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When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealting With Suicidal Suspects

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ARTICLE

WHEN INDIVIDUALS SEEK DEATH AT THE HANDS OF THE POLICE: THE LEGAL AND POLICY IMPLICATIONS OF SUICIDE BY COP AND WHY POLICE OFFICERS SHOULD USE NONLETHAL FORCE IN DEALING WITH SUICIDAL SUSPECTS

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INTRODUCTION

Occasionally, Joel Schumacher's 1993 film *Falling Down*, starring Michael Douglas and Robert Duvall, serves as a topic of discussion in academic papers.[1] In *Falling Down*, Douglas plays Bill Foster, a psychotic engineer fired from his position at a missile defense company. A traffic jam on a scorching day in Los Angeles serves as the triggering event in the storyline. Ostracized from work and delirious from heat,

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[1] *See* Rebecca Johnson & Ruth Buchanan, *Getting the Insider's Story Out: What Popular Film Can Tell Us About Legal Method's Dirty Secrets*, 20 WINDSOR Y.B. ACCESS TO JUST. 87, 100-103 (2001) (discussing the film *Falling Down* as an example of the perceptual powers of cinema); *see also* Christine Alice Corcos, *"Who Ya Gonna C(s)ite?" Ghostbusters and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231, 271 n.180 (1997) (discussing *Falling Down* as an example of a movie with a frustrated protagonist who takes the law into his own hands).

Foster leaves his car in the middle of the freeway and journeys by foot to Venice Beach, where he hopes to reunite with his estranged wife and daughter. En route, he engages in violent confrontations with several individuals, including a Korean storeowner, three Mexican gang members, and a militant skinhead.

Duvall's character, a homicide detective, tracks Foster down and corners him at a pier in Venice. Even though he discarded his gun earlier that day, Foster suggests that they have a shoot out. He reaches into his pocket and pretends to retrieve a weapon. The detective instinctively shoots him. Before he falls over the pier, Foster pulls out a squirt gun he had obtained earlier from his daughter's room. The audience realizes that Foster wanted to die. By goading the officer into killing him, Foster enabled his wife to collect the proceeds of his life insurance policy and raise their daughter securely.

Foster's death constitutes a recognized category of police killings: suicide by cop.[2] The term "suicide by cop" (alternatively, "police-assisted suicide"[3]) is controversial and ill-defined. Academics have explored the psychological and narratological implications of suicide by cop to some extent. We know that suicidal individuals sometimes enlist the help of others in killing themselves as a way to overcome the moral prohibition against committing suicide.[4] And, as exemplified in *Falling Down*, directors and writers sometimes use suicide by cop as a narrative device in portraying the demise of a protagonist who is either a sympathetic vigilante or an antihero.[5] However, our legal literature has not thoroughly examined how classifying a police killing as suicide by cop might shape legal complaints against law enforcement agencies.[6]

The U.S. Supreme Court has held that police officers can use deadly force against a suspect only if he or she employs deadly force against an officer or a bystander.[7] The standard to determine whether an officer's

[2] Alan Feuer, *Drawing a Bead on a Baffling Endgame: Suicide by Cop*, N.Y. TIMES, June 21, 1998, at 4.

[3] *See* Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 556 (2000) (stating that the term "suicide by cop" is interchangeable with "police assisted suicide").

[4] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9 (2004).

[5] For example, in S.E. Hinton's coming-of-age novel about 1960s greasers, *The Outsiders*, one of the main characters of the book commits suicide by cop. S.E. HINTON, THE OUTSIDERS (1967).

[6] The exception is Flynn and Homant's work. *See* Timothy P. Flynn & Robert J. Homant, "*Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555 (2000).

[7] Tennessee v. Garner, 471 U.S. 1, 11-12 (1985).

use of force is excessive is one of "objective reasonableness": whether it was objectively reasonable under the circumstances for the officer to believe that the suspect meant to kill or seriously harm others.[8] Evidence that the suspect threatened to harm the officer or civilians is helpful in making this determination.[9] Sometimes the police realize after the shooting that despite his or her actions, the suspect did not intend to harm anyone.[10] The suspect may have threatened to shoot a bystander to facilitate the commission of a robbery or to escape the scene of a nonviolent crime. Yet the suspect's intent does not factor into a determination of whether the officer's use of lethal force was lawful.[11] As long as it was objectively reasonable for the officer to conclude—precisely at the moment that he or she fired the shot—that the suspect was about to use lethal force, the officer's use of deadly force is excusable.[12]

This Article serves two purposes: 1) to determine whether suicide by cop can form the basis for a lawsuit under 42 U.S.C. § 1983, part of the 1871 Civil Rights Act[13]— the main federal statute through which private litigants can bring civil rights suits against police departments—and 2) to analyze the policy implications of recognizing suicide by cop as a unique category of police killings. This Article will also determine whether a suicide-by-cop killing inclines courts to apply something other than the "objectively reasonable" standard in adjudicating a § 1983 claim.[14] Furthermore, it will try to determine whether evidence of the

[8] Graham v. Connor, 490 U.S. 386, 395-98 (1989).

[9] However, as this Article will further explore, the suspect's intent to commit suicide does not necessarily negate the reasonableness of the officer's actions, given the difficult decisions officers must make when confronting potentially dangerous suspects. *See Graham*, 490 U.S. at 397-98 (stating that the calculus of reasonableness must "embody allowance for the fact that officers are forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

[10] *See* Wood v. City of Lakeland, 203 F.3d 1288, 1290 (11th Cir. 2000), *abrogated on other grounds in* Hope v. Pelzer, 536 U.S. 730 (2002). In that case, a suicidal suspect cut himself with a knife before the police arrived, indicating that he probably meant only to harm himself. Also, evidence in that case suggested that he did not intentionally provoke the officers. Rather, he inadvertently fell off the dresser drawer, whereupon the officers thought he was about to attack them and so shot him to death.

[11] *See Graham*, 490 U.S. at 396 (holding that the "reasonableness" of an officer's actions must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight).

[12] *See Garner*, 471 U.S. at 11-12 (holding that an officer must reasonably believe that a suspect poses a deadly threat before he can deploy lethal force against the suspect).

[13] 42 U.S.C.A. § 1983 (Westlaw 2011).

[14] *See Graham*, 490 U.S. at 388 (holding that the appropriate standard for deciding § 1983 suits is whether an objectively reasonable officer would have used that degree of force under the circumstances).

suspect's suicidal intentions can either improve or mitigate the plaintiff's chances of prevailing in court.[15]

Additionally, this Article makes two principal arguments. First, because suicide by cop can often result in litigation, police departments should train officers to better ascertain when a suspect may be attempting suicide by cop.[16] While many courts bar the admission of "pre-seizure" evidence (evidence that came into being before the suspect's interaction with officers, like a suicide note[17]) in § 1983 suits, some courts have shown a willingness to admit evidence that the suspect was attempting suicide.[18] Therefore, police departments face a tangible threat of litigation stemming from suicide-by-cop incidents.[19] At least one federal appellate case, *Palmquist v. Selvik*, suggests that evidence of suicide by cop may be pertinent in determining whether police tactics are appropriate under § 1983.[20]

Second, because suicide by cop poses a significant sociological problem,[21] we should encourage police officers to employ nonlethal force in defusing an attempt at suicide by cop where the risk of harm to others is minimal.[22] Victims of suicide by cop often share certain traits: they are usually poor, mentally ill, and addicted to alcohol or narcotics.[23] Law enforcement agencies must educate officers of the underlying circumstances that can contribute to suicide by cop.[24] Suicide-by-cop

[15] In *Garner*, the Supreme Court held that the trier of fact must determine whether an officer's use of force was objectively reasonable according to the totality of circumstances at the time of the shooting. *Garner*, 471 U.S. at 9-10. The question this Article confronts is whether a suspect's suicidal motives or actions constitute a circumstance that the trier of fact may consider.

[16] Many police departments provide some general training on suicide intervention. *See* Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 574 (2000).

[17] *See, e.g.*, Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) (holding that "pre-seizure conduct is not subject to Fourth Amendment scrutiny").

[18] *See, e.g.*, Palmquist v. Selvik, 111 F.3d 1332, 1342 (7th Cir. 1997) (holding that evidence that a suspect intends to commit suicide by police is "directly relevant to his life expectancy" and therefore likely admissible). This Article will closely examine the *Palmquist* opinion in later sections.

[19] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 558 (2000).

[20] *Palmquist*, 111 F.3d at 1340-42.

[21] *See* Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller III, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 19-20 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf (characterizing suicide-by-cop incidents as "painful and damaging experiences for surviving families, the communities, and all law enforcement professionals").

[22] *Id.* at 11.

[23] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 87 (2004).

[24] Flynn and Homant have pointed out that until fairly recently, very few police departments

incidents may worsen police-community relations because residents might think that the police shooting was unnecessary, unjustified, or even racially motivated.[25] Therefore, police officers should minimize the occurrences of suicide by cop by using deadly force only when absolutely necessary.

I. THE HISTORY AND PREVALENCE OF SUICIDE BY COP

A. THE ORIGINS OF THE TERM "SUICIDE BY COP"

Forensic medical journals coined the term "suicide by cop."[26] Prior to the 1990s, the term was not widely known, but today law enforcement agencies and media commentators frequently use it.[27] However, there is no commonly accepted definition of suicide by cop, which considerably complicates its consideration in § 1983 lawsuits.[28]

Some consider the classification a misnomer.[29] One commentator suggests that suicide by cop is "far more often a post hoc justification of sloppy police work than a valid explanation of why and how someone died."[30] Another characterizes it as a "catchy descriptor for a far larger number of cases in which officers put themselves unnecessarily into harm's way" and must "shoot their way out."[31] From this perspective, the classification tends to insulate police officers from blame even when their actions were unreasonable.[32] The word "suicide" suggests that the

dealt specifically with "suicide-by-police" scenarios. Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 574 (2000).

[25] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 99 (2004).

[26] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 556 (2000).

[27] Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 10 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf.

[28] *Id.*

[29] *See* James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. AM. ACAD. PSYCHIATRY L. 345, 346 (2000) (arguing that suicide by cop is an inadequate explanation of why and how someone dies).

[30] *See id.*

[31] Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 297 n.173 (2003) (internal citation omitted).

[32] *See* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 298 (2003) (suggesting that because plaintiffs in police

suspect was to blame for his or her own death; the officer was merely an unwitting instrument in effectuating the suspect's suicidal desires.[33] According to proponents of this view, suicide by cop is nothing more than an attempt to shift blame "from police to victim."[34]

Others have defined suicide by cop as a situation in which "a suicidal, distraught and often unbalanced individual comes into contact with law enforcement officers," and through life-threatening actions "causes the police to retaliate in self-defense or defense of others by killing the person."[35] The best example emerges when a suspect deliberately points an unloaded gun at a police officer in order to provoke a violent response.[36] The suspect's intent becomes probative; if the offender intends to kill the officer or threatens him or her with deadly force in order to escape, labeling the incident as suicide by cop proves misleading.[37] It erroneously portrays a potential murderer as a victim of police brutality.

B. THE PREVALENCE OF SUICIDE BY COP

Studies that explore the frequency of suicide by cop emerged in the early 1990s,[38] after a California newspaper acknowledged that suicide by cop was a growing problem among lower-income males in San Diego.[39] Unfortunately, complete, nationwide statistics on suicide by cop are unavailable.[40] The Uniform Crime Reporting program indicates that between 1991 and 2000, sixty-two offenders who feloniously killed a

misconduct cases often challenge the way in which officers were trained, police training on suicidal suspects may be relevant to a plaintiff's claim).

[33] Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1103 n.134 (2001).

[34] *Id*.

[35] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 555 (2000).

[36] Some might characterize such a situation as suicide by cop even if the gun was loaded. *See, e.g.*, James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 137 (2000). What ultimately matters with regard to the classification is the suspect's intent.

[37] James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 137 (2000).

[38] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 556 (2000).

[39] Clark Brooks, *Suicide by Cop; Officers Sometimes Find Themselves Pawns in an Individual's Death Wish*, San Diego Union-Tribune, Aug. 26, 1991, at C1.

[40] Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 9 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf.

law enforcement officer committed suicide during the same incident.[41] The study fails, however, to identify the number of suspects who intentionally goaded officers into shooting them during that time period.[42]

In compiling statistics, law enforcement and social service agencies usually consider incidents in which suspects genuinely attempted to harm or kill police officers.[43] Neglecting to consider these situations might be unfair to police officers, as the use of lethal force against a suspect who is attempting suicide is justified when the suspect poses a concomitant danger to either the officer or public safety.[44] Moreover, a suspect who intends to harm officers or others can still possess the requisite intent to commit suicide by cop.

Merely identifying the number of individuals who commit suicide by cop does not adequately address the problem. Rather, studies should identify the characteristics that perpetrators share, so that police officers can more readily determine whether a suspect exhibits those characteristics. A study conducted by the Los Angeles Sheriff's Department does precisely that. The study indicates that roughly 10% of officer-involved shootings end in suicide by cop.[45] According to this study, 65% of offenders who commit suicide by cop convey their suicidal intent to others,[46] 43% exhibit signs of suicidal behavior and 22% leave suicide notes.[47] An alarming 59% ask the police to kill them and 15% continue to point a gun at the police after being warned that they would be shot.[48] Finally, the study found that 16% of those who commit suicide by cop were not armed with a gun, but were trying to harm the officer with a knife.[49]

For the most part, studies about suicide by cop are scarce and

[41] *Id*. at 10; *see also* Alan Feuer, *Drawing a Bead on a Baffling Endgame: Suicide by Cop*, N.Y. TIMES, June 21, 1998, at 4.

[42] Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 10 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf.

[43] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 556 (2000).

[44] *Id*. at 570 n.116.

[45] Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 10 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf. The study was based on suicide-by-cop incidents that occurred during a ten-year period, from 1987 to 1997.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *Id*.

inadequate.[50] The foregoing studies are limited because they do not indicate whether a given suicidal suspect threatened officers with a nonlethal instrument, nor do they indicate whether the officers were aware that the suspect was suicidal. Without more comprehensive data on suicide by cop, law enforcement agencies may not be able to assess the ways in which suicide-by-cop incidents strain relations between police departments and members of the communities they serve.[51]

II. THE RELATIONSHIP BETWEEN HOMICIDE AND SUICIDE: ASSESSING THE SOCIOECONOMIC AND PSYCHOLOGICAL IMPLICATIONS OF SUICIDE BY COP

A. THE LINK BETWEEN HOMICIDE AND SUICIDE

A relationship exists between self-destructive and homicidal impulses.[52] For instance, Eric Harris and Dylan Klebold, the teenage perpetrators of the Columbine Massacre, killed themselves shortly after murdering 18 classmates in their high school cafeteria on April 20, 1999.[53] Kip Kinkel, a 15-year-old who went on a shooting spree in Springfield, Oregon, screamed "Kill me! Kill me!" after being wrestled to the ground by onlookers.[54] Often, acts of self-destruction and the destruction of others share similar psychological roots: the sense that life is intolerable and that death is the only true escape.[55] Consequently, homicide sometimes functions as a masked suicide attempt, especially when the suspect is certain his or her actions will trigger a lethal police response.[56] A suicidal suspect who threatens others with violence may rather die than face incarceration.[57] Thus, the suspect will devise a situation in which officers have little choice but to shoot him or her.[58]

[50] *Id*. at 74.

[51] *Id*.

[52] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 13 (2004).

[53] James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 131 (2000).

[54] *Id*. at 137.

[55] *Id*.

[56] *Id*. (stating that "in some cases, the act of killing others is intended as a suicide attempt").

[57] *Id*.

[58] *Id*. (suggesting that the suspect may devise such a situation by "taking hostages or pointing a loaded gun at a police officer").

B. FACTORS THAT TRIGGER SUICIDE BY COP

The factors that lead to suicide-by-cop are similar to the factors behind other forms of suicide: poverty, unemployment, drug addiction, depression, mental illness, and a history of familial dissension.[59] For example, in one case a suicidal drug addict assailed a police officer because he was dissatisfied with his job as a mechanic.[60] In another case, a suspect who threatened police officers with physical violence kept exclaiming that his life "isn't worth anything" and insisted that the officers shoot him.[61] Multiple factors like economic hardship coupled with substance abuse can drive an individual to commit violent crimes.[62] A single factor by itself is less likely to trigger violence.[63] For instance, one study revealed that the odds of a male teenager acting violently doubled if he abused alcohol or drugs.[64] The odds tripled if the teenager also had a prior arrest record.[65]

Mental instability can also trigger confrontations with officers.[66] In *Wallace v. Davies*, a suspect became suicidal after unsuccessfully trying to contact his mental health counselor.[67] The police promptly arrived at the suspect's apartment and found the suspect in possession of a gun, planning to shoot himself.[68] An officer, upon seeing the gun, fired once at the suspect, fatally wounding him.[69]

A similar case, *Hainze v. Richards*, demonstrates the difficulty that police officers face when subduing suicidal suspects who exhibit signs of mental illness, like delusions and auditory hallucinations.[70] In *Hainze*, the police responded to a call from a woman to transport her suicidal nephew to a hospital for mental health treatment.[71] The nephew had a

[59] *Id*. at 137-38.

[60] Palmquist v. Selvik, 111 F.3d 1332, 1335-36 (7th Cir. 1997).

[61] Plakas v. Drinski, 19 F.3d 1143, 1146 (7th Cir. 1994).

[62] James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 138 (2000).

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *See* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 262-63 (2003) (stating that nationwide, police departments "estimate that an average of approximately seven percent of police calls involve mentally ill people").

[67] Wallace v. Estate of Davies by Davies, 676 N.E.2d 422, 424 (Ind. Ct. App. 1997).

[68] *Id*. at 424-25.

[69] *Id*. at 424.

[70] Hainze v. Richards, 207 F.3d 795, 797-98 (5th Cir. 2000).

[71] *Id*. at 798.

mental illness and was under the influence of alcohol and antidepressants.[72] The police had been notified he was contemplating suicide by cop.[73] When officers arrived on the scene he walked toward the officers with a knife.[74] After he refused an order to stop, the officers shot him.[75] The suspect survived, but the court addressed the issue of whether anything short of lethal force might have disabled the suspect without compounding the risk of harm to the officers.[76] The Fifth Circuit exonerated the officers after commenting on the danger posed to public safety by the knife-wielding, intoxicated suspect.[77]

C. BETTER UNDERSTANDING WHY INDIVIDUALS COMMIT SUICIDE BY COP AND WHY THE POLICE SHOULD USE NONLETHAL FORCE IN THE FIRST PLACE

In order to enable officers to resolve suicide-by-cop incidents through nonviolent methods, police departments must provide more adequate training concerning the traits shared by suicide-by-cop victims. The cases and limited studies we have reflect a general trend: the majority of victims of suicide by cop are young and economically disadvantaged males, often wrestling with psychosis or substance abuse.[78] However, unlike other suicidal individuals (e.g., the Columbine shooters), they require assistance in accomplishing their own deaths. Someone else has to pull the trigger.

Some commentators argue that distinguishing the homicidal from the suicidal does not advance a particular law enforcement aim.[79] The systemic problems that trigger both suicide and homicide among urban youth are almost identical in nature.[80] Like persons who are suicidal, homicidal individuals are predominantly disadvantaged and have a propensity toward substance abuse.[81] From this perspective, suicide by cop is not really a "police problem" in that it does not substantially differ from other forms of suicide. Accordingly, the term "suicide by cop" is

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] *Id*. at 798-99.

[76] *Id*. at 798.

[77] *Id*. at 800-02

[78] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 87 (2004).

[79] *Id*.

[80] *Id*. at 50.

[81] *Id*. at 49-50.

inconsequential. It should not have any bearing on police work.[82] Instead, these commentators argue that the responsibility should fall on social service workers and mental health professionals to facilitate early intervention before children are old enough to commit violent crimes.

The advocates of this view raise significant points.[83] A suspect who genuinely desires to hurt civilians or police officers is not entitled to preferential treatment from law enforcement agents simply because he or she is suicidal.[84] However, victims of suicide by cop often do not pose a threat of violence to others. They merely wish to end their lives. No community can completely eradicate the factors that lead to suicide, such as depression, poverty, and substance abuse.[85] Therefore, the burden falls on law enforcement agencies to train officers to exercise greater restraint when dealing with individuals who appear to be attempting suicide by cop. Otherwise, police officers will continue to serve as instruments through which desperate individuals can effectuate their suicidal desires.

III. SUICIDE BY COP IN § 1983 LAWSUITS

A suspect's recourse against a police officer who uses excessive force is a § 1983 lawsuit.[86] Through a § 1983 lawsuit, the plaintiff—either the suspect, or if the suspect is killed, his or her estate—can allege that the officer's use of excessive force constituted an unreasonable "seizure" or arrest that violated his or her Fourth Amendment rights.[87] The standard for determining whether the officer's use of force was excessive is the "objective reasonableness" test, articulated by the U.S. Supreme Court in *Graham v. Connor*.[88] In order to prevail under that

[82] For example, at least one court has held that failing "merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to deliberate indifference." Pena v. Leombruni, 200 F.3d 1031, 1033 (7th Cir. 1999). *Pena*'s holding suggests that even if a suspect is suicidal or deranged, the police cannot be deemed negligent in their handling of the suspect if he or she posed a danger to others.

[83] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 577 (2000) (stating that "holding police responsible for having someone aim a shotgun at them because they checked a doorknob . . . would at best be likely to have a chilling effect on policy intervention into any situation").

[84] *Id*.

[85] *See* James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 142 (2000) (discussing the socioeconomic issues plaguing urban youth).

[86] 42 U.S.C.A. § 1983 (Westlaw 2011).

[87] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985), (holding that apprehension "by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment").

[88] Graham v. Connor, 490 U.S. 386, 395-398 (1989).

test, the plaintiff must show that the use of deadly force was not reasonably necessary from the perspective of the objective police officer under the apparent circumstances.[89]

Tennessee v. Garner governs the propriety of a police officer's use of deadly force.[90] The use of deadly force is justified only if the suspect poses an immediate threat of serious bodily harm to the officer or civilians.[91] In determining whether the officer's belief that the suspect posed an immediate threat of serious harm was objectively reasonable, courts will consider "the totality of the circumstances" at the time of the shooting.[92] As this Article will show, the legal standard remains the same where suicide by cop is in play.[93] But the question becomes whether suicide by cop is an admissible circumstance that factors into a § 1983 analysis. In answering that question, it is necessary to examine the legislative rationale behind § 1983.

A. THE LEGISLATIVE HISTORY OF § 1983: AN ATTEMPT TO REMEDY RACIAL DISCRIMINATION

The enactment of § 1983 was tied to the Civil War and Reconstruction—the period following the assassination of President Lincoln when Congress passed a series of laws designed to secure the rights of citizenship for emancipated African-Americans.[94] Congress borrowed much of the language in § 1983 from the Enforcement Act of 1871.[95] That statute, passed during the Reconstruction Period following the Civil War, was designed to provide African-Americans with a federal civil rights remedy against white supremacist organizations like the Ku Klux Klan and the White Brotherhood.[96] Federal civil rights legislation was necessary because local and state governments refused to protect African-Americans from violent racists.[97] Moreover, local governments

[89] *See id*. at 397 (holding that the inquiry "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation").

[90] *Garner*, 471 U.S. 1.

[91] *Id*. at 11.

[92] *Id*. at 9-10.

[93] Palmquist v. Selvik, 111 F.3d 1332, 1337 (7th Cir. 1997).

[94] For an overview of civil rights legislation enacted during the Reconstruction, see Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 510-12 (1993).

[95] *See id*. at 506 (stating that the Enforcement Act of 1871 "contained in its first section the language now found" in § 1983).

[96] *Id*. at 513-14.

[97] *Id*. at 510-12.

often collaborated with racist groups in depriving African-Americans of their constitutional rights.[98] The ratification of the Fourteenth Amendment in 1866 led to a wave of violence against freed blacks throughout the former Confederacy.[99]

The Enforcement Act, also called the Ku Klux Klan Act, was based in part on the earlier 1866 Civil Rights Act.[100] That law, together with the Fifteenth Amendment, guaranteed African-Americans status as citizens and empowered the federal government to criminally prosecute any local official who deprived a citizen of his or her civil rights while acting "under color of law."[101] The Enforcement Act granted the President the power to suspend habeas corpus in prosecuting Klan members.[102] By 1872, hundreds of Klansmen had been arrested.[103] Ultimately, the federal government broke the organizational apparatus of the Klan.[104] However, during the Reconstruction period, the civil provisions of the Enforcement Act,[105] which enabled any plaintiff to file suit against two or more private individuals who conspired to violate that person's Fourteenth Amendment rights, were not utilized by litigants in redressing civil rights violations.[106]

The Civil Rights Act of 1871, later codified as § 1983, empowered citizens to sue local or state officials for civil rights violations.[107] Its

[98] *Id*. at 514.

[99] *Id*. at 514-18.

[100] *Id*. at 514 (stating that the drafters of the Enforcement Act modeled its language after the 1866 Civil Rights Act's criminal provision).

[101] *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C.A. § 242 (Westlaw 2011) (prohibiting the deprivation of a person's civil rights under color of law); *see also* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 511-12 (1993) (noting that the Civil Rights Act of 1866 guaranteed African-Americans the status of citizenship and reinforced the ability of the federal government to protect the rights of citizenship).

[102] *See* Ku Klux Klan Act of 1871, ch. 22, §§ 3, 4, 17 Stat. 13, 14-15 (1871) (vesting the President with discretion to suspend habeas corpus in order to overthrow a rebellion); *see also* Mark D. Pezold, *When to Be a Court of Last Resort: The Search for a Standard of Review for the Suspension Clause*, 51 B.C. L. REV. 243, 250 (pointing out that after the Civil War, Congress authorized President Ulysses S. Grant "to suspend the writ of habeas corpus in 1871 as part of the federal government's efforts to combat the Ku Klux Klan during the Reconstruction era").

[103] Richard Wormser, *The Enforcement Acts (1870-1871)*, THE RISE AND FALL OF JIM CROW, JIM CROW STORIES, http://www.pbs.org/wnet/jimcrow/stories_events_enforce.html (last visited Feb. 7, 2011).

[104] *Id*.

[105] The Enforcement (or Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (1871).

[106] Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 514-16 (1993).

[107] 42 U.S.C.A. § 1983 (Westlaw 2011). This statute, which Congress originally enacted as section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

purpose, unlike that of the Enforcement Act, was to protect African-Americans from racist government actors.[108] While citizens could sue state or municipal governments under the Enforcement Act for violating federal statutory or constitutional law, the Act did not vest citizens with a separate cause of action.[109] But other laws existed that protected the civil rights of African-Americans, including the right to vote (protected by the Fifteenth Amendment),[110] secure property (protected by the Fourteenth Amendment),[111] and live as free individuals (protected by the Thirteenth Amendment).[112] Together with the post-Civil War Amendments, § 1983 deterred local officials from infringing on these rights.[113]

B. THE MODERN USE OF § 1983 AS A MEANS TO BRING EXCESSIVE-FORCE CLAIMS AGAINST POLICE DEPARTMENTS

Since the Civil Rights Movement of the 1960s, the nature of § 1983 litigation has changed.[114] Private individuals still rely on § 1983 as

State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[108] Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 515-16 (1993).

[109] *Id*.

[110] U.S. CONST. amend. XV.

[111] U.S. CONST. amend. XIV.

[112] U.S. CONST. amend. XIII.

[113] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 517 (1993) (stating that the purpose of the Reconstruction-era constitutional amendments was to "counter the officially condoned and perpetrated white 'reign of terror' that sought to reverse the legal gains of African-Americans from post-War federal policy").

[114] After Reconstruction, courts construed federal civil rights statutes quite narrowly in order to prevent African-Americans from challenging Jim Crow practices. For example, from 1871 until 1941, Supreme Court decisions on § 1983 limited the meaning of "under color of law" in cases involving state agents other than law enforcement officials. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 518 n.93 (1993). In *Barney v. City of New York*, the Court held that unauthorized acts of state construction do not constitute state action within the meaning of the Fourteenth Amendment. Barney v. City of New York, 193 U.S. 430, 440-41 (1904). Moreover, prior to *Monroe v. Pape*, the Court's "under color of law" had required litigants to establish that the state had *authorized* an official's unlawful act under state law. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 519 (1993). As Justice Frankfurter pointed out in *Monroe*, during the "seventy year [sic] which followed [§ 1983's passage,] . . . the 'under color' provisions . . . uniformly involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws." Monroe v. Pape, 365 U.S. 167, 212-13 (1961) (Frankfurter, J., dissenting) (footnote omitted), *overruled on other grounds by* Monell v. Dep't of Soc. Servs. of City of New York 436 U.S. 658, 663 (1978). This limited

a powerful tool against police departments that employ racially discriminatory tactics against suspects.[115] However, today parties can also use § 1983 to sue the police based on allegations of excessive force, even in the absence of racial discrimination or racial profiling.[116]

The Fourth Amendment provides the legal basis for a complaint alleging excessive force by a police officer.[117] Courts have held that a police officer's use of excessive force in detaining or subduing a suspect constitutes an unlawful "seizure" under the Fourth Amendment.[118] Whenever a police officer "accosts an individual and restrains his freedom to walk away, he has seized that person."[119] The standard for determining reasonableness takes into account that police officers must sometimes make split-second decisions when confronting deadly assailants.[120] Consequently, the "reasonableness" of the seizure depends not only on when the seizure is made, but also on how it is carried out.[121]

In *Tennessee v. Garner*, the Supreme Court advanced a more

interpretation of the "under color" language meant that police officers and other officials were not subject to federal jurisdiction for actions that deprived citizens of their constitutional rights. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 519 n.92 (1993). However, *Monroe v. Pape*, decided in 1961, "revitalized Section 1983's role as a federal civil remedy against individual police officers that deprive citizens of their constitutional rights." Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 519 (1993). In *Monroe*, the Supreme Court rejected the narrow definition of the term "under color of law" that had stymied § 1983 litigation for the preceding ninety years. Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 519 n.92 (1993). *Monroe* held that plaintiffs could use § 1983 to remedy a constitutional injury inflicted by a police officer whose misuse of power by "virtue of state law [was only] made possible . . . because the wrongdoer [was] clothed with the authority of state law." *Monroe*, 365 U.S. at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

[115] Racial profiling claims are usually based on the Equal Protection Clause of the Constitution. *Cf.* U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction . . . ."). But § 1983 serves as a vehicle for bringing these and other constitutional claims. *See generally* Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 LAW & INEQ. 73, 82 (2004) (discussing the role of the Equal Protection Clause in racial profiling cases).

[116] *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 753-57 (1993) (discussing the ways in which § 1983 has been used to litigate against police departments).

[117] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985) (holding that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment").

[118] *See id*. 7-8 (holding that a seizure is unlawful when it is unreasonable in light of the amount of force used in the course of the intrusion and the interest at stake).

[119] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (internal citation omitted).

[120] *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989) (holding that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation").

[121] *Garner*, 471 U.S. at 8.

specific standard for determining when an officer's use of *deadly force* is objectively reasonable.[122] While an officer is allowed to arrest a person if "he has probable cause to believe that person committed a crime," the use of deadly force is permissible only when the suspect poses a threat of deadly force to others or the officer herself.[123] An officer's belief that a suspect is trying to use deadly force must be reasonable.[124] In making that determination, courts will balance the "totality of circumstances" that existed at the time of the seizure.[125] For instance, in *Gray-Hopkins v. Prince George's County, Maryland*, the Fourth Circuit held that the fatal shooting of an unarmed suspect who was standing still with his hands over his head was excessive and unconstitutional because the man did not pose any threat to public safety.[126]

The test is an objective one; the officer's motives do not factor into a § 1983 analysis concerning the lawfulness of a police seizure.[127] Instead, courts consider only circumstances of which the officer had knowledge at the time of the shooting, not after the fact.[128] More specifically, when suicide by cop is in play, the issue becomes whether the police were aware of the suspect's suicidal motives *at the time of the shooting*. If the officer was not aware of the suspect's suicidal motives at the time of the shooting, then those motives do not factor into a § 1983 analysis because *Graham* proscribes the use of hindsight in determining whether a police shooting was reasonable.[129]

C. SUICIDE BY COP IN § 1983 LITIGATION AND WHETHER A SUSPECT'S SUICIDAL MOTIVES SHOULD BE CONSIDERED IN A TOTALITY-OF-THE-CIRCUMSTANCES ANALYSIS

The seminal case on suicide by cop is *Palmquist v. Selvik.*[130]

[122] *Id*. at 17-22.

[123] *See id*. at 2 (holding that apprehension by the use of deadly force is not permissible unless the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others").

[124] *See id*. (holding that "apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement").

[125] *Id*. at 9-10.

[126] Gray-Hopkins v. Prince George's County, Maryland, 309 F.3d 224, 231 (4th Cir. 2002).

[127] *See* Graham v. Connor, 490 U.S. 386, 395-98 (1989) (holding that the question is whether the officers' actions are objectively reasonable "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation").

[128] *See id*. at 396 (holding that the reasonableness "of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight").

[129] *Id*.

[130] Palmquist v. Selvik, 111 F.3d 1332 (7th Cir. 1997); *see also* Timothy P. Flynn & Robert J.

Palmquist addressed the question whether evidence that the suspect was attempting suicide by cop is admissible in a § 1983 suit.[131] While the Seventh Circuit declined to admit evidence of the suspect's suicidal motives on the facts of that case, in dictum it stressed that evidence of suicide by cop can be admissible at trial by either party under certain circumstances.[132] The court applied the *Graham* standard in determining the lawfulness of a police shooting in a suicide-by-cop scenario; however, the decision demonstrates that evidence of a suspect's suicidal intentions can both strengthen and undermine the merits of a § 1983 claim.[133]

In *Palmquist*, Paul Palmquist, a resident of Bensenville, Illinois, began screaming obscenities and incoherent statements in his apartment and broke his neighbor's window.[134] The police were notified of his erratic behavior, and when officers arrived at his apartment they found Palmquist wielding a muffler pipe.[135] Suffering from hallucinations, he thought that the police officers were there to kill him.[136] When the officers attempted to arrest him for breaking the windows, he swung the pipe at one of the officers and landed a blow.[137] After Palmquist swung the pipe again, another officer fired numerous shots, killing him.[138] Palmquist's last words were, "You finally gave me what I wanted," and "I hope this worked, I hope you shot me enough."[139]

Palmquist was a Vietnam War veteran who had told friends that he wished to be shot by the police because he was depressed with his job as a mechanic and the fact that he did not have a girlfriend.[140] At the time of the incident with the police, he may have been under the influence of alcohol or drugs, and shouted at the officers that they were Viet Cong colonels.[141] After his death, Palmquist's estate filed suit against the city, alleging a § 1983 violation for use of excessive force.[142] The estate argued that Selvik, the sheriff who fatally shot Palmquist eleven times,

Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 559, 563 (2000) (characterizing *Palmquist* as the first case on suicide by cop).

[131] *Palmquist*, 111 F.3d at 1340-42.

[132] *Id*. at 1338-42.

[133] *See id*. at 1337.

[134] *Id*. at 1335.

[135] *Id*.

[136] *Id*.

[137] *Id*.

[138] *Id*. at 1336.

[139] *Id*.

[140] *Id*. at 1338.

[141] *Id*. at 1336, 1338.

[142] *Id*. at 1336.

and the other officers had received inadequate training on how to handle persons behaving abnormally and used excessive force in seizing Palmquist.[143] Although the estate did not rely on Palmquist's suicidal motives to support its legal argument, several references were made during trial regarding Palmquist's desire to commit suicide.[144] However, the magistrate judge crafted a jury instruction stating that any evidence of the suspect's "death wish" was irrelevant to the excessive-force claim, since it fell outside the time frame of the shooting (evidence that Palmquist wished to kill himself emerged only after Palmquist was shot).[145] The jury found the city liable and awarded the estate $165,000 in damages.[146]

Selvik and the city appealed the verdict, arguing that the judge had improperly excluded evidence concerning Palmquist's death wish, because this evidence was directly relevant to both liability and damages.[147] The city argued that evidence of Palmquist's intent to commit suicide by cop was relevant to liability, because it tended to show that Palmquist was the initial aggressor during his entanglement with police officers and that the officers' lethal response was therefore appropriate.[148] The city also argued that evidence of suicide by cop was admissible under Rule 404(a)(2) of the Federal Rules of Evidence as an exception to the general prohibition against character evidence in criminal cases, for the purpose of showing that Palmquist was the "first aggressor."[149] The defense sought to show that the officer who shot Palmquist acted in self-defense, and that Palmquist was the proximate cause of his own death.[150] As to the question of damages, the city argued that if Palmquist was suicidal, any computation of damages based on his life expectancy prior to the shooting should have taken his suicidal motives into account.[151]

On appeal, the Seventh Circuit upheld the award with regard to the

[143] *Id*.

[144] *Id*. at 1341.

[145] *Id*.

[146] *Id*. at 1342.

[147] *Id*. at 1337.

[148] *Id*. at 1338.

[149] *Id*. at 1332, 1338; *see also* FED. R. EVID. 404(a)(2) (prohibiting the admission of evidence of a person's character or a trait of character for the purpose of proving action in conformity therewith on a particular occasion, except where "[i]n a criminal case . . . the prosecution [offers] evidence of a character trait of peacefulness of the alleged victim . . . [in order] to rebut evidence that the alleged victim was the first aggressor").

[150] *Palmquist*, 111 F.3d at 1339.

[151] *Id*. at 1342.

excessive-force claim and the police department's liability.[152] It also affirmed the inadmissibility of evidence pertaining to Palmquist's suicidal motives with regard to the excessive-force claim.[153] The court held that evidence of Palmquist's death wish was inadmissible under the character-evidence rule.[154] Moreover, it did not tend to make the existence of any fact material to "the objective reasonableness" test more or less probable, as this evidence came to light only after the shooting.[155] For these reasons, the court declined to upset the jury's verdict.[156]

However, the panel noted that the trial court had admitted much evidence bearing on Palmquist's suicidal desires.[157] Experts on both sides characterized the case as a suicide-by-cop situation, and the jury heard them characterize it as such.[158] The appellate court held that the admission of additional evidence about suicide by cop would have been "cumulative" and "prejudicial."[159] Furthermore, even assuming that the additional evidence was improperly excluded, the error was harmless and therefore not a basis for overturning the verdict.[160]

However, the court also declared that the suspect's death wish was relevant to determining the validity of the damages award.[161] The court held that completely excluding evidence bearing on Palmquist's suicidal motives "could have had a highly prejudicial impact on the jury's ultimate award to the plaintiff."[162] Palmquist's suicidal statements to friends before the shooting reflected his life expectancy and were therefore relevant in calculating damages.[163] However, because Selvik's counsel did not fully present this argument on appeal, it was forfeited, and the appellate court could not rule on the matter.[164] While the court strongly admonished Selvik's attorneys for not exercising due diligence and raising this point at trial, it affirmed the trial court's award of damages.[165]

Ultimately, the Seventh Circuit's opinion suggests that either side

[152] *Id*. at 1347.
[153] *Id*. at 1340-41.
[154] *Id*. at 1341.
[155] *Id*.
[156] *Id*. at 1347.
[157] *Id*. at 1341.
[158] *Id*.
[159] *Id*. at 1342.
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] *Id*.
[165] *Id*.

may introduce testimony about suicide by cop, if 1) it proves relevant to the question of damages, 2) the police were aware that the suspect was attempting suicide by goading officers into killing him or her, and 3) there is a dispute regarding the facts and the suspect's suicidal motives have probative value in resolving that dispute.[166] In *Palmquist*, the court cited another Seventh Circuit case, *Sherrod v. Berry*, which held that "knowledge of facts and circumstances gained after the fact . . . has no place in the . . . jury's post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise, . . . the jury would possess more information than the officer possessed when he made the crucial decision."[167] The *Palmquist* court reiterated this rule by concluding that information that Sergeant Selvik did not possess at the time of the shooting, "such as Palmquist's mental state and his physical behavior before the encounter," was inadmissible.[168] Such information would divert the jury's focus from Palmquist's actions to facts not immediately accessible to Selvik during his confrontation with the suspect—like Palmquist's mental condition.[169]

However, the court qualified its general restriction on testimony concerning suicide by cop: such testimony is inadmissible only if it "occurred outside the presence of the police" and they "had no personal knowledge of it."[170] This qualification suggests that if police officers are aware of the suspect's suicidal motives prior to the shooting, their awareness may be probative in determining whether the officers used excessive force. The court stated that Officer Selvik "knew nothing of [Palmquist's] preexisting condition and behavior" when he first encountered him.[171] Consequently, these facts "could not have entered into Selvik's determination on whether or not to shoot or how many times."[172] The court's reasoning indicates that an officer's personal knowledge can be probative when it goes to the issue of objective reasonableness. In light of the officer's knowledge at the time of the shooting, the court may consider whether his or her use of lethal force against a suspect who merely intended to commit suicide was objectively reasonable. The officer's personal knowledge is something a jury may take into account when assessing the reasonableness of a police response. For instance, the jury heard Palmquist's statement to Selvik that the

[166] *Id*. at 1341-42.
[167] *Id*. at 1339 (quoting Sherrod v. Berry, 856 F.2d 802, 805 (7th Cir. 1988)).
[168] *Palmquist*, 111 F.3d at 1340.
[169] *Id*. at 1340-41.
[170] *Id*. at 1340.
[171] *Id*. at 1341.
[172] *Id*.

police would have to kill him, and also Palmquist's last words that "this is what [he] wanted [the police] to do."[173] Thus, the jury's determination that Selvik's eleven gunshots amounted to excessive force may have been based in part on the jury's consideration of these statements, despite the judge's limiting instructions.[174]

Other decisions also suggest that evidence of a suspect's desire to commit suicide is admissible, as long as this evidence was known to the officer at the time of the shooting. In *Rascon v. Hardimen*, another Seventh Circuit decision, officers severely beat a mentally impaired suspect.[175] The trial judge refused to admit evidence of the suspect's mental history, and on appeal the Seventh Circuit affirmed the ruling.[176] The court held that the admission of such evidence might lead a jury to conclude that the suspect invited mistreatment at the hands of police officers.[177] The jury could draw such a conclusion only on the basis of facts available at the time of the altercation.[178] However, had the officer known of the suspect's mental state before the severe beating, under *Palmquist* such knowledge might have been admissible as evidence in proving that the officer's use of force was reasonable.

Ironically, evidence that the suspect was attempting suicide may undermine a § 1983 claim if it appears that the suspect was inciting a lethal response through provocative or dangerous actions. In a Ninth Circuit case, *Boyd v. City and County of San Francisco*, a kidnapping suspect, Cammerin Boyd, repeatedly screamed at police officers to kill him.[179] The officers asked Boyd to lie on the ground, and when he reached into his vehicle instead, the officers shot and killed him.[180] Boyd's estate filed a § 1983 lawsuit against the county, and the county sought to introduce expert testimony that Boyd was attempting suicide by cop.[181] The court held that such testimony was relevant to whether Boyd engaged in provocative actions against the police, and that "the suicide-by-cop theory" was "generally accepted in the relevant professional community" and therefore reliable.[182] Consequently, it

[173] *Id*.

[174] *See id*. (suggesting that the jury possibly considered the suspect's suicidal intentions).

[175] Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986).

[176] *Id*. at 278.

[177] *Id*.

[178] *See id*. (holding that the exclusion of testimony regarding the suspect's mental history was proper because such testimony might improperly suggest that "it would be reasonable to subdue him based on a supposed status rather than his conduct at the time [of the shooting]").

[179] Boyd v. City & County of San Francisco, 576 F.3d 938, 942 (9th Cir. 2009).

[180] *Id*.

[181] *Id*. at 945-46.

[182] Under the federal rules of evidence, in order for an expert's testimony to be admissible at

upheld the district court's decision to allow the county to introduce expert testimony on suicide by cop.[183]

Boyd demonstrates that evidence of suicide by cop can be a double-edged sword. In some cases, it may be detrimental to a plaintiff's excessive-force claim. Often, a mentally ill suspect poses a threat to others even while attempting suicide. The use of lethal force against such a suspect may be justified. For instance, the suspect in *Palmquist* yelled at the officers trying to apprehend him that they were Viet Cong colonels.[184] One could argue that he was suffering from hallucinations that made him dangerous to the police. The lesson of *Palmquist* and the aforementioned cases is that evidence pertaining to a suspect's suicidal motives may be relevant and admissible in a § 1983 lawsuit, and the jury may consider such evidence in deciding whether to impose liability on a police department. If the evidence shows that the suspect posed a threat of harm only to himself or herself, the suspect's death is likely to elicit sympathy from the jury, thereby allowing the plaintiff to prevail at trial.

Other federal circuits have also prohibited the admission of pre-seizure evidence in § 1983 suits. For instance, in *Dickerson v. McClellan*, a Sixth Circuit case, police entered Joel Dickerson's home without first knocking and announcing their presence.[185] They heard Dickerson screaming the words, "I'll get you motherfucker"[186] but they did not know whom Dickerson was speaking to. One of the officers saw a gun in Dickerson's hand, and the officer fired four shots.[187] Dickerson was killed, and his estate sued the police department for excessive force.[188] An investigation revealed that Dickerson's revolver was not cocked, and that he had not shot at any of the police officers.[189] In fact, he had been on the phone with his girlfriend, and his threatening statement was directed at her.[190]

The court limited its inquiry to circumstances of which the officer

trial it must meet be based on reliable principles and methods that are applicable to the facts of the case. *Id*. at 945 (citing Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579, 597 (1993)).

[183] *Boyd*, 576 F.3d at 946.

[184] Palmquist v. Selvik, 111 F.3d 1332, 1336 (7th Cir. 1997).

[185] Dickerson v. McClellan, 101 F.3d 1151, 1154-55 (6th Cir. 1996). The knock-and-announce rule is a common-law requirement that police officers seeking to enter a residential home must first knock on the door, announce their presence, and then wait a reasonable period before forcibly entering. Wilson v. Arkansas, 514 U.S. 927, 934-36 (1995). Only exigent circumstances can justify an officer's forced entry into a private home without first knocking and announcing his or her presence. *Id.*

[186] *Dickerson*, 101 F.3d at 1154.

[187] *Id*. at 1155.

[188] *Id*. at 1154.

[189] *Id*. at 1155.

[190] *Id*.

had knowledge at the time of the shooting.[191] It "segmented" or distinguished the violation of the knock-and-announce rule (requiring police officers to announce their presence before entering someone's home) from the excessive-force claim.[192] Accordingly, in determining the validity of the plaintiff's excessive-force claim, the court declined to consider the reasonableness of the officer's actions prior to his "seizure" of the suspect.[193] Even if an officer is responsible for creating the circumstances that necessitated the use of lethal force, a court should not consider the officer's actions prior to his or her use of force.[194] The prohibition against considering pre-seizure evidence applies to both the officer's and the suspect's conduct. For example, a suicide note would constitute pre-seizure evidence of the suspect's suicidal motives, and under *Dickerson* it may not be admissible—that is, of course, unless the officer read it prior to shooting the suspect. If the officer reads the note before shooting the suspect, he or she would have knowledge of the suspect's suicidal desire within the appropriate time frame, and evidence of that desire may then become admissible in determining whether the officer's actions were reasonable.

The Tenth Circuit has likewise held that a court should consider an officer's conduct prior to the suspect's threat of force only if the conduct is "immediately connected" to the threat.[195] A suspect's statement that he or she wishes to commit suicide may be the basis for finding that immediate connection, depending on when the officer hears the statement—if the officer hears the statement before he or she shoots the suspect, the statement may be admissible. The Fourth Circuit has also adopted a narrow scope of the shooting time-frame, holding that questions like whether an officer showed his badge to a suspect or demanded that the suspect stop his car are irrelevant, because what matters is whether the officer had "reason to believe that [the suspect] posed a threat of death or serious bodily harm to him" at the moment of the shooting.[196]

Other circuits have similarly restricted the admissibility of evidence

[191] *Id*. at 1162-63.

[192] *Id*. at 1160-63.

[193] *Id*. at 1160-62.

[194] *See id*. at 1161 (stating that in deciding a § 1983 case, a court must examine "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances") (quoting Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992)).

[195] Allen v. Muskogee, Okla., 119 F.3d 837, 840 (10th Cir. 1997).

[196] *See* Drewitt v. Pratt, 999 F.2d 774, 780 (4th Cir. 1993) (holding that an officer's failure to show his badge after stopping a suspect does not mean that the officer's subsequent use of force was unconstitutional).

in excessive-force cases. In *Wood v. City of Lakeland*, an Eleventh Circuit case, officers entered the room of a "volatile, emotional and aggressive" teenager who was threatening to commit suicide.[197] The teenager had not committed a crime.[198] However, when officers entered the premises, they found the teenager bleeding on his dresser and holding a knife.[199] When the teenager slid off the dresser, the officers shot him.[200] The defense argued that the suspect had come at the officers with a knife.[201] By contrast, the plaintiff argued that the teenager was lying prone on the floor when he was shot.[202] Despite the factual dispute, the court sided with the defendants and concluded that knife-wielding suspect could have endangered the officers, due to his aggravated emotional state and possession of a dangerous weapon.[203] The court declined to consider the suspect's suicidal impulses of which the officers were aware, and whether in light of those impulses the police should have acted with greater restraint.

Other courts have refused to hold the police liable for the death of a suicidal suspect. For instance, in *Quezada v. County of Bernalillo*, the Tenth Circuit ruled against a suspect who sued under New Mexico state tort law and § 1983.[204] The suspect, Berlinda Griego, held a gun to her head after she was pulled over by police officers and asked the officers to leave her alone so that she could kill herself.[205] She refused several commands to drop her gun.[206] After being blockaded by police cars, Griego turned her gun on the officers, who immediately shot and killed her.[207] While the trial court ruled in favor of Griego's estate on its § 1983 claim, the Tenth Circuit reversed, holding that the trial court had applied the wrong standard of reasonableness.[208] The police officers may have negligently placed themselves in harm's way when they approached the suspect after she asked to be left alone, but their actions

[197] Wood v. City of Lakeland, 203 F.3d 1288, 1290, 1293 (11th Cir. 2000), *abrogated on other grounds in* Hope v. Pelzer, 536 U.S. 730 (2002).

[198] The suspect's family called the police because he was trying to injure himself. *Id*. at 1290.

[199] *Id*.

[200] *Id*. at 1290-91.

[201] *Id*. at 1290.

[202] *Id*. at 1290-91.

[203] *Id*. at 1293.

[204] Quezada v. County of Bernalillo, 944 F.2d 710 (10th Cir. 1991), *overruled on other grounds by* Anderson v. Creighton, 483 U.S. 635, 640-41 (1987).

[205] *Id*. at 712.

[206] *Id*. at 713.

[207] *Id*.

[208] *Id*. at 716-17.

did not give rise to a colorable excessive-force claim under *Graham*.[209] *Quezada* illustrates two points: that a suspect's suicidal motives may not provide significant evidentiary support for a plaintiff's arguments, and that a finding of negligence under state tort law does not by itself support a § 1983 claim.

Another decision, *Plakas v. Drinski*, reinforces the difficulty of raising suicide by cop as a theory for recovery under § 1983.[210] In *Plakas*, the Seventh Circuit held that police officers have no constitutional duty to employ nonlethal means in subduing a dangerous suspect, even if the suspect is attempting suicide-by-cop.[211] The court stressed the importance of evaluating objective signs that the suspect poses a danger to police officers, rather than evaluating the suspect's subjective intent.[212] For example, if a suspect points a gun at a police officer, a lethal response by the officer would be appropriate even if evidence later shows that the suspect did not intend to kill the officer.[213]

Thus, while courts following *Palmquist* may accept evidence of a suspect's suicidal desires in determining whether a police response was unreasonable or excessive, courts outside the Seventh Circuit seem reticent in considering such evidence. The Tenth, Eleventh, and Seventh Circuits have indicated that even if the suspect is suicidal, as long as he or she possesses a weapon and makes provocative gestures, the police are entitled to use lethal force. Nevertheless, the *Palmquist* verdict suggests that, despite the more academic holding of the appellate opinion, the jury took the victim's statements—that he wanted the police to shoot him—into consideration when deciding whether to hold the police liable. Because other circuits may decide to follow *Palmquist*, police

[209] *Id*. The Tenth Circuit stressed that the standard of reasonableness in negligence cases is broader than the reasonableness standard applied under § 1983 and *Graham v. Connor*, 490 U.S. 386 (1989). Under an ordinary negligence standard, the trier of fact may consider whether officers acted unreasonably before engaging the suspect. However, the reasonableness inquiry under § 1983 is far more time-specific: only the circumstances immediately preceding the shooting can be assessed in determining whether officers violated a suspect's Fourth Amendment rights. In *Quezada*, although the court did not find that the police officer had violated Griego's constitutional rights, it found that he had breached the duty of care he owed to Griego. *Id*. at 722. He breached this duty because he "amplified the risk of harm to Ms. Griego" when he approached her vehicle. Accordingly, the court found that he had acted negligently but not with excessive force. *Id*.

[210] Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994).

[211] *Id*.

[212] The court declared that "[s]hooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an act of self-defense even if, as Plakas's expert maintains, the man is attempting 'suicide by police.'" *Id*. at 1146.

[213] The court rejected the proposition that it should "return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct." *Id*. at 1150.

departments should consider the liability they may face if they fail to train officers in properly identifying and engaging with suspects who may be attempting suicide by cop.

IV. POLICY JUSTIFICATIONS FOR ADDRESSING SUICIDE BY COP AS A SERIOUS PROBLEM WITHIN THE LAW ENFORCEMENT COMMUNITY

A blanket refusal to scrutinize police tactics in suicide-by-cop incidents may "invite reckless and irresponsible police behavior."[214] On the one hand, holding an officer liable for shooting a suspect with a gun may impair the ability of police departments to protect the public. On the other hand, police departments cannot ignore the possibility that some suspects commit provocative acts for the purpose of inviting a lethal response. Devising a way to reduce suicide-by-cop incidents without hindering police responsiveness proves difficult, especially when only 22% of suicide-by-cop attempts involve an empty gun or some other nonlethal prop.[215] Most other attempts involve lethal force directed at the officer.[216]

Moreover, requiring a police officer to assess the psychological condition of a suspect, in addition to any number of other split-second judgments the officer is required to make under life-threatening circumstances might not be fair. Requiring officers to use more lenient tactics in subduing suicidal suspects might encourage non-suicidal suspects to feign suicide in order to accomplish their criminal ends. In light of the relationship between homicidal and suicidal tendencies, these "criminal ends" often involve the intent to kill or harm others;[217] the Columbine shooters exemplify this trend.[218] Preserving the life of an individual who attempts suicide becomes less of a priority if he or she poses a threat to innocent civilians.

Nevertheless, police departments should do all they can to restrain officers in the use of lethal force. Few would criticize the police officer in *Plakas* for subduing a suspect who came at the officer with a sharp metal object by shooting him, because that suspect posed a danger to the

[214] Timothy P. Flynn & Robert J. Homant, *"Suicide by Police" in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 577 (2000).

[215] *Id*. at 578.

[216] *Id*.

[217] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 13 (2004).

[218] James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 131 (2000).

officer.[219] However, a suspect like the one in *Wood* – the teenager who was attempting suicide – may elicit more sympathy from a jury.[220] The officer in *Wood* could have subdued the suspect with a taser, as the suspect had not yet charged at the police officers.[221] In fact, he fell to the floor before he was shot.[222] Had the officers understood the nature of the suspect's acts and that he only intended to harm himself, tragedy might have been averted. Consequently, police departments should take reasonable steps to prevent suicide by cop. In order to improve their tactical response to suicide by cop, law enforcement agencies should take the following steps: 1) implement a procedure for tracking the frequency of suicide-by-cop incidents, and 2) better educate officers on to use nonlethal methods to resolve suicide-by-cop attempts.

A. IMPLEMENTING A UNIFORM METHOD FOR REPORTING SUICIDE BY COP

The absence of national statistics on suicide by cop hinders law enforcement agencies in fully addressing the problem. Without comprehensive studies, police departments cannot incorporate a procedure to address suicide by cop into their tactical training programs. One proposed solution is to collect several hundred incidents from around the country and determine the common characteristics that victims involved in these incidents share, so as to convey a "sense of the 'typical' suicide-by-cop incident."[223] With this information, law enforcement officers would be better equipped to recognize and formulate appropriate responses to suicide-by-cop incidents.

A study by the FBI, published in 2005, advocates the use of a two-tiered system in evaluating attempts at suicide by cop.[224] First, after the event occurs, the officer present at the scene makes the initial

[219] In *Plakas*, the suspect assailed the police officer with a fireplace poker. Plakas v. Drinski, 19 F.3d 1143, 1146 (7th Cir. 1994).

[220] In *Wood*, the suspect had cut himself repeatedly with a knife before the police arrived, indicating that he likely meant to harm only himself. Wood v. City of Lakeland, 203 F.3d 1288, 1290 (11th Cir. 2000), *abrogated on other grounds in* Hope v. Pelzer, 536 U.S. 730 (2002). The autopsy report also indicated that the suspect had not raised his hand in a threatening gesture toward the cops. *Id*. at 1290-91. The officers shot him when he slid off the dresser on which he was sitting. *Id*. at 1293.

[221] *Id*.

[222] *Id*.

[223] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 109 (2004).

[224] Anthony J. Pinizzotto, Edward F. Davis, & Charles E. Miller, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 10 (2005), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2005-pdfs/feb05leb.pdf.

determination that the suspect's use of deadly force was motivated by suicide.[225] Second, an officer with expertise in handling deadly-force incidents makes a final determination after a complete investigation as to whether the initial officer's determination was correct.[226] Circumstances that will support these determinations include "statements made by the offender . . . ; [the] type of weapon possessed by the offender; . . . conduct that the officer deemed bizarre or inappropriate on the part of the offender; and circumstances indicating that the offender's motivation may have been suicide."[227] Obviously, in some cases the offender's motivation may not be apparent even after a full investigation. Nevertheless, this approach will enable law enforcement agencies to measure the frequency of suicide by cop more effectively.

B. HOW OFFICERS CAN SUBDUE ATTEMPTS AT SUICIDE BY COP WITHOUT RESORTING TO DEADLY FORCE

There are a number of nonlethal methods for restraining a suicidal suspect. One such method is "tactical withdrawal": once an officer determines that an individual is suicidal, the officer can create greater physical distance between him or herself and the individual.[228] Physical distance will mitigate the threat posed to police officers and give officers more time to formulate a plan of action to calm and neutralize the suicidal individual.[229] Some commentators suggest that a suicidal individual can be left alone as long as it is "in an area . . . where no one else is at risk."[230] Through withdrawal, police officers can at least make it difficult for the suspect to commit suicide.

The police can also deal with suspects wielding weapons other than firearms or bombs by using nonlethal force.[231] A knife-wielding suspect, like the suspect in *Wood*, can sometimes be disarmed using shotgun-projected bean bags or rubber bullets.[232] A sharpshooter can keep a target on the perpetrator, in case he or she runs at an officer with a dangerous object. [233] Likewise, a taser can be employed against a

[225] *Id*.

[226] *Id*.

[227] *Id*.

[228] MARK LINDSAY & DAVID LESTER, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9, 110 (2004).

[229] *Id*.

[230] *Id*.

[231] *Id*.

[232] *Id*.

[233] *Id*.

suspect who is not holding a firearm.[234]

Police departments should instruct officers to employ these nonlethal methods only when they can reasonably ascertain that a suspect poses no risk of deadly harm to others. Once they receive rigorous training on the characteristics that suicidal suspects share, police officers can more readily recognize a genuine attempt at suicide by cop and handle the situation accordingly. This sort of training will enhance the quality of police work and aid social workers and psychologists in treating suicidal and emotionally disturbed individuals before they meet a tragic end.

CONCLUSION

The lack of comprehensive legal literature on suicide by cop perpetuates the belief that nothing can be done by law enforcement agencies to ameliorate this primarily sociological problem. Perhaps the scarcity of such literature reflects a belief that unless something poses a tangible threat of litigation, it need not be addressed as a serious concern. However, suicide-by-cop incidents often lead to lawsuits. Moreover, evidence of a suspect's suicidal desires may negate the reasonableness of a lethal police response under § 1983, thereby empowering plaintiffs in Fourth Amendment suits.

Strong policy reasons exist for distinguishing police-assisted suicide from assault or homicide incidents. Law enforcement agencies should recall the original impetus behind the enactment of the 1871 Civil Rights Act: protecting African-Americans from abuse and discrimination at the hands of the state. As discussed earlier, those who commit suicide by cop tend to be destitute and to suffer from substance abuse or mental illness. Suicide by cop is a byproduct of cumulative factors prevalent in lower-income communities. When the police kill individuals desperate enough to attempt suicide, they remain apathetic to discriminatory state policies that exacerbate such factors. Police tactics take on a discriminatory hue, thereby undermining the very spirit of § 1983. Thus, police officers should do their best to defuse suicide-by-cop incidents through nonlethal force. If police departments can adopt this approach, they would set a powerful example for the rest of society to follow in redressing the ills that § 1983 was designed to combat.

[234] *Id*. at 111.