage of these items, especially the law dealing with constitutionally acceptable measures to prevent suicide. Suffice it to say that the courts are reasonably lenient on custodians and very demanding of plaintiffs. Courts will not require special detoxification facilities; will not find liability for failure to fully observe a suicide watch or to remove all implements capable of causing death; there is no liability for allowing a potential suicide to shower unobserved and with a sheet; or for failure to utilize a surveillance camera or even have custodial staff on for a shift. Each of these instances have been found to not constitute deliberate indifference.<sup>97</sup>

What has been explored here in some detail is when a custodian — particularly at a jail or lockup — has a duty to take appropriate prevention action. Without some knowledge of a high probability of a particular vulnerability to suicide, there will be no recovery and summary judgment is likely.

The distressing aspect of modern caselaw is the premium it appears to place on ignorance; a premium which is anti-therapeutic and life threatening. The cost of screening, training and an obligation to preserve record items is trivial in light of the potential benefits of saving lives and avoiding the trauma

undoubtedly experienced by the officials who experience a suicide.<sup>98</sup>

Development and refinement of the informational items analyzed here should be on the agenda for the courts and concerned policy makers. In addition, courts should think through their reflexive reliance on the medical model of suicide and the failure to provide medical or psychiatric care theory of liability.

Jails and lockups should be under a broader obligation to develop broad screening measure and to implement preventive programs. Prisons, on the other hand, with their longer periods of confinement are more likely candidates for requiring more careful diagnosis and to react with preventive measures as well as appropriate medical and psychiatric care.

### About the Author

*Fred Cohen is a Professor of Law and Criminal Justice at the State University of New York at Albany. He is also a graduate of Temple and Yale Law Schools, Editor-in-Chief of the Criminal Law Bulletin and Co-Editor of the Correctional Law Reporter. His most recent book is The Law of Deprivation of Liberty, published by Carolina Academic Press, 700 Kent Street, Durham, North Carolina 27712. Correspondence should be addressed to Fred Cohen, Professor of Law and Criminal Justice, School of Criminal Justice, State University of New York, 135 Western Avenue, Albany, New York 12222, (518) 442-5221.*

### Footnotes

- <sup>1</sup> This listing is representative and not intended to be exhaustive.
- <sup>2</sup> See W.D. O'Leary, *Custodial Suicide: Evolving Liability Considerations*, 60 *Psychiatric Quarterly* 31, 34-36 (1989) where he clearly describes the differences between a Civil Rights Action under 42 U.S.C. 1983 and a state court wrongful death action as a negligence action sounding in tort.
- <sup>3</sup> Even where the language of a duty to seek medical or psychiatric care is employed, the claim ultimately will be failure to obtain adequate care or a failure to obtain any care at all; i.e., a preventive obligation.
- <sup>4</sup> See *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1024-25 (3d Cir. 1991). [Known as *Colburn II*, distinguishing it from an earlier decision to remand, 838 F.2d 663 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).]
- <sup>5</sup> *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) is one of the earliest decisions to use this phrase which now is regularly and uncritically repeated by the federal courts. For a full discussion see F. Cohen, *Legal Issues and the Mentally Disordered Prisoner* 58-63 (NIC 1988). (Hereafter, Cohen, "Legal Issues.") Only "serious" medical or psychological needs evoke a constitutional duty of appropriate care.
- <sup>6</sup> See *Rellergert v. Cape Girardeau Co., Mo.*, 924 F.2d 794, 796 (8th Cir. 1991) on the issue of suicide as not conclusive proof of deliberate indifference.
- <sup>7</sup> See *Belcher v. Oliver*, 898 F.2d 32, 34-35 (4th Cir. 1990) citing also to five other circuits as supportive of this view.
- <sup>8</sup> See e.g., *Belcher v. Oliver*, 898 F.2d at 35.
- <sup>9</sup> Professor David Wexler has developed an approach to mental health law — of which our topic is a part — which he entitles *Therapeutic Jurisprudence*. Simply put, this jurisprudence looks at a legal decision as a social force that may produce therapeutic or anti-therapeutic results.

- For us, the question would be whether or not a premium on custodial ignorance is consistent with the need for early identification and a mental health/life preserving response. Clearly, a premium on ignorance is an anti-therapeutic legal rule. The preservation of life as a goal would be far better served by insisting at least on some gross screening followed by more intensive screening if a given number of "hits" occurs. "Hits" would include being drunk, young, male, agitated, "hesitation" marks, and so on. See D.B. Wexler and B.J. Winick, *Essays in Therapeutic Jurisprudence*, Ch. 2 (1991). See also *Freedman v. City of Allentown, PA*, 853 F.2d 1111, 1118-19 (3d Cir. 1988) (Judge Brotman concurring and dissenting on duty of a trained officer who sees certain scars to recognize them as "hesitation marks."
- 10 See *Bell v. Sligers*, 937 F.2d 1340 (8th Cir. 1991) reversing the district court judge who listened to a tape of the detainee threatening to commit suicide and characterized it as a voice of despair. The Court of Appeals, at 1344, describes this as a single, off-hand comment about shooting oneself where no weapon is available. This court, at 1343-44, also stressed that the brain-damaged, suicide attempt survivor had not threatened or attempted suicide before.
  - 11 *Edwards v. Gilbert*, 867 F.2d 1271, 1275 (11th Cir. 1989). The opinion suggests that there was only one reported decision suggesting that deliberate indifference could exist absent a prior threat or attempt at suicide: *Brewer v. Perm*, 132 Mich. App. 520, 349 N.W.2d 198 (1984). At least one subsequent decision, *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), is somewhat contrary to the *Edwards* pronouncement in that the decedent does not appear to have attempted or threatened suicide prior to hanging himself in a police lockup. The verdict for the plaintiff-mother is upheld, however, despite her failure to establish deliberate indifference due to the City's failure to properly pursue an objection. 947 F.2d at 1088, 749 F. Supp. 815 (W.D. Mich. 1990).
  - 13 *Fellert v. Cape Girardeau Co., Mo.*, 924 F.2d 794, 797 (8th Cir. 1991).
  - 14 See e.g., *Wilson v. Seiter*, 111 S.Ct. 2321 (1991).
  - 15 489 U.S. 189 (1989).
  - 16 In *Revere v. Mass. General Hospital*, 463 U.S. 239 (1983) the Court affirmed the duty of care owed to a fleeing felon who was shot and wounded by the police. Custody was created at the moment of disablement and the duty was to obtain life-reserving and/or pain reducing medical care.
  - 17 Of course, the "who" question is relevant for a host of other legal issues including criminal charges if the cause was an assault by another.
  - 18 913 F.2d 113 (4th Cir. 1990).
  - 19 913 F.2d at 199. See also *Simmons v. City of Philadelphia*, 942 F.2d 1042 (3d Cir. 1991) where decedent was said to be in protective custody.
  - 20 *Wayland v. City of Springdale, Arkansas*, 933 F.2d 668, 691 (8th Cir. 1991).
  - 21 *Gerstein v. Pugh*, 420 U.S. 103 (1975).
  - 22 *County of Riverside v. McLaughlin*, \_\_\_\_\_ U.S. \_\_\_\_\_, 111 S.Ct. 1661 (1991).
  - 23 In one sense, it would not matter why a detainee became agitated if the agitation was of a sufficient nature and degree to trigger a suicide alarm. Why the decedent became agitated might well influence a jury in the direction of establishing liability.
  - 24 324 Md. 376, 597 A.2d 447 (1991). This is based exclusively on state law and while it is unique and interesting, it is only of parenthetical interest to the thrust of this article.
  - 25 See Swenson, Legal Liability for a Patient's Suicide, 14 *Journal of Psychiatry and Law* 409 (1986). The author points out that failure to care for obvious suicide risks is at the top of the list of reasons for malpractice suits against psychiatrists.
  - 26 See *Bell v. Wolfish*, 441 U.S. 520 (1979). What I mean by "in our context" is the rights of those in confinement. Cruel and Unusual Punishment doctrine has been applied, e.g., to the discipline of school children, the death penalty, proportionality in sentencing, whether a person may be punished at all, and so on.
  - 27 Some courts will be explicit and state that denial of required medical or psychiatric care, or the failure to prevent suicide, may amount to punishment. See *Kocienski v. City of Bayonne*, 757 F. Supp. 457, 462 (D.N.J. 1991).
  - 28 *Belcher v. Oliver*, 898 F.2d 32, 34 (4th Cir. 1990).
  - 29 A person who has been convicted and is in jail awaiting sentence, is not a pretrial detainee nor is he held under a criminal sentence. However, with Due Process and Eighth Amendment claims analyzed in the same fashion it may not be vital to clarify this status. See *Edwards v. Gilbert*, 867 F.2d 1271, 1274 (11th Cir. 1989) on convicted but unsentenced juvenile's suicide in an adult jail.
  - 30 Whether the existence of a warrant might be important is unclear.
  - 31 See *Jones v. DuPage*, 700 F.Supp. 965 (N.D.Ill. 1988). See also *Graham v. Connor*, 490 U.S. 386 (1989) for the Court's analysis of use of force issues and the Fourth Amendment. In *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Canon*, 474 U.S. 344 (1986), the Court rejected negligence as a basis for damages under a Section 1983 (Civil Rights Action) claim.
  - 32 Should the Fourth Amendment be used as a basis for liability then, as discussed above in the text, a reasonableness test might apply.
  - 33 111 S.Ct. 2321 (1991).
  - 34 429 U.S. 97 (1976).
  - 35 489 U.S. 378 (1989).
  - 36 There are cases dealing with a claim of inadequate aid after a suicide has been attempted. While such a claim may argue that life could have been saved, it is not focused on prevention of the suicidal act. See e.g., *Estate of Cartwright v. City of Concord, California*, 856 F.2d 1437 (9th Cir. 1988) involving also an unsuccessful claim of inadequate post-hanging investigation and preservation of evidence.
  - 37 *Wyckoff v. Mutual Life Insurance Co.*, 173 Or. 592, 595, 147 P.2d 227, 229 (1944). At common law, suicides were punishable by ignominious burial and forfeiture of chattels. A widely held belief that mental illness "caused" suicide probably accounts for its gradual legal destigmatization. See Bloch, The Role of Law in Suicide Prevention: Beyond Civil Commitment — A Bystander's Duty to Report Suicide Threats, 39 *Stanford Law Review*. 929 (1989). See also Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 *California Law Review* 54, 59-65 (1982) arguing generally that the assertion that the crazy behavior of mentally disordered persons is compelled in contrast to the freely chosen behavior of normal persons is a belief based on commonsense assumptions and not scientific evidence.
  - 38 See S.J. Brakel, J. Parry, and B.A. Weiner, *The Mentally Disabled and the Law*, Ch. 2 (3d edition, 1985, A.B.F.). This is the single best reference book available on the mentally ill and the law.
  - 39 D. Wexler, *Mental Health Law: Major Issues* 45-47 (1981).
  - 40 See F. Cohen, *The Law of Deprivation of Liberty* 107-22 (1991) for various perspectives on treatment.
  - 41 Rubenstein, Moses and Lidz, On Attempted Suicide, 79 *A.M.A. Archives Neurology and Psychiatry* 103, 111 (1958) conclude that attempted suicide is not an effort to die but rather an effort to improve one's life. Anecdotal evidence I have acquired suggests that some, perhaps many, threats or attempts at custodial suicide are either pleas for help or a manipulative effort to obtain a mental health placement — not otherwise available. When asked for legal advice on point I always urge that errors be made on the side of taking the threat or aborted effort seriously.
  - 42 See page 2, *supra*.
  - 43 749 F. Supp. 815 (W.D. Mich. 1990).
  - 44 749 F. Supp. at 818.
  - 45 749 F. Supp. at 819.
  - 46 Indeed, it is not a case where the court discusses the authenticity of the threat.
  - 47 See F. Cohen, Custodial Suicides: Common Source of Litigation — But Cases can be Defended, 1 *Correctional Law Reporter* 50 (1989).
  - 48 749 F. Supp. at 820.
  - 49 898 F.2d 32, 34-35 (4th Cir. 1990).
  - 50 See *Wilkes v. Borough of Clayton*, 696 F. Supp. 144 (D.N.J. 1988) noted at 1 *Correctional Law Reporter* 14 (1989) where decisions on automatic strip searches are noted.
  - 51 See F. Cohen, *The Law of Deprivation of Liberty* 325-38 (1991) for a collection of material questioning the ability of "experts" to predict dangerousness. See *Foucha v. Louisiana*, 51 CRL 2081 (May 1992) on the issue of confining the non-mentally ill but dangerous offender.
  - 52 I mention "health" because there are cases where a suicide attempt is foiled but not before serious and permanent brain damage occurs. See e.g., *Fitch v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992) — no right to be cut down immediately when discovered hanging with delay resulting in physical and mental disabilities.
  - 53 See F. Cohen, Custodial Suicides: Common Source of Litigation — But Cases can be Defended, 1 *Correctional Law Reporter* 50 (1989).
  - 54 853 F.2d 1111 (3d Cir. 1988).
  - 55 853 F.2d at 1116.
  - 56 853 F.2d at 1119.
  - 57 According to the most recent national statistics, there were 401 suicides in jails and police lockups during 1986. See L. Hayes and J. Rowan, *National Study of Jail Suicides: Seven Years Later* (NCIA, 1988).
  - 58 489 U.S. 378 (1989).
  - 59 937 F.2d 1340 (8th Cir. 1990).
  - 60 *Bell v. County of Washington, Iowa*, 741 F. Supp. 1354, 1359 (S.D. Iowa, 1990).
  - 61 937 F.2d at 1344.
  - 62 937 F.2d at 1344.
  - 63 *Christian By and Through Jett v. Stanczak*, 769 F. Supp. 317, 319 (E.D.Mo. 1991). At the time of the threat, decedent did have a weapon.
  - 64 769 F. Supp. at 322.
  - 65 769 F. Supp. at 322.

- 66 757 F. Supp. 457 (D.N.J. 1991).  
 67 757 F. Supp. at 460.  
 68 757 F. Supp. at 464. This decision has other aspects as well: violation of police rules in failing to remove party hose.  
 69 853 F.2d at 1117.  
 70 853 F.2d at 1117.  
 71 913 F.2d 113 (4th Cir. 1990).  
 72 913 F.2d at 117.  
 73 913 F.2d at 117.  
 74 791 F.2d 1182 (5th Cir. 1986).  
 75 We should also note that the amended complaint in *Partridge* also claimed that suicide is a known risk in jails; there was no special training about suicide, no written policy or procedural manual, police personnel had no protocol for access to jail clinical data; inadequate staffing, no television monitoring; no regular cell-checking and no sharing of relevant information. These details represent a basic checklist of what a plaintiff's attorney is going to pursue and, therefore, represent questions to which a custodial facility better have acceptable answers.  
 76 894 F.2d 142 (5th Cir. 1990).  
 77 894 F.2d at 144.  
 78 The jury awarded no compensatory damages and only \$6,279.00 punitive damages, the cost of the funeral. The Court of Appeals remanded for further findings on damages. 894 F.2d at 150.  
 79 940 F.2d 7 (1st Cir. 1991).  
 80 940 F.2d at 9.  
 81 940 F.2d at 12. The case was remanded on possible liability for jail officials based on post-confinement behavior of the decedent.  
 82 923 F.2d 229 (1st Cir. 1991).  
 83 923 F.2d at 230.  
 84 923 F.2d at 231. Judgment for all defendants was affirmed. The decision is not clear concerning whether there were significant differences in a watch or a watch called suicide.  
 85 See note 50 *supra*, and accompanying text.  
 86 772 F. Supp. 1104 (E.D. Wisc. 1991).  
 87 772 F. Supp. at 1111.  
 88 See note 59, *supra* and accompanying text.  
 89 772 F. Supp. at 1112. Summary judgment was granted.  
 90 See A.L.I., Model Penal Code, Section 2.20(2)(c).  
 91 Whether this duty is put in terms of training or failure to provide a non-life threatening environment is not the significant question. There should be policy and rules governing such matters in every jurisdiction. Of course, without some concomitant duty to keep records, the duty to consult is abortive. See 2 *Jail Suicide Update* 4-5 (1989) for a survey of jurisdictions requiring such standards.  
 92 See 2 *Jail Suicide Update* 2-3 (1989) for selected excerpts from five sets of such standards. The Commission on Accreditation for Law Enforcement Agencies seems to be the least demanding.  
 93 See *U.S. Small Business Administration v. Bridges*, 894 F.2d 108 (5th Cir. 1990).  
 94 There are jurisdictional problems involved in, e.g., arguing that jail official's knowledge of suicide attempts will be imputed to a receiving corrections department or a particular prison. While I believe that such information must be recorded and shared, I am not yet ready to argue for imputed knowledge and liability on the receiving agency.  
 95 For a recent example of liability based upon allowing a jail suicide victim to remain hanging for more than eight minutes, see *Hellin v. Stewart County*, 958 F.2d 709 (6th Cir. 1992). Jail and prison officials that strictly adhere to a rule that forbids an officer from entering a cell while alone for any reason should reconsider that policy in light of *Hellin*.  
 96 One of the better summaries of liability requirements is in *Colburn (II) v. Upper Darby Twp.*, 946 F.2d 1017, 1024-25 (3d Cir. 1991).  
 97 See e.g., *Rellergert v. Cape Girardeau, Mo.*, 924 F.2d 794 (8th Cir. 1991); *Popham v. City of Talladega*, 908 F.2d 1561 (11th Cir. 1990). Some courts now speak of deliberate caution as being inconsistent with deliberate indifference. See *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1071 n. 28 (3d Cir. 1991).  
 98 See *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1074 (3d Cir. 1991) for a cost-benefit analysis along these lines. *Simmons* is a 56-page decision, with three opinions, including one dissent. Ultimately, the plaintiffs prevail but primarily due to the ineptitude of counsel for the City. What first appeared to be a major decision is simply a lengthy one.

## JAIL SUICIDE UPDATE

This technical update, published quarterly, is part of the National Center on Institutions and Alternatives (NCIA)'s continuing effort to keep state and local officials, individual correctional staff and interested others aware of developments in the field of jail suicide prevention. Please contact us if you are not on our mailing list, or desire additional copies of this publication. As NCIA also acts as a clearinghouse for jail suicide prevention information, readers are encouraged to forward pertinent materials for inclusion into future issues.

This project is supported by grant number 92J01GH03 from the National Institute of Corrections (NIC), U.S. Department of Justice. Points of view or opinions stated in this document are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Lindsay M. Hayes, Project Director  
 National Center on Institutions  
 and Alternatives  
 40 Lantern Lane  
 Mansfield, Massachusetts 02048  
 (508) 337-8806 • (508) 337-3083 (FAX)

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Lindsay M. Hayes, Project Director  
 National Center on Institutions  
 and Alternatives  
 40 Lantern Lane  
 Mansfield, Massachusetts 02048  
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