Hot Topics in Law Enforcement Liability under Section 1983:

What Every Municipal Lawyer Should Know

IMLA

Wayne C. Beyer, Esq.

Program Overview

I. **Claims and Defenses**: Basics under 42 U.S.C. Section 1983

II. **Hot Topics:**
- consensus policies on use of force
- chokeholds and neck restraints after George Floyd
- de-escalation and use of force against emotionally disturbed subjects
- latest on shooting at vehicles and vehicular pursuits
- best practices on the use of force during protests and demonstrations
- restrictions on no-knock warrants after Breonna Taylor
- duty to intervene to prevent misconduct of others

III. **Damages:** Avoiding big numbers

Claims and Defenses: Basics under 42 U.S.C. § 1983

Under color of state law

- Plaintiff must establish that defendant acted under color of state law. ***Gomez v. Toledo***, 446 U.S. 635 (1980).
- That can mean in excess of his/her authority. ***Monroe v. Pape***, 365 U.S. 167 (1961).
- And off-duty if performing police function.

Deprivation of federal right

- Plaintiff must also establish that defendant deprived plaintiff of federal right, such as right to be free from "unreasonable seizures." ***Gomez.***

Fourth Amendment Prohibition against Unreasonable Searches and Seizures

Unreasonable search

- Property: residences with or without warrants; vehicles; businesses; phones and computers. ***Arizona v. Gant***, 129 S.Ct. 1710 (2009) (permitting vehicle search incident to arrest).
- Persons: pat-down, inventory, body cavity searches. ***United States v. Robinson***, 414 U.S. 218, 224-37 (1973) (permitting reasonable search of arrested person).

Unreasonable seizures

- Stops under reasonable suspicion standard. ***Terry v. Ohio***, 392 U.S. 1 (1968).
- Arrests, with or without warrants, under probable cause standard. ***Brown v. Illinois***, 422 U.S. 590 (1975).
- Use of force: objective reasonableness standard under ***Graham v. Connor***, 490 U.S. 386 (1989).

Fifth/Fourteenth Amendment: Failure to Provide Medical Care and Duty to Protect

- Officer can be held liable if "deliberately indifferent" to serious medical need of arrestee. ***Burgess v. Fischer***, 735 F.3d 462 (6th Cir. 2013).
- Although most courts apply the Fourteenth Amendment's "deliberate indifference" standard, ***Burgess v. Fischer***, 735 F.3d 462 (6th Cir. 2013), some apply Fourth Amendment reasonableness. ***Ortiz v. City of Chicago***, 656 F.3d 523 (7th Cir. 2011).
- Duty to protect those in custody, e.g., "deliberate indifference" to risk of suicide. ***Estate of Clark v. County of Green Lake***, 14-C-1402 (E.D. Wis. 09/12/2016).
- "State-Created Danger" theory for those not in custody, ***e.g.***, ***Okin v. Village of Cornwall-on-Hudson Police Dept***., 577 F.3d 415 (2d Cir. 2009) (domestic violence).

First Amendment, Disorderly Conduct Arrests

- Citizens can verbally protest police activity. ***City of Houston v. Hill***, 482 U.S. 451 (1987).
- Citizens have First Amendment right to record police activity and verbally protest, subject to restrictions on actual interference. ***See, e.g., Gericke v. Begin***, 753 F.3d 1 (1st Cir. 2014); ***Glik v. Cunniffe***, 655 F. 3d 78 (1st Cir. 2011).
- Arrest can be made for disorderly conduct, e.g., conduct likely to cause breach of peace. ***Stern v. City of New York***, No. 12-CV-5210 (NGG)(RER)(E.D.N.Y. 2/27/2015).
- Protests, demonstrations and crowd control addressed later in program.

Municipal Liability

To hold municipality liable, plaintiff must establish that its policy or custom caused violation. Four ways to establish municipal policy or custom:

- Facially unconstitutional policy. ***Monell v. Department of Social Services***, 436 U.S. 658 (1978).
- Single decision of policymaker. ***Pembaur v. City of Cincinnati***, 475 U.S. 469 (1986).
- "Deliberate indifference" to hiring, training, supervision, discipline. ***City of Canton v. Harris***, 489 U.S. 378 (1989).
- Custom or practice of violations. ***Monell***, at 691; ***Adickes v. S.H. Kress & Co***., 398 U.S. 144, 167-68 (1970).

Affirmative Defenses

- Failure to state claim, Fed. R. Civ. P. 12(b)(6), although technically not affirmative defense.
- Collateral estoppel, ***Allen v. McCurry***, 449 U.S. 90, 104 (1990), and res judicata, ***Migra v. Warren City School Dist. Bd. of Educ.***, 465 U.S. 75, 83 (1984), if plaintiff was convicted.
- Accrual if plaintiff has not vacated conviction. ***Heck v. Humphrey***, 512 U.S. 477, 489-90 (1994).
- Statute of limitations under state law. ***Wilson v. Garcia***, 471 U.S. 261 (1985).
- Qualified immunity for officers must be asserted. ***Siegert v. Gilley***, 500 U.S. 226, 231 (1991).
- Defenses under state law, including notice of claim, which does not apply to § 1983 . ***Felder v. Casey***, 487 U.S. 131 (1988).

Additional Defenses

Improper, duplicative defendants:

- "John/Jane Doe" defendants. ***Simmons v. District of Columbia***, 750 F.Supp.2d 43, 45 (D.D.C. 2011) (requiring the plaintiff to replace "John Doe" defendants with real defendants after completion of discovery).
- Police departments because they are *non sui juris.* ***Perales v. Heard,*** Case No. 2:15-cv-14381-ROSENBERG/LYNCH (S.D. Fla. 2/16/2016).
- Officers in their official capacity requires municipal liability. ***Hafer v. Melo***, 502 U.S. 21 (1991).
- Judges, prosecutors. ***Stump v. Sparkman***, 435 U.S. 349 (1978) (judges); ***Imbler v. Pachtman***, 424 U.S. 409 (1976) (prosecutors).

Qualified Immunity Defense

- ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982) (***Bivens*** (***Bivens v. Six Unknown Fed. Narcotics Agents***, 403 U.S. 388 (1971)) action) (abandoning good faith subjective test in favor of objective reasonableness).
- Defense has been applied to arrest warrants, ***Malley v. Briggs***, 475 U.S. 335 (1986); warrantless searches, ***Anderson v. Creighton***, 483 U.S. 635 (1987) (***Bivens*** action); use of force, ***Saucier v. Katz***, 533 U.S. 194 (2001); shooting at vehicles, ***Plumhoff v. Rickard***, 134 S.Ct. 2012 (2014); and shooting emotionally disturbed persons with knives, ***Kisela v. Hughes***, 138 S.Ct. 1148 (2018).
- Although Supreme Court requires "robust consensus of cases persuasive authority," Court has "not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity[,]" ***District of Columbia v. Wesby***, 138 S.Ct. 577, 591 n. 8 (2018), citing ***Reichle v. Howards***, 566 U. S. 658, 665-666 (2012).

Statistics on Police-Citizen Encounters and Use of Force

- Estimated 240 million calls are made to 9-1-1 in U.S. each year. National Emergency Number Association (NENA), available at https://www.nena.org/page/911Statistics
- In 2018, about 61.5 million persons age 16 or older had at least one contact in prior 12 months with police. 1.3 million (2%) experienced threats or use of force from police, which includes handcuffing. Contacts Between Police and the Public, 2018 – Statistical Tables, U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics, available at https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf
- Nationwide, law enforcement made estimated 10,085,207 arrests in 2019. Highest number of arrests were for drug abuse violations (estimated at 1,558,862 arrests), driving under influence (estimated at 1,024,508), and larceny-theft (estimated at 813,073). FBI's Uniform Crime Reporting (UCR) Program, available at https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested

Police-Citizen Encounters and Use of Force (cont'd)

- In 2021, 13,725 non-prisoner federal civil rights cases were brought in federal court. Only 2 percent tried to conclusion. U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken—During the 12-Month Period Ending December 31, 2021, available at https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2021/12/31
- During five-year period (of ten years) your presenter was assistant attorney general for D.C., there were on average 1.3 million calls for service, 55,000 arrests, and 55 successful claims (out of about 100 suits) for false arrest, excessive force, § 1983, annually, most of which were resolved for high nuisance value, or one out of every 1,000 arrests.

Fight or Flight Response

- Most subjects respond appropriately to police presence.
- Most who get injured during violation or misdemeanor have tried to fight or flee. Common situations are motor vehicle stops, disorderly conduct arrests, and domestic calls.
- Officer will take subject to ground and subject receives facial and similar injuries.
- Uses of deadly force: (1) often start with minor offense; (2) subject flees or fights; and (3) officer has to make split-second decision.
- De-escalation can prevent losses where subject is suicidal or armed with weapon other than firearm, or officer has time to assess and decide on options.

“National Consensus Policy and Discussion Paper on Use of Force” (IACP July 2020)

- Value and preserve human life
- Use objectively reasonable force
- Discontinue force when resistance ceases
- Intervene and stop excessive force by another officer
- De-escalate whenever possible
- Allow individual time to submit to verbal commands
- Limit less-lethal force to actively resisting individuals
- Employ deadly force only when individual imminent threat of serious bodily harm or death
- Warn when feasible
- Do not use when individual is threat only to themselves or property
- Do not fire at or from moving vehicles
- Chokeholds (but not vascular neck restraints) prohibited
- Document uses of force and training

Use of Force Resources

- International Association of Chiefs of Police (IACP), "National Consensus Policy and Discussion Paper on Use of Force" (revised July 2020), available at https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf
- IACP Model Policies, Concepts and Issues Papers, and Training Keys, available to members at https://www.theiacp.org/policycenter
- U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," available at https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875
- U.S. Department of Justice Office of Community Oriented Police Services (COPS Office) comprehensive policy on use of force and investigations, adopted by Las Vegas Metropolitan Police Department (LVMPD), available at https://cops.usdoj.gov/pdf/use-of-force.pd

Use of Force Resources (cont'd)

Police Executive Research Forum (PERF) monographs in "Critical Issues in Policing Series":

- "Re-Engineering Training on Police Use of Force," (2015), available at http://www.policeforum.org/assets/reengineeringtraining1.pdf
- "Guiding Principles on Use of Force," (2016), available at http://www.policeforum.org/assets/guidingprinciples1.pdf
- "Refining the Role of Less-Lethal Technology: Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," (2020), available at https://www.policeforum.org/assets/LessLethal.pdf
- "Integrating Communications, Assessment, and Tactics (ICAT)," (2016) ,available at http://www.policeforum.org/assets/icattrainingguide.pdf
- "Implementing the ICAT Training Program at Your Agency," (2023), available at https://www.policeforum.org/assets/ICATImplementation.pdf

Chokeholds and Neck Restraints after George Floyd

“trachea holds” (colloquially “choke holds”)

- Under District of Columbia law, “trachea hold,” also sometimes referred to as an “arm bar hold,” or “bar-arm hold,” is technique “that attempts to control or disable person by applying force or pressure against the trachea, windpipe, or the frontal area of the neck with the purpose or intent of controlling a person’s movement or rendering a person unconscious by blocking the passage of air through the windpipe**.” D.C. Code § 5-125.02(1)**.
- Under D.C. law, use of trachea hold by police officer is prohibited under any circumstances. **D.C. Code § 5-125.03(a)**.

“carotid artery holds” (colloquially “strangle holds”)

- “Carotid artery hold,” also known as “sleeper hold,” or “v hold,” is technique “which is applied in an effort to control or disable a person by applying pressure or force to the carotid artery or the jugular vein or the sides of the neck with the intent or purpose of controlling a person’s movement or rendering a person unconscious by constricting the flow of blood to and from the brain.” **D.C. Code § 5-125.02(2)**.
- Carotid artery hold is prohibited except when “the use of lethal force is necessary to protect the life of a civilian or a law enforcement officer.”

Positional Asphyxia; In-custody Death Syndrome

"**Positional asphyxia**," also called "compression asphyxia" and related phenomenon called "excited delirium" and "in-custody death syndrome" (known through national media by the words "I can't breathe"), generally have some or all of following features:

- **Vulnerable individual**; someone obese, mentally disturbed, on drugs or alcohol, or who has heart condition or other medical problem; often engaged in minor violation and unarmed.
- **Violent fight or period of physical exertion**; either trying to avoid arrest, or trying to breathe as officers place their weight on top of him/her; often involving Taser use.
- **Suppression of subject's breathing**; with subject on his/her stomach and officers with their weight on him/her compressing his/her chest and holding him/her down.
- **Handcuffing and ankle cuffing**; colloquially "hog tying," that further restrains movement.
- **A slow or inadequate response**; officers fail to roll subject to his/her side as soon as he/she is restrained so that he/she can breathe and are slow to administer CPR and call for medical assistance.

Neck Restraint and Positional Asphyxia Resources

- IACP Law Enforcement Policy Center, Model Policy, Concepts and Issues Paper, "Excited Delirium" (2017), available to members at https://www.theiacp.org/resources/policy-center-resource/excited-delirium (under review)
- U.S. Department of Justice, Memorandum from the Deputy Attorney General, CHOKEHOLDS & CAROTID RESTRAINTS; KNOCK & ANNOUNCE REQUIREMENT (Sept. 14, 2021), available at https://www.justice.gov/dag/page/file/1432531/download
- U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, "Positional Asphyxia—Sudden Death," (June 1995), available at https://www.ncjrs.gov/pdffiles/posasph.pdf
- Washington Post, "Half of the nation's largest police departments have banned or limited neck restraints since June [death of George Floyd]," available to subscribers at https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/

De-escalation and Use of Force Against Emotionally Disturbed Persons (EDPs)

- Between 2015 and 2022, police fatally shot 7,785 subjects. 1,314 were armed with knives. 1,647 were known to have mental illness.
- Supreme Court granted qualified immunity to officers who shot EDPs armed with knives in ***Kisela v. Hughes***, 138 S.Ct. 1148 (2018) and ***City and County of San Francisco v. Sheehan***, 135 S.Ct. 1765 (2015).
- Although Constitution does not require de-escalation in dealing with armed EDP, person's ability to reason part of reasonableness analysis.
- PERF's "Critical Issues in Policing Series" emphasizes de-escalation and crisis intervention for (1) subjects in crisis; or (2) armed with weapon other than firearm.
- PERF, "Rethinking the Police Response to Mental Health-Related Calls: Promising Models," (2023), available at https://www.policeforum.org/assets/MBHResponse.pdf

Americans with Disabilities Act (ADA) Claims

- Arrest is “service, program, or activity of public entity” under ADA.
- ADA does not require reasonable accommodation if person is direct threat to health or safety of others (exigent circumstances exception).
- Some Circuits hold that exigent circumstances factor into whether requested modification is reasonable under totality of circumstances. ***Waller ex rel. Estate of Hunt v. Danville***, 556 F.3d 171, 175 (4th Cir. 2009).
- Others that ADA does not apply to police officers making on-the-street response until they have secured scene. ***Hainze v. Richards***, 207 F.3d 795, 801 (5th Cir. 2000).
- Supreme Court has not decided whether mentally ill person who is armed with weapon and presents immediate threat is entitled to accommodation, such as attempted de-escalation, in manner in which he/she is taken into custody. ***City and County of San Francisco v. Sheehan***, 135 S.Ct. 1765 (2015).

Deadly Force: Shooting at Vehicles

- Between 2015 and 2022, 285 subjects were fatally shot who used vehicle as weapon to drag, crush or run into officer.
- Both PERF and IACP say that lives can be saved by restricting when officers can shoot at or from moving vehicles.
- Consensus policies require officers to move out of path (if practical) rather than shoot when vehicle is used as weapon.
- But SCOTUS has found for defense in ***Brosseau v. Haugen***, 543 U.S. 194, 201 (2004); ***Plumhoff v. Rickard***, 134 S.Ct. 2012, 2022 (2014); ***Mullenix v. Luna***, 136 S.Ct. 305, 311 (2015).

Deadly Force: Pursuits

- At least 1,594 deaths in police chases occurred from 2014 through 2017 — an average of 399 a year.
- Fourth Amendment violation requires "seizure." ***Brower v. County of Inyo***, 489 U.S. 593, 596-99 (1989) (suspect crashed into blind roadblock intended to stop him); ***Scott v. Harris***, 127 S.Ct. 1769 (2007) (ramming vehicle objectively reasonable in view of risk to innocent motorists). ***Cf. Torres v. Madrid***, 141 S.Ct. 989 (2021) (shooting at fleeing subject with intent to restrain her is "seizure").
- Lower Court decisions: ***Osborn v. Meitzen***, No. 21-7069 (10th Cir. 2022); ***Steed v. Mo. State Highway Patrol***, 2 F.4th 767 (8th Cir. 2021); ***Shields v. Wiegand***, Civil Action No. 20-2999 (E.D. Pa. 11/17/2023).

Pursuits (cont'd)

- Without "seizure," governed by "shocks conscience," "intent to harm" standard of Due Process Clause. ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998) (deputy's vehicle struck passenger after motor cycle crash).
- Lower Court Decisions: ***A. Shaw v. City of Norman***, No. 22-6106 (10th Cir. 04/13/2023); ***Braun v. Burke***, 983 F.3d 999 (8th Cir. 2020); ***Simmons v. Balt. City Police Dep.***, Civil Action No. 21-cv-00969-LKG (D. Md. 12/06/2023).
- No national consensus on whether pursuits should be permitted, but IACP offers guidance to departments that elect to allow them.
- PERF with DoJ COPS office says, "[P]ursuits should take place only when two very specific standards are met: (1) A violent crime has been committed and (2) the suspect poses an imminent threat to commit another violent crime."

Resources: Shooting at Vehicles, Pursuits

- IACP Policy Center, "Vehicular Pursuits, Considerations Document and Concepts and Issues Paper," (updated December 2019), available to members at https://www.theiacp.org/sites/default/files/2019-12/Vehicular%20Pursuits%20-%202019.pdf
- "Vehicular Pursuits: A Guide for Law Enforcement Executives on Managing the Associated Risks," (COPS office and PERF 2023), available at https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-r1134-pub.pdf
- McClatchy, "Fatalities from Police Chases Climbing, could be Higher than Records Indicate," available at https://www.mcclatchydc.com/news/investigations/article226512455.html.
- U.S. Department of Justice, Bureau of Justice Statistics, "Police Vehicle Pursuits, 2012-13" (May 2017), at 1, available at https://bjs.ojp.gov/content/pub/pdf/pvp1213.pdf
- James T. Hamilton, *Democracy's Detectives*, Harvard University Press (2016), citing *Washington Post* series, pages found at https://www.google.com/search?tbo=p&tbm=bks&q=isbn:0674973593.

Protests, Demonstrations and First Amendment

- First Amendment protects right to speak and assemble in traditional public forums, e.g., streets, sidewalks, and parks, subject to reasonable restrictions on time, place, or manner of protected speech.
- Restrictions must be (1) justified without reference to content of regulated speech; (2) narrowly tailored to serve significant governmental interest; and (3) leave open ample alternative channels for communication of information. ***Ward v. Rock Against Racism***, 491 U.S. 781 (1989).
- Government can restrict content in limited public forums and remove disruptors. ***Grant v. Slattery***, Civil Action No. 22-941 (FLW) (D.N.J. 09/29/2022).
- Mass arrest requires declaration of unlawful assembly and order to disburse. ***In re N.Y.C. Policing During Summer 2020 Demonstrations***, 548 F. Supp.3d 383 (S.D.N.Y. 2021).

Less-Lethal Force: Crowd Control During Protests

Approved use

- Bicycles (to control and move persons)
- Horses (used to contain, control, or direct)
- Motor vehicles (to contain, control, or direct, but not brought into contact)
- Aerosol restraint spray, known as oleoresin capsicum (OC) (pepper spray) against groups engaged in unlawful activity
- Baton (held horizontally for crowd control)
- Electronic control weapons (ECWs) (Tasers against actively resisting individuals)

Disapproved use

- Canine teams (not deployed for crowd control)
- Fire hoses (not recommended for crowd dispersal due to negative images)
- Impact projectiles, both non-direct (skip fired) and direct (not fired into crowds)
- CS (2-chlorobenzalmalononitrile) chemical agent, known as tear gas (unless lesser options are not available)

Resources

- IACP Policy Center, “Crowd Management,” Model Policy and Concepts and Issues Paper (2019), available to members at https://www.theiacp.org/resources/policy-center-resource/crowd-management
- PERF, “Rethinking the Police Response to Mass Demonstrations: 9 Recommendations,” (2022), available at https://www.policeforum.org/assets/ResponseMassDemonstrations.pdf
- Center for Policing Equity, “Guiding Principles for Crowd Management” available at https://policingequity.org/images/pdfs-doc/crowdmgt.pdf (Although this is progressive policy group, its advice parallels IACP).
- Metropolitan Police Department (District of Columbia), “Standard Operating Procedures: Handling First Amendment Assemblies and Mass Demonstrations,” available at https://pdf4pro.com/view/standard-operating-procedures-cf14a.html

Issues Raised with Police Body Worn Cameras (BWCs)

- When officer should activate and deactivate camera
- How to handle recording in private places, minors, victims, witnesses
- When video should be made available under right to know requests
- Whether an officer should be able to review video before writing report or making statement. Officer's perception of time and distance may vary from what video shows.
- Video may provide reliable documentary evidence to overcome attempt to create fact dispute on summary judgment.
- When there is videotape that discredits non-movant's description of facts, court will consider "the facts in the light depicted by the videotape." ***Scott v. Harris***, 550 U.S. 372, 381 (2007).

Resources (cont'd)

- DOJ, Bureau of Justice Assistance, Body Worn Camera Toolkit, available at https://bja.ojp.gov/program/bwc
- PERF "Body-Worn Cameras a Decade Later: What We Know," (2023), available at https://www.policeforum.org/assets/BWCdecadelater.pdf
- (IACP) Policy Center, "Body Worn Cameras," Model Policy and Concepts and Issues Paper (2019), available to members at https://www.theiacp.org/sites/default/files/2020-06/BWCs%20June%202020.pdf
- The Americans for Effective Law Enforcement (AELE) has compiled model policies, reports and studies, litigation, privacy, Freedom of Information (FOIA), training issues and the like, available at http://www.aele.org/bwc-info.html.

Issues on Obtaining and Executing Search Warrants

- Is search warrant facially valid, or, if facially valid, was it obtained through fraud or misstatements? ***Franks v. Delaware***, 438 U.S. 154 (1974).
- Is location to be searched properly identified? ***Maryland v. Garrison***, 480 U.S. 79 (1987).
- Did officers knock and announce, or was no-knock entry justified?
- Was safety sweep and detention of occupants reasonable? ***Maryland v. Buie***, 494 U.S. 325 (1990).
- Was warrant properly executed, or did officers exceed scope, use unnecessary force, or destroy property? ***United States v. Ramirez***, 523 U.S. 65, 71 (1998).
- Is there supervisory or municipal liability because officers were not properly trained, or raid was not properly planned and executed? ***Monell v. Dep't of Soc. Servs. of New York***, 436 U.S. 658, 692 (1978); ***Canton v. Harris***, 489 U.S. 378 (1989).
- Are officers entitled to qualified immunity? ***Malley v. Briggs***, 475 U.S. 335, 341 (1986).

No-Knock Warrants

- Under common law officer executing search warrant must first knock, identify himself/herself and intent, and wait reasonable time for occupants to permit entry.
- ***Wilson v. Arkansas***, 514 U.S. 927, 931-937 (1995): Common-law knock and announce rule forms part of Fourth Amendment reasonableness inquiry.
- ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997): “No-knock" entry justified when announcing police presence would be dangerous or futile, or would inhibit investigation of crime.
- ***States v. Banks***, 540 U. S. 31, 40-41 (2003): Measure of wait time how long it would take for resident to dispose of suspected drugs; here 15-20 seconds.
- IACP Policy Center, “Executing Search Warrants” (2006), available to members at https://www.theiacp.org/resources/policy-center-resource/executing-search-warrants

Restrictions on No-knock Warrants after Breonna Taylor

- Department of Justice Memorandum: Limits use of higher-risk "no knock" entries by Federal law enforcement officers to instances where physical safety is at stake at time of entry. U.S. Department of Justice, Memorandum from the Deputy Attorney General, CHOKEHOLDS & CAROTID RESTRAINTS; KNOCK & ANNOUNCE REQUIREMENT (Sept. 14, 2021), available at https://www.justice.gov/dag/page/file/1432531/download
- **Justice for Breonna Taylor Act**, Senate Bill 3955: Requires federal law enforcement officers to provide notice of their authority and purpose before executing warrant. State and local law enforcement agencies that receive funds from Department of Justice must execute warrants that require serving officer to provide notice of his/her authority and purpose before forcibly entering premises.
- No-knock warrants prohibited or restricted in Oregon, Florida, Virginia, Tennessee, Utah, and Maine. Wikipedia "No-knock warrant," available at https://en.wikipedia.org/wiki/No-knock_warrant
- 15 cities, including Orlando, Louisville, Santa Fe, and Indianapolis have passed no-knock warrant bans or severe restrictions. Bans or restrictive measures are pending in 22 states and 20 cities. CCJ, Task force on Policing, "No-Knock Warrants," available at https://counciloncj.foleon.com/policing/assessing-the-evidence/iii-no-knock-warrants-and-police-raids/

Duty to Intervene to Prevent Misconduct of Others

- To succeed on bystander liability, plaintiff must show that: (1) law enforcement officer knew that fellow officer was violating plaintiff's rights; (2) had reasonable opportunity to prevent harm; and (3) did not act. ***Goodwin v. City of Painesville***, 781 F.3d 314, 329 (6th Cir. 2015); ***Stevenson v. City of Seat Pleasant, Md***., 743 F.3d 411, 416-17 (4th Cir. 2014); ***Burgess v. Fischer***, 735 F.3d 462, 475-76 (6th Cir. 2013).
- IACP Policy Center, "Peer Bystander Intervention in Law Enforcement Agencies," available to members at https://www.theiacp.org/sites/default/files/243806_IACP_CPE_Bystander_Intervention_p2.pdf
- Active Bystandership for Law Enforcement (ABLE) Project, Georgetown University Law Center, available at https://www.law.georgetown.edu/cics/able/

Avoiding Big Numbers: Recoverable Damages in High Frequency Cases

- Plaintiff entitled to recover compensatory, tort-type damages. ***Carey v. Piphus***, 435 U.S. 247 (1978).
- Nominal damages for violation of abstract right without actual damages. ***Memphis Community School Dist. v. Stachura***, 477 U.S. 299 (1986).
- Punitive damages against individuals, ***Smith v. Wade***, 461 U.S. 30 (1983), but not municipalities, ***Newport v. Fact Concerts, Inc***., 453 U.S. 247 (1981).
- **42 U.S.C. § 1988(b)**, allows prevailing plaintiff to receive attorney's fees against losing defendant(s). Calculation is based on reasonable hours times reasonable rate ("lodestar"). ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983).

Evaluation of High Frequency Cases

- Multiple of special damages: e.g., 3 times medicals; 1-3 times lost wages; value of night in jail.
- Percentage of success: e.g., expected jury range times percentage chance of success.
- Cost of litigation: “high nuisance value” for case that will get to jury.
- Cost of litigation model does not apply to high exposure cases.

Damages Awards in Death and Catastrophic Injury Cases

- Justine Ruszczyk Damond – Minneapolis. Settlement: $20 million
- Bettie Jones – Chicago. Settlement: $16 million
- Breonna Taylor – Louisville, Ky. Settlement: $12 million
- Walter Scott - North Charleston, S.C. Settlement: $6.5 million
- Freddie Gray – Baltimore, Md. Settlement: $6.4 million
- Tamir Rice – Cleveland. Settlement: $6 million
- Eric Garner – New York City. Settlement: $5.9 million
- Laquan McDonald – Chicago. Settlement: $5 million
- Michael Brown – Ferguson, Mo. Settlement: $1.5 million

Survival and Wrongful Death (Generally)

Survival

- Medical bills and funeral expenses
- Conscious pain and suffering
- Economic loss to estate: lifetime earnings, less personal consumption, increased for inflation, and discounted to present value
- Punitive damages

Wrongful Death

- New cause of action that arises on behalf of heirs and beneficiaries for losses as result of decedent's death
- Loss of support and value of household services, inflated and then discounted to present value

Damages Recoverable in Death Cases

- **42 U.S.C. § 1988** allows federal court to fashion federal remedy where state survival and wrongful death statutes do not meet compensation and deterrence goals of **§ 1983.** ***Robertson v. Wegmann*****,** 436 U.S. 584 (1978); ***Carlson v. Green***, 446 U.S. 14 (1980).
- Compare ***Merritt-Ruth v. Frey-Latta***, Case No. 14-12858 (E.D. Mich. 11/7/2017) (following state law) with ***Estate of Strong v. Schlenker***, Civil Action No. 17-cv-1276-WJM-SKC (D. Colo. 7/24/2019) (supplementing state law with federal remedy).
- Some states also include hedonic (loss of pleasure of decedent's life) and/or grief to family members.

Key Takeaways: What We Covered

I. **Claims and Defenses**: Basics under 42 U.S.C. Section 1983

II. **Hot Topics:**
- consensus policies on use of force
- chokeholds and neck restraints after George Floyd
- de-escalation and use of force against emotionally disturbed subjects
- latest on shooting at vehicles and vehicular pursuits
- best practices on the use of force during protests and demonstrations
- restrictions on no-knock warrants after Breonna Taylor
- duty to intervene to prevent misconduct of others

III. **Damages:** Avoiding big numbers

Additional Resource

- Wayne C. Beyer, “Police Misconduct: A Practitioner’s Guide to Section 1983,” 1540 pages with 18 chapters on law, 12 on practice with issues checklists, practice tips, dozens of forms, and free annual supplements available at http://www.jurispub.com/Bookstore/Civil/Police-Misconduct.html
- Government discount: Get 20% off (~~$320~~ **$256** in print and ~~$250.75~~ **$200.60** as PDF book)**.** Order print version and get PDF for additional **$55**. Use code **IMLA20** to receive discounts. **Contact Juris** at orders@jurispub.com for more information.
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