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CIVIL ACTIONS FOR CRIMINAL ACTS

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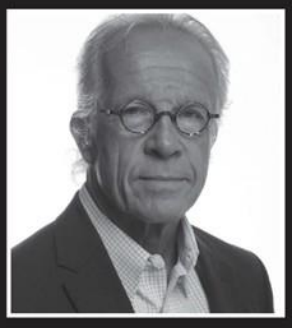

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How Are Generation X and Y Jurors Different And How Do They See Inadequate Security Cases?

Recent years have seen a lot written about Generation X and Y. Because these "millennials" are literally taking over the country at least in numbers, their rising influence is just beginning to be studied. In particular, the issue of how they will change jury trends is of utmost importance to trial lawyers.

Although much has been written about voir dire and jury selection (not to confuse the two), little has focused on how Gen X/Y jurors affect juries and how jury selection should be approached with their views in mind. Most trial lawyers have tried cases and picked juries based on the target juror being a baby boomer. We have been practicing trial law predicated on jury research utilizing a generation that is starting to wane.

Some of these are timeless concepts and some are based on jury research, focus groups or science. The jury panels courts are now seeing are different from those of the past. Part of the change is due to the rising strength and size of the Millennials (a/k/a Generation Y) and what they represent.

Traditionally as trial lawyers we have recognized that jury selection sets the foundation for a successful trial result, and must be viewed as a building block to closing argument. This is still true today. According to Dr. Richard Crawford, "...the opening moments and hours of a trial tend to set in motion a persuasive momentum which is difficult to reverse. Thus, if you win the persuasion battle before your opening statement, you are well on your way toward a favorable

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verdict."[2] One study revealed that eighty percent of jurors have reached a verdict by the end of voir dire.[3]

Whether this is a consistent fact, and follows true with today's jurors is hard to say. What is certain, however, is that jurors develop their first impressions during voir dire: of you, your client, and the meritoriousness of your case. The question today is *upon what do they base those first impressions*?

So what about cases involving claim of inadequate security or other violent crime cases? How do Millennial jurors perceive these claims and what should be our focus with these panels?

Besides the usual issues facing plaintiffs when they come before a panel with the burden of proof (and other extra-judicial biases that have been provided by the insurance and business communities), the economic reality of today's jurors interlace into their perceptions and belief systems in ways that we may not easily understand and process. The way their financial burdens may impact the juror's decision making requires even greater analysis of their answers and responses, both verbal and non verbal. The rise of Generation X and Y as jurors may change many of our previously-sacrosanct jury bias notions.

Resist the traditional fears that if a juror spews their prejudice openly it will taint the rest of the panel. Jurors are not going to change their core beliefs simply because another juror voices a strongly held perception. Your focus should be to look for these land mines, and contrary to conventional wisdom, trying to get them to go off by showing themselves. In fact by not identifying these problem jurors, you certainly run the risk of the mines going off during jury deliberation when it's too late.

The real questions are:

What makes today's jurors different than the juries we were picking 15 or 20 years ago, and how do they perceive claims for negligent security and violent crime?

Those first impressions we are concerned with may be fully formed much earlier than previously thought. And formed without regard to what happens in the courtroom. Today's online-wired-socially-networked-fully-connected-with-every-media-outlet-and-website juror is a very different animal than those of Baby Boomer and earlier generations.

Until recently trial lawyers often ignored the science of jury de-selection. Maybe that is why many of us spend countless hours preparing the case but spend little or no time preparing for jury de-selection. Maybe it's because we believed that our charisma and talent is enough to carry the case to victory. That strategy may have worked in the past, but these younger jurors are better educated and more aware of local and world events. The arrival of the internet, 24 hour a-day news, social

[2]Crawford, "Developing a sound approach to voir dire", *Trial Diplomacy Journal*, 12:1 24 Spring 1989 at 25.
[3]Jones, "Voir Dire and Jury Selection", *Trial*, September 1986 at 60.

networking, and more realistic TV programming has creating a more enlightened and connected juror. With different expectations of a trial as well. Remember, these generations have watched live "trials of the century" on live TV. Networks have been dedicated to trials (CourtTV), and the employment of trial experts in the media has fueled its own economic resurgence for trial lawyers and law professors who look good on air. They grew up with watching real trials (not Perry Mason).

Millennial Jurors: The Generation Y Phenomena

Social scientists have developed generalized categories for generations in this country. These are our jurors. Generally speaking, they break down this way:

- Traditionalists/Silent Generation (Post-war) (Born 1928 – 1945): Ages 69 - 86; 12% of adult population
- Baby Boomers (Born 1946 – 1964): Ages 50 – 68; 32% of adult population
- Generation X (Born 1965 – 1980): Ages 34 - 49; 27% of adult population
- Millennials/Gen Y (Born after 1980): Ages 18 – 33; 27% of adult population

Baby Boomers (age 47–65): 80 million people
Generation X (age 31–46): 47 million people
Generation Y (age 18–30): 76 million people

Generation X has gotten a bad rap. Originally derided as "slackers" who are disrespectful and non-empathetic. These were the children of a generation with the highest divorce rate and were initially the known as "latchkey" kids. Left to their own devices and less likely to succeed. But recent research and articles refute the slacker label and suggest that they are actually hungrier and more confident than previous generations at their age. ("The Myth of the Lazy, Entitled Millennial," NBC News, 4/22/2015, http://www.nbcnews.com/business/careers/millennials-hungrier-more-well-educated-past-groups-n345406).

The Millennials (Gen Y) are the most important to focus on right now because they are the newest and least understood. They are the country's most diverse generation; only 57% identify as non-Hispanic white. Compared to prior generations, the Millennials are significantly less connected with traditional institutions, such as political parties, religious institutions and marriage (only 27%). They generally have more progressive and inclusive social views. Despite being less financially secure than the previous two generations at the same age, they remain relentlessly optimistic, with 49 percent saying the country's best years are ahead and 8 in 10 reporting that they currently have, or expect to have, enough money to lead the lives they want.

Gen Y grew up in an environment of worldwide disorder: school shootings, 9/11, governmental changes throughout the world, global climate change, enormous natural disasters, BP Oil spill, the great recession. These are the events that have shaped and continue to influence the Millennials. Because their world has involved incidents like Columbine, Sandy Hook, Virginia Tech, 911 and

the like, they tend to be more security-conscious than prior generations. They believe there should be security plans in place and security should be considered by businesses. They have always known a world where security was an issue and where businesses and institutions provided security. They are comfortable with security cameras and limited ingress/egress systems. They have never stayed in hotels which handed out real keys. They have never boarded an airplane without having to take off their shoes or go through magnetometers and x-ray equipment. In short, their life experience incorporates security into almost every aspect.

Because of that, there is an expectation of security and an equal expectation that it be competent.

What is important to note is that Millennials have great distrust of others. In studies only a very small percentage feel that "most people can be trusted," compared to a third of Gen Xers and 40 percent of Baby Boomers. Many studies suggest that both Gen X and Y have strong anti-corporation biases and a generalized sense that if someone is hurt, they should be compensated. Interestingly, as compared to Gen X, Millennials are lest distrustful of the government and are more optimistic about what government can do. While this may be a function of youth - and the likely increasing skepticism that may take place as they mature - it is a factor to keep in mind.

This generation is poised to be the most educated group yet the most under-employed (16.2% unemployment for 18 to 29 year olds). They are graduating into job markets with fewer jobs and often take jobs for which they would traditionally be over qualified (e.g., the barista with a master's degree). They are debt-ridden, with a substantial number carrying large student loan debt. Some feel that Gen Y has a sense of entitlement; that theory is not yet proven but certainly many in this group have displayed those traits.

Perhaps the defining element of a Millennial is that they are constantly "plugged in" and connected. This generation grew up with technology. They have never known a time when there were no cell phones or internet. Their understanding is derived from being able to "Google" anything they need to know. They are used to instantaneous responses.

Another element of the Millennials is that they tend to defer to policies and procedures ("rules of the road" if you will). If you can get them to realize that the other party has violated policies, they are much more likely to find liability. In this vein, they defer to documentation. If something is not documented, they assume it did not occur. This may play into the fact that this is the most documented generation ever, between social media, computers, video, etc.

Approaching jury selection with Millennials:

Understand that they are keenly tuned in to networks like Twitter. Twitter and similar social networks are the backbone of the Gen Y existence and connectivity. They are used to espousing their opinions, even if limited to the characters allowed on Twitter. This is a generation with opinions which they believe should be freely shared. And often.

Because they are by nature distrustful, you need to build trust. That begins with any opening remarks and throughout jury selection. Credibility is key; exploit perceived credibility gaps in

the opposition without succumbing to overreaching arguments or anything that reeks of being manipulative. They want concrete facts and a basis for opinions from experts. They will defer to the superior expertise and credentials of an expert but only if it is supported by credible reasoning and facts.

The social networked and online existence brings about certain characteristics in this group. Due to the overload of data available at warp speed which they have lived in their whole life, they have short attention spans. That is not aided by today's television and online entertainment. Streaming videos on demand without commercials, the ability to pause anything to then multitask and come back to it later, make this a generation that needs constant information to grab their attention. Twitter's 140 character limit means that they are accustomed to receiving succinct information. "Snapchat" allows users to view a picture for 10 seconds before it disappears. It's no wonder that this generation needs rapid fire information and presentation throughout trial. The presentation needs to be simple but no condescending.

Their use of and involvement with technology means that they are not only comfortable with it in the courtroom, but suspicious of a lack of it. Use technology and recognize that you must be adept at using it or its use will backfire.

Some interesting differences between the generations:

Recent jury research found that Gen X is most likely to award damages for *emotional distress*, while Baby Boomers and Gen Y were slightly less like to do so (but not significantly less). However, Gen Y were much less likely to award damages for *loss of capacity to enjoy life* compared to the other generations. Most experts consider this to be maturational in nature. These are the people at the earliest stage in life with much less life experience and are most likely to take quality of life for granted.

Keep in mind that even among these "generations" there are substantial age differences. They are also in a constant state of flux, and with the aging of Gen Y we can expect to see differences in attitudes and jury behaviors.

SOCIAL MEDIA: The 21st CENTURY DILEMMA

Virtually every juror uses social media. Many are constantly online. For the Gen Y's, they are more comfortable texting than conversing. For a generation used to getting any answer online at any time, sitting in a courtroom and being prohibited from internet use is akin to being imprisoned.

You can be sure that every Millennial will consider "googling" as a daily event. If there is something they don't know or want to learn, they will google it or go to YouTube. This group is least likely to heed the command not to perform any independent research, partly because it comes as second nature and partly because they may not truly consider it research. It is in their DNA.

Courts and Judges have wrestled with the issue of how to prevent jurors from conducting online research. Forget the day where the juror went to the scene of the accident; today's jurors will get

on Google Earth or Google Maps and look at the scene from multiple angles, will check the backgrounds of the parties, witnesses, lawyers and experts, and check out the web sites and social media of those entities. In sum, whatever there is out there on you, your client, the opposing party and the case will be within reach of these jurors. They use electronic communications for virtually everything and it is unlikely that they will stop during trial. You can expect them to try to ascertain what the security situation was like at the time of the incident, check the backgrounds of those involved, and perhaps even attempt to view a crime grid or examine prior criminal acts on or near the subject location.

Interestingly, crime rates have been substantially dropping for those who are in this group. In general there is less violent crime (but more economic and terrorist-related crime). From 1993 to 1998, violent crime committed by people 12 to 17 fell 45%. "The most crime-prone age and gender cohort — 15-to-25-year-old males — are committing far fewer crimes than that cohort did in 1990."[4] Despite that, about 33,000 Americans are killed by gun violence each year the majority of which are under the age of 30. That is the leading cause of death for those 15 to 24 years-old. Thus the Millennials may be poised to change gun laws and support enhanced security. It might be worth questioning potential Millennial jurors if they or anyone they know has been impacted by gun violence.

Conclusion

Voir dire continues to be one of the most significant parts of a trial. In security and civil violent crime trials, that is particularly so because in most cases the focus of the case is on the conduct of a party who did not commit the crime. We now recognize that there have been substantial generational changes among the jury pool. The rising numbers and power of the Generation X and Y jurors require trial lawyers to alter some of their basic approaches to jury selection. Most importantly, lawyers need to understand Gen X and Millennial experiences to better understand their biases and means of absorbing information.

Today's Gen X and Y jurors present a much greater need to present trials in an interesting and rapid pace format. The use of multimedia is almost mandatory in order to satisfy these generations' need for stimuli as well as the fact that they have been wired to process information in that manner. It is a well-accepted concept that Gen X and Y are used to taking in vast amounts of information on a daily basis, much more than Boomers and prior generations. They have been heavily influenced by the media and technological entertainment ("CSI effect").

There have been various theories and studies of these new generations, but there are a few constants to keep in mind:

[4] *Washington Examiner* (1/26/2015), http://www.washingtonexaminer.com/are-millennials-a-new-victorian-generation/article/2559123

- They value technology
- They have short attention spans
- They expect technology and/or graphics in trial
- They are comfortable with a logical presentation order for the trial
- Credibility is king
- They have always known a world where the presence of security is ubiquitous
- They expect security to be provided in commercial premises
- They believe there is a responsibility to care for each other

When all is said and done, they still need to hear a good story. And they need instant gratification. If you want to lose a millennial juror, slow it down and make it boring.

Just like the web site that takes too long to load, they will click elsewhere.

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LITIGATING NIGHTCLUB SHOOTINGS

[L]et the slugs bust
Shoot the club up
These ###### scandalous
Good thing we packin'
……..
Naw, we don't plan to fall, ya'll
Cause we did not get searched
We all got pistols in our drawers
…….
Bass from the DJ went blank
Everybody runnin' tryin' to get the #### up out this place
I pulled out my gun
Like 007 – rolled under the table
Unload, reload
Every mutha###### in the club folded up on the floor
…….
Unload some more
Keep spittin'
I never can understand
If security's got the door
Then why so many ###### in here got guns
And I can testify that cuz I just shot one[3]

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[3] Krayzie Bone, Shoot the Club Up (Ruthless/Mo Thugs/Relativity 1999)

INTRODUCTION

A dark crowded room with blaring music, flowing alcohol, racing hormones and young men engaged in 'macho posturing'[4]…..what could possibly go wrong? Add to the mix, absent metal detectors, shoddy pat-downs and inexperienced, poorly trained security personnel. A fun night out too often results in death and disfigurement after the club turns into a modern day version of the O.K. Corall. Of course, after all of the shell casings are swept up, nightclub owners feign surprise as to how such an event could have occurred.

In an average year in America, over 48,000 people are victims of violent crime in a commercial restaurant, bar or nightclub.[5] Where drinking to excess is encouraged, the open use of illegal drugs is allowed and DJs spin music that glorifies guns and violence, it's honestly difficult to imagine how this is not happening more often.

Innocent or otherwise minor offenses that would normally have little to no consequence in any other setting (in an office, a store or on the street) can trigger a violent response in a nightclub. Such innocent or minor affronts become catalysts for violent offending and victimization.[6]

Attorneys who routinely handle nightclub shooting cases are keenly aware of the explosive results that are born of these highly volatile environments. The purpose of this paper is to briefly discuss the substantive law related to nightclub shootings, security measures and protocols that are standard within the nightclub industry, techniques for investigations post incident, and common insurance policy exclusions that attempt to reduce or eliminate coverage for nightclub shootings.

OVERVIEW OF SUBSTANTIVE LAW

Nightclub shooting cases are essentially 'third-party" premises liability actions. To prevail in such an action, the Plaintiff must plead and prove that (1) the defendant had a duty to exercise reasonable care to protect the plaintiff either from harm generally or harm that is of the type of criminal assault that injured the plaintiff; (2) the defendant breached its duty; and (3) the defendant's breach of that duty was a cause of the injury sustained by the plaintiff.

With regard to establishing a duty, a few jurisdictions hold that business owners owe no duty to protect a patron from a third-party criminal assault unless there exists a "special relationship" between the business owner and patron.[7] This less common approach holds defendants liable when there is an innkeeper-guest, business inviter-invitee, carrier-passenger or custodian-protectee relationship.

[4] Robert Nolin, *Gun Violence At Nightclubs Becoming More Common*, servingalcohol.com, February 26, 2012, http://servingalcohol.com/blog/managing-alcohol-serving-environments/gun-violence-nightclubs-common/.
[5] National Crime Victimization Survey (June 19, 2015), http://www.bjs.gov/index.cfm?ty=tp&tid=44
[6] *Id*.
[7] *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 229, 234-241 (2005).

In most jurisdictions, a duty to protect patrons absent a special relationship does exist. Depending on the jurisdiction, one of the following approaches (or a hybrid of these approaches) is used. The known aggressor/imminent danger[8] approach holds that a business owner is not liable for injuries sustained by a patron unless the assailant was known to be aggressive or prone to violence against other patrons. The prior similar incidents[9] approach holds that a business owner is not liable for injuries unless the plaintiff can prove a sufficient number and type of prior similar incidents at or near the business. Such incidents, it is argued, provide adequate notice to a reasonable business owner that a violent crime would occur. The totality of the circumstances[10] approach allows the plaintiff to put forth a variety of different types of evidence, including evidence about crimes in the immediate vicinity of the business in question, to suggest that a criminal attack which could harm the plaintiff was foreseeable.

Foreseeability does not mean the exact type of occurrence has happened in the exact same manner as before. Instead, foreseeability looks at the general character of the event or harm. This topic, specifically, how you can comb for facts to prove foreseeability, is an important step of your post-incident investigation and is further discussed below.

NIGHTCLUB SECURITY MEASURES AND PROTOCOLS

Nightclubs pose unique security problems. Responsible club owners and managers must recognize and, just as importantly, address these unique problems. Unfortunately, many nightclubs focus more on their bottom line and how to maximize profit than how to ensure a safe environment for their patrons. With alcohol as one of the biggest draws of a nightclub, there exists an increased risk that clubgoers may act more aggressively or make poor choices. Furthermore, clubgoers with propensities for violence and criminal activity will take advantage of any weaknesses in security to further their criminal agendas. Patrons, on the other hand, are not in a position to protect themselves against gun violence in a dark, confined and possibly unfamiliar space. Accordingly, they rely on the nightclub owners and managers to provide adequate security to protect them.

Retaining an expert witness who has a background in nightclub security and law enforcement early on in the case is crucial. The expert's years of experience in real world situations and his or her ability to discuss what security measures work, and how the defendant's failure to follow these measures allowed the criminal activity to occur, is an essential part of the plaintiff's case in chief.

A good expert witness will be familiar with and will be able to explain to a jury in plain English what the industry standards are with regard to nightclub security measures. Below are just a few of the areas you should cover with your expert witness when preparing for testimony in a nightclub shooting case.

[8] *Hedrick v. Fraternal Order of Fishermen of Alaska*, 13 Alaska 652, 103 F. Supp. 582 (Terr. Alaska 1952).
[9] *Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex. 1998).*
[10] *Traynom v. Cinemark USA, Inc., 940 F. Supp.2d 1339, 1357 (2013).*

Rope Lines

Rope lines are among the first opportunities responsible club owners and managers have to eyeball each patron awaiting admission to the club. The opportunity to observe the behavior and make contact with each patron as they are entering the club is often all that is needed to keep criminals out. All patrons awaiting admission to a nightclub should be placed in a single line, not blocking the sidewalk. All individuals in line should be informed that if they are not orderly, they will not be admitted. Individuals who will not be admitted should be asked to leave the area.[11] Those who continue to loiter after being denied admission should be dealt with by local law enforcement at the request of the club.

Metal Detectors / Wanding

In combination with the rope line, the use of metal detector wands or standard walk through metal detectors for each patron who is attempting to enter the club is an industry standard according to J.C. Diaz, Chief Operating Officer of the National Club Industry Association of America.[12] Patrons with guns will usually avoid nightclubs that utilize metal detectors / wands and will instead go to a club that does not attempt to keep out weapons. If metal detectors are used, every patron should go through the metal detector or wanding process in accordance with establishment policy. VIP patrons, DJs, promoters, and entourages should not receive special treatment and should likewise go through the metal detector/wanding process.

Security Pat-Downs

Similar to metal detectors/wanding, properly executed pat-downs can help to detect and keep weapons, alcohol and illegal drugs out of a nightclub.

ID Scanning Technology

The use of ID scanning machines is strongly recommended. While this technology cannot detect legal IDs being used by another individual and are not foolproof in rejecting fake IDs, they can be extremely helpful in recording who is entering the establishment. Some machines are able to verify an ID is valid and even record notes, such as linking an ID to an entry that identifies the patron as a problem person[13] or someone who has ban banned from the nightclub.

Zero Tolerance Drug Policy

Nightclubs should enact and enforce a zero tolerance policy for illegal drugs within their establishment. Often times, it is a drug deal within the club that starts a dispute that leads to

[11] New York Police Department and New York Nightlife Association, *Best Practices for Nightlife Establishments*, 2nd Edition (2011).
[12] Robert Nolin, *Gun Violence At Nightclubs Becoming More Common*, servingalcohol.com, February 26, 2012, http://servingalcohol.com/blog/managing-alcohol-serving-environments/gun-violence-nightclubs-common/.
[13] New York Police Department and New York Nightlife Association, *Best Practices for Nightlife Establishments*, 2nd Edition (2011).

violence. Drugs and violence, particularly gun violence, go hand in hand. Furthermore, criminals who see that illegal drug use is tolerated within an establishment will feel emboldened to engage in other illegal activities and will assume that the club tolerates this, and other types, of criminal behavior.

Proper Ejection of Aggressive Patrons

Patrons who are engaging in verbal or physical aggression or altercations must be separated and removed from the establishment. However, these violent patrons cannot simply be kicked outside. They must be removed in a legal manner, designed to prevent a continuation of violent activity outside the club.[14] Establishments must call 911 to report criminal activity[15] and to ensure that fighting patrons do not continue their violence in the nightclub's parking lot or in the streets nearby the club.

Identifying information on ejected and/or arrested patrons should be retained on a "banned list" database. These patrons should not be allowed subsequent re-entry to the nightclub.[16]

Video Surveillance

It is recommended that properly working and maintained digital cameras be mounted in front of the establishment (both inside and outside), at all entry doors and outside the bathroom doors.[17] Thought should be given to whether the cameras are monitored live or simply videotaped. There exists a school of thought that cameras that are not monitored live can provide a false sense of security for patrons. Some experts will testify that the best practice is for the cameras to be recording and to be monitored live as well.

Adequate Lighting

Ensure that levels of lighting inside and outside the establishment are sufficient for observation by security and to deter criminal activity.[18] Many nightclub shootings happen outside of the nightclub in dimly lit and poorly monitored areas like parking lots or alleys.

Properly Trained Security Staff

Security guards should be trained in techniques to de-escalate potential violent encounters and difficult situations. It is recommended that security guards be distinctively and uniformly attired so that they are easily identifiable to patrons and law enforcement. It is recommended that security guards be spread throughout the establishment and not just at the door.[19]

[14] New York Police Department and New York Nightlife Association, *Best Practices for Nightlife Establishments*, 2nd Edition (2011).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

As a general guideline, there should be a minimum of one licensed and trained security guard in every premise when 75 or more patrons are present at the same time. For larger premises, there should be one such security guard for every 75 club patrons present. Discretion should be used by management to determine the appropriate number of security based on the event or crowd to ensure safety and lawfulness.[20] Spot checks of employees should be conducted to ensure compliance with establishment policies and applicable laws and rules. Specific employees should be charged with conducting occupancy counts periodically throughout the night[21] to ensure compliance with fire codes and to guard against dangerous overcrowding.

THE WORLD WIDE GOLD MINE

Immediately after a nightclub shooting, our office begins its research on the nightclub in question, the neighborhood surrounding the club, and similar businesses within close proximity to the nightclub. We reach out to the investigating law enforcement officers and attempts to stay abreast of the investigation. We being to comb through local news stories (television and print) and catalog any story which discusses the incident in question. We also search for prior stories about the club in question, to try to uncover prior similar incidents. Thanks to today's technology and the younger generation's obsession with recording and sharing everything in their lives, we also scour YouTube and Facebook to find not only video of the incident in question, but also any videos of prior incidents (usually fights) at the nightclub. We, of course, do everything listed above for the strip mall or facility in which the nightclub is located and for surrounding businesses as well.

It is not unusual, within only minutes of searching, to uncover numerous recordings of fights inside and outside of the nightclub we are investigating. When conducting internet research on nightclubs, we have found video footage showing illegal drug use in front of security personnel as well as video which revealed shoddy pat-downs and incomplete wandings while patrons were being admitted into the nightclub.

Most clubs advertise specials on certain nights and have started to 'brand' those evenings with catchy names like "$20 Sink or Swim Saturdays". It is not unusual to find a flyer (posted on the exterior walls/doors of a club as well as on the club's Facebook page), referencing drug use and gang symbols. What better evidence to use against a defendant at trial than their own advertisement?

Just like any other negligent security case, we bring in our best private investigators immediately to begin gathering data, including ordering the police reports for the nightclub, the strip mall or shopping center the nightclub is located in, directly beside or behind and those from any other nightclubs within a few mile radius. We task the private investigator with producing not only individual police reports but also obtaining for us a crime grid of the immediate area where the shooting has occurred. Our firm also orders a copy of the CAP Index (a statistical indicator of crime) for the incident location in question. The CAP Index is routinely used by property owners and businesses to analyze the risk of crime in a certain location and compare it

[20] *Id.*
[21] *Id.*

to the overall national or local crime risk. A score below 100 indicates an area is safer than a national or local average by comparison. A score above 100 indicates an area is less safe than a national or local average by comparison. We usually find a score of 300 or above (three times the national or local level) at nightclubs where our clients have been victims of shootings.

Finally, depending on the rules of the jurisdiction, if allowed, our firm attempts to find former employees of the nightclub. Many times we find folks who make decent appearances and admit that illegal drug use was allowed in the club; that patrons were allowed to come into the club without a pat-down or wanding, and/or that there was little to no formal training on security protocols, including pat-downs, wanding or how to properly eject combative patrons.

INSURANCE POLICIES AND EXCLUSIONS

A nightclub's commercial general liability (CGL) policy often provides the only source to recover money for injured plaintiffs. It is imperative to obtain a complete certified copy of the CGL policy of all defendants as soon as possible. Every policy contains different endorsements and exclusions and it is important to know right from the start what coverage issues you are going to have to contend with.

In general, most plaintiff attorneys plead causes of action based in negligence. Allegations usually include negligent hiring, training and supervision and negligent failure to provide adequate security.

Some CGL policies issued to nightclubs have endorsements that create eroding sub-limits for damages resulting out of assault and battery at limits much lower than the stated CGL per occurrence limit. However, it is important to remember to carefully examine each endorsement and to take time to check the date of any endorsement that purports to limit or exclude coverage. Recently, our office found an endorsement which reduced the CGL limit from one million dollars to one hundred thousand dollars that was added to the defendant nightclub's policy four days after our client was paralyzed from the waist down as a result of a nightclub shooting.

Depending on your jurisdiction, you may be able to overcome assault and battery exclusions by alleging the exclusion is ambiguous[22], against public policy[23], or invalid based on the doctrine of reasonable expectations[24].

Another type of exclusion – a Firearm Exclusion – which excludes coverage for any injury or damage that "arises out of, relates to, is based upon, or attributable to the use of a firearm(s)" is one that we had never encountered in our practice until December 2014. Following a shooting at a Tampa, Florida nightclub, our firm was retained by seven clubgoers who were shot or otherwise injured while fleeing from a club after gun shots rang out. Having

[22] *Liquor Liability Joint Underwriting Ass'n v. Hermitage Ins. Co.*, 419Mass 316, 644 NE2d 964, 44 ALR5th 787.
[23] *Hickey v. Centenary Oyster House*, 690 So. 2d 858 (La. Ct. App. 2d Cir. 1997).
[24] *Monticello Ins. Co. v. Mike's Speedway Lounge, Inc*., 949 F. Supp. (S.D. Ind. 1996).

never seen such an exclusion in a nightclub's CGL policy before, you can imagine how wide our eyes opened when we first read the words "Firearm Exclusion".

In 2012, in a case of first impression, a Washington Appellate Court held that a firearms exclusion in a CGL policy unambiguously excluded coverage for all claims arising from a nightclub shooting, including those characterized as pre-shooting negligence claims, regardless of who used the firearm.[25]

We are closing watching this emerging area of the law and fully expect to be involved in a declaratory judgment action on this very issue in the near future as a result of our representation of seven clients injured in a 2014 shooting at a Tampa nightclub.

CONCLUSION

Years ago, the worst thing that could happen after a night at the club was waking up with an empty wallet and a pounding headache. Unfortunately, in today's world, many nightclubs have become battlegrounds, increasing the possibility that patrons might not make it home at all.

When nightclubs put profits over people by failing to hire, train and supervise a professional security staff or by failing to enact and execute appropriate security protocols, bad guys with guns make their way in and "Shoot the Club Up". Negligent security attorneys shine a light on shadowy nightclub owners and operators who fail to follow industry standard to protect their patrons. In holding nightclub owners and operators responsible, we are not only obtaining justice for our clients, but helping to elevate the industry and making our communities safer.

[25] *Capitol Specialty Insurance Corp. v. JBC Entertainment Holdings*, 172 Wn. App. 328, 289 P.3d 735 (2012).

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The Dark Side of Substance Abuse Treatment- Credibility Issues When Addicts Become Victims

Substance Related and Addictive Disorders and Sexual Assault Survivors

Substance related disorders now encompass ten separate classes of drugs including alcohol, cannabis, hallucinates, inhalants, opiates, sedatives, hypnotics, stimulates, and several others. According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM-5, the substance related disorders are divided into two groups: substance use disorders and substance induced disorders. The following conditions may be classified as substance induced, intoxication, withdrawal and other substance medication induced mental disorders like psychotic disorders, depressive disorders, and neurocognitive disorders.

The victims of rape are 13.4 times more likely to develop two or more alcohol related problems and 26 times more likely to have two or more serious drug abuse related problems[2]. In a study of male survivors sexually abused as children, over 80% had a history of substance abuse, 50% had suicidal thoughts, 23% attempted suicide, and almost 70% received psychological treatment[3]. Moreover, 75% of women in treatment programs for drug and alcohol abuse report having been sexually abused[4]. Continuing with this theme, in another study of 100 adult patients with polytoxic drug abuse, 70% of the females and 56% of the male drug abusers had been sexually abused prior to the age of 16.[5] Adding from a sample of 100 male and female

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[2] Kilpatrick and Aciemo, 2003 "Mental Health Needs of Crime Victims: Epidemiology and Outcomes", Journal of Traumatic Stress

[3] Lisak, David 1994 "The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors" Journal of Traumatic Stress, 7 subsection 4: 525-548

[4] Nejavits, L.M., Weiss, R.D. and Shaw, S.R. (1997) "The Length between Substance Abuse and Post-traumatic Stress Disorder in Women: A Research Review" American Journal on Addictions, 6:273-283

[5] Mueser, K.T., Rosenberg, S.D., Goodman, L.A. and Trumbetta, S.L. 2002 "Trauma, PTSD and the Course of Severe Mental Illness: An Interactive Model" Schizophrenia research, 53: pages 123-143

subjects receiving treatment for substance abuse, more than one third were diagnosed with some form of dissociative disorder stemming from childhood sexual or physical abuse[6].

Substance Abuse Treatment Centers

In the Department of Health and Human Services Substance Abuse and Mental Health Services Administration's (SAMHSA) report concerning the annual census of facilities providing substance abuse treatment throughout the country, SAMHSA noted that a total of 14,630 facilities participated in the survey. These facilities had a one day census on March 29, 2013 and a total of 1,249,629 clients/patients were enrolled in substance abuse treatment on that day.[7] Additionally, in the United States, there are 481 clients in treatment per 100,000 in the population age 18 and older.[7]

Depending on the area in which a person searches for treatment, there may be a major difference in the amount of for profit treatment options versus not for profit facility locations. Generally throughout the country, private non-profit organizations operate about 55% of all facilities and are treating 51% of all clients[7]. The private for profit organizations operate 32% of all facilities and are treating 34% of all clients[7]. Local governments operate about 5% of all facilities, state governments operate approximately 2% of all facilities, the federal government operates about 3% of all facilities, and tribal governments operate 2% of all facilities[7].

In terms of credentialing and licensing of these facilities, according to SAMHSA, 81% of all facilities report to their local state substance abuse agencies and 43% report to their local state Department of Health and/or State Mental Health Department. About 24% report to CARF (Commission on Accreditation of Rehabilitation Facilities)[8]. 7% of the facilities report to the Joint Commission. Approximately 5% report to a hospital licensing agency. The remainder report to another state or local agency or another organization. The majority of substance abuse treatment facilities are operated as free standing facilities. This means that they are not directly affiliated with any hospital or other type of medical institution. The majority of substance abuse treatment facilities will have some modicum of medical staff in that they provide detoxification services that by state and federal regulations require medical management. The general distinction between detoxification services and residential or non-hospital treatment is simply that the detoxification services can be anywhere from 3 to 7 days and short term residential treatment is considered 30 days or less.

There is little doubt that alcohol and other drug addictions are an immense problem for society. According to SAMHSA, it is estimated that about 25 million Americans age 12 or older need treatment for substance abuse and addiction.

Preventing the Wreckage of the Future

[6] Ross, C.A., Kronson, J., Koensgen, G. 1992 "Dissociative Comorbidity in 100 Chemically Dependent Patients" Hospital and Community Psychiatry, Chapter 43, subsection 8, Pages 840-842

[7] See, National Survey of Substance Abuse Treatment Services (N-SSATS) 2003. Data on substance abuse treatment facilities, Department of Health and Human Services, Substance Abuse and Mental Health Services Administration.

[8] CARF founded in 1966 as a Commission on the Accreditation of Rehabilitation Facilities, CARF international is an independent, non-profit accreditor of health and human services.

Many survivors begin their recovery journey by going through a substance abuse treatment program and these survivors are also directed to recovery residences of all types.[9] "Though we work out our solutions on a spiritual as well as altruistic plain, we favor hospitalization of the alcoholic who is very jittery or befogged. More often than not, it is imperative that a man's and woman's brain be cleared before he or she is approached." Alcoholics Anonymous, The Doctor's Opinion, 4th Edition 2001. In the United States, many public and private substance abuse disorder treatment programs subscribe to a 12-step approached organized around the philosophy of Alcoholics Anonymous (AA).[10] AA is an organization that began as a fellowship devoted to helping those who wished to stop drinking. From its original two members in 1935, it has become an international organization consisting of over 100,000 groups worldwide with an estimated membership in the United States and Canada of approximately 1.4 million[11].

Although AA does not view itself as a treatment modality, [12]AA plays a prominent role in the design and implementation of 12-step-based treatment programs in several important ways. On the positive end, it fosters relationships with local treatment facilities, and its philosophy methods and materials are formally integrated into treatment activities. Practically speaking, some 12-step-based treatment programs are headed by private physicians or affiliated with a hospital, whereas others are often lead by mental health professionals and self standing. Although generally characterized as "aftercare," 12-step programs are the basis for recovery for the young and old around the world. Appreciating the instructions contained in the 12 steps gives some understanding as to "how it works" and sheds a little insight as to how these concepts can be misused:

1. We admitted we are powerless over alcohol (our addiction) and that our lives have become unmanageable.
2. Came to believe that a power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood Him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all of these defects of character.
7. Humbly asked him to remove our shortcomings.
8. Made a list of all persons we had harmed and became willing to make amends to them all.
9. Made a direct amends to such people wherever possible, except when to do so would injure them or others.

[9] NARR – National Association of Recovery Residences – recovery residences are generally non regulated "sober homes."

[10] Bukstein, O., Treatment of Adolescents Alcohol Abuse and Dependents Alcohol Health and Research World. 1994, 18:296-301.

[11] AA.org, Estimates of AA Groups and Members as of January, 2015.

[12] Laundergan, JC. Easy Does it Alcoholism Treatment Outcomes Hazelton and the Minnesota Model, Minneapolis, Hazelton Foundation, 1992

10. Continued to take personal inventory and when we were wrong, promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for the knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics (addicts), and practice these principles and all of our affairs.

What occurs in many of the substance abuse treatment facilities is that the "carry the message" in helping other alcoholics or addicts is the mantra for the staff of these treatment programs. While a number of the facilities will have professionally trained supervisory staff, the day to day interactions between the residents, patients, and the staffers is largely based on interactions with poorly and inadequately trained *behavioral health technicians* ("techs"), many of whom only have the employment qualification of being a "graduate" of the very organization they are employed by.

Mary Ann's Story

At the time of her admission to the substance treatment center, Mary Ann was a 22 year old seeking help for her dependence on alcohol. She had recently been arrested for a DUI and was on probation for another alcohol fueled offense. She had been to other treatment facilities in the past but this time it was part of the consequences of her recent relapse, which lead to the arrests. This substance abuse treatment facility was thousands of miles from her home and family.

Mary Ann had a significant history of depression and had experienced childhood sexual abuse at the hands of a teenage neighbor. She did not report the sexual abuse to any authorities as there was a family culture of not talking about "such things." She described the events to previous counselors, therapists, and at the time of admission. Mary Ann's only interaction with a medical provider was at the time of her admission when she was initially evaluated. During the first week of her stay, she participated in the scheduled activities, which primarily consisted of group therapy and attendance at 12 step meetings outside of the facility. Her fellow residents were comprised of several other men around her age and an a few older fellows. She also reported that she considered herself bisexual.

This tech (a relative of the owner who purportedly was "sober" for a year himself with pending open felony drug charges) was left to manage, supervise, and oversee the well-being of the residents from 8 pm to 6 am. In the days prior to the sexual assault, Mary Ann was approached by the tech who would admire her clothing and physique, offer her cigarettes, and in her mind, seemed sincerely interested in her well being. During the day of the assault, Mary Ann was in a group session where she disclosed, in front of the tech, some facts concerning her sexual abuse experience and substance abuse. In the same meeting, she disclosed that she thought she was bisexual but felt "on the fence." She left the meeting distraught and the tech followed her out to offer her several cigarettes and "12 step talk." That very evening, the tech came to Mary Ann's room, knocked on the door, and said that he was coming in for a "bed check." He then produced a bottle of alcohol and offered it to her. She initially refused and he told her that "no

one will know." She drank with him and while she was impaired, he sexually assaulted her. He told her later that "no one will believe you" and left the room.

She did not report this event and two days later, in her room, she was found with another bottle of alcohol. She was brought to the main staffing office where she was **confronted** by the admissions coordinator and the director of the program. At this juncture, they began to question her as to whether she was being truthful about the allegation that she had been sexually assaulted by the tech. They told her that there would be consequences for these reports and that she might have to leave the facility if she was not "truthful," adding that the program requires "rigorous honesty" and she might also face consequences related to her DUI charge. She quickly retracted her statement fearing the repercussions of being kicked out of the facility and the consequences involved with her current DUI. She was also fearful that her family's admonition that if this treatment facility "didn't work" then she would not be welcomed home. She left the facility and spent the night in the parking lot of a nearby building. She returned the next morning and was then offered an opportunity to be transferred to another facility. She was not offered counseling and she was not offered any other type of assistance. Law enforcement officials were never called.

Liability of the Facility

As with most facilities of this nature, the facilities often have clients' statements of rights and/or descriptions of their services. This facility was no different in that they put in their brochure, "every client is assured and guaranteed the following: (a) the right to be treated with respect and dignity, (b) to receive timely treatment by qualified professionals, and (c) to be provided humane care, protection from harm, and privacy for counseling and interview sessions, among other things." One would assume that there is no debate that the only thing that a treatment facility needs to get 100% right is to protect its patients from harm.

In this instance, it was a fairly clear case of negligent hiring and retention of the tech. Moreover, there were issues regarding supervision and adequacy of the facility. The inadequacy and inappropriateness of the response of the facility once the disclosure was made compounds the injury to the client/patient substantially[13].

Although survivors frequently receive both negative and positive reactions from disclosing such events, according to the social negativity hypothesis from stress and coping literature, victims may give more weight to negative reactions than positive ones. Negative reactions can then elicit strong emotional reactions from victims. In addition, negative social reactions could be enforced or exacerbate already existing feelings of self-blame that are common in victims of this crime. This is consistent with the effect matching hypothesis. This means, simply stated, that those who you went to for help then become the blamers and shamers. This is coupled with issues regarding the so called credibility of the reporter; namely, why should anyone believe the alcoholic or drag addict?

[13] See, Perspective Changes in attributions of self-blame and social reactions to women disclosure of adult sexual assault. Journal of Interpersonal Violence 2011, 26 :1934 (August 2010)

The Shield and the Sword - "Credibility" Issues of Survivors who are Substance Abusers

As with all evidentiary matters, testimony concerning a plaintiff's substance abuse may be held to be relevant and/or in certain circumstances, properly disallowed. The following cases are some historical examples:

In Chicago, in *Northwest Railroad Company v. McKenna*, 1934, Nebraska 74 F.2d 155, the plaintiff brought an action to recover damages for an assault allegedly committed by the defendant, a watch guard, guarding carloads of wheat for his employer, the co-defendant. The court held that a reversible error was committed in withdrawing from the jury proper testimony that would have tended to show the plaintiff, who admitted on cross examination, that he had been treated for "morphineism," was treating in the year preceding the assault and a few months thereafter. The court held it was error for the trial court to have refused to allow the defendant to bring out by evidence of the superintendent of the hospital the plaintiff was treated for chronic "morphineism"; that addiction to morphine causes the disposition of the addict to become vicious and quarrelsome. The court then opined that the defendant should have been permitted to show that the plaintiff was a habitual user of drugs that may have effected his mental faculties irrespective whether he was under the immediate influence of them at the time of the occurrence. The court added that continued addiction had direct bearing upon credibility and held that since there was testimony that the plaintiff had a bad reputation with regard to truthfulness and honesty, the jury would have been aided by the reception of the excluded evidence with respect to the addiction.

However, conversely, in *Standard Oil Company v. Carter*, 1923, 210 Alabama 572, 98 So. 575, there was a civil action seeking damages for personal injuries. The court noted that the use of opium cannot be introduced to repair the creditability of a witness unless it is shown that he was under the influence of the drug at the time of testifying or at the time of the occurrence of the event to which he is testifying or that his mind was generally impaired by the use of said drug. The secondary issue when it comes to the substance abuse of a plaintiff is the sort of sideways attack on credibility because of the substance abuse history and how expert testimony can be the "shield and the sword."

The criteria often employed by courts in approaching the problem of admissibility of an expert's testimony as to "drug addiction" and the consensus of the experts has lead the courts to distinguish between testimony proffered to show drug use or addiction for "veracity" and testimony proffered, show the drug user's addiction impairs mental and physical faculties such as his mind, memory, vision and narrative powers. In *Markowitz v. Markowitz*, 1927 Missouri, 290 So. 119, there was an action against the decedent's estate's admission of expert testimony as to the general effect of drug addiction on a mental and moral condition of a witness who had been using for 15 years until a year before the trial. This was held proper to attack his credibility. The Nevada case ruled admissible, expert testimony that drug addicts had a strong tendency to lie. These cases predate modern substance abuse research, however, many in the field of substance abuse treatment will offer anecdotes as to the "truthfulness" of that opinion.

Testimony regarding substance abuse can be used in the context of a personal injury case to address damages and injuries and so-called "credibility" issues. As an example, in Tacey v.

Kelner, 697 So.2d 932, 1997, the Kelners filed suit against the Taceys seeking damages for personal injuries suffered as a result of the automobile accident. Prior to trial, the Kelners filed a motion in limine to prohibit the Taceys from introducing records from a substance abuse treatment facility that demonstrated the plaintiff's long time use of illegal narcotics. The Kelners argued that such evidence would be highly prejudicial and would prohibit a fair trial. The trial court conducted a hearing and denied the motion, finding that the records were relevant to the issues of the plaintiff's life expectancy, credibility, and the existence of any post-surgical complications. The court expressly found that the value of the drug abuse evidence outweighed its potential prejudicial effects. In this matter, the plaintiff had developed a case of osteomyelitis and the defendant argued that the plaintiff's medical treatment was in part the result of his chronic IV drug use as well as anything related to the car crash. Additionally, it was also admitted to the issue of his credibility in that the plaintiff had made several inconsistent statements concerning his drug use and his prior medical treatment.

One approach, in looking at Mary Ann's situation, her prior substance abuse, and even her arrest history; instead of being used as a sword against her, it became "the shield." Her vulnerability, the very reason she was at the substance abuse treatment facility to begin with, was her significant history of substance abuse and other co-occurring disorders. Adding her history of sexual abuse and her fear of legal repercussions made her particularly vulnerable to the attack by the inadequately trained and poorly supervised technician.

According to our expert, "unfortunately despite her efforts, Mary Ann did not receive any form of appropriate therapeutic intervention." Instead, she was re-traumatized through inappropriate scrutiny and shame based interview tactics. Moreover, she was encouraged to make a false statement that the events did not occur. The trauma experienced through the sexual assault was severely exacerbated when she was shamed and humiliated by a "trusted member in authority" placed a significant chilling effect on her ability to seek comfortable institutional care of any type, including for sexual assault recovery and substance abuse in the future.

While criminal charges were never filed, Mary Ann did file a civil suit and it settled at mediation. She has moved back to her hometown and her family and she has been able to stay sober.

Conclusion

According to SAMHSA's National Survey on Drug Use and Health (NSDUH), more than half of all adults drink alcohol, with 6.6% meeting criteria for an alcohol use disorder. Among Americans aged 12 or older, the use of illicit drugs has increased over the last decade from 8.3% of the population using illicit drugs in the past month in 2002 to 9.4% (24.6 million people) in 2013. Of those, 8.2 million people met criteria for a substance use disorder in the past year. The misuse of prescription drugs is second only to marijuana as the nation's most common drug problem after alcohol and tobacco, leading to troubling increases in opioid overdoses in the past decade. Additionally, a 2012 study of the rehab industry by Columbia University's National Center on Addiction and Substance Abuse found that in many states, treatment facilities are barely regulated and offer "unproven therapies" at "astronomical prices."

Clearly, substance abuse and the way it is clinically treated is a major issue in this country. However, millions have recovered and there is hope. With stronger regulation, oversight and training of clinical staff, we can begin to ensure that survivors of sexual abuse, who are trying to recover from addiction, can successfully come through the system.

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She is a member of the American College of Legal Medicine; Palm Beach County Bar Association; Palm Beach County Justice Association; Florida Justice Association and the National Crime Victims Bar Association. She has received several awards for community service, including the Arnold Markle Award by the Judicial District in New Haven, Connecticut, for her work with survivors of sexual assault. Now, Ms. Ramsey actively litigates on behalf of survivors of catastrophic injuries.

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Ethics for Crime Victims' Lawyers

For each of the following issues:

1. **What can you do?**
2. **What can't you do?**
3. **What must you do?**

(1) **EO** During settlement negotiations in a child sexual abuse case against a well-known religious institution, a defendant's attorney advises you that that the settlement agreement must contain the following terms:

a) All settlement terms are confidential.
b) Your client will never speak of the incident at issue in the case again.
c) Your client will never speak disparagingly about the defendant again.

[1] Jeffrey R. Dion, Esq., is Director of the National Crime Victim Bar Association, an affiliate of the National Center for Victims of Crime. In that capacity, he lectures throughout the entire country to foster greater communication and understanding among crime victims and trial attorneys. He trains victim advocates in the application of civil litigation and instructs fellow attorneys in crime victim issues and services. Mr. Dion is a homicide victim survivor and a survivor of childhood sexual abuse. Jeff earned both his undergraduate and law degree at George Mason University in Fairfax, Virginia.

[2] Erin K. Olson specializes in the representation of victims of child sexual abuse and elder financial abuse in both civil and criminal courts. She has litigated dozens of clergy sexual abuse cases against the Archdiocese of Portland and various religious orders, as well as child sexual abuse cases against individuals, private secular organizations, and governmental entities such as school districts and the Oregon Youth Authority. She often represents her civil clients' interests in the criminal prosecutions of their abusers, and occasionally is called upon to represent victims and witnesses in criminal cases when their constitutional or statutory rights are not being honored. Erin spent the first ten years of her legal career as a prosecutor, working for the Multnomah County District Attorney's Office, the United States Attorney's Office for the District of Oregon, and the Massachusetts Attorney General's Office. Erin was raised in Madras, Oregon, and has a B.A. from Stanford University, an M.S. in Criminal Justice from Northeastern University, and a J.D. from the University of Connecticut.

[3] Jerry O'Neill was admitted to the District of Columbia Bar in 1971. After a period of service in 1971-1972 as an active duty U.S. Army Officer, he was a law clerk to the Honorable Sylvia Bacon, a Judge of the District of Columbia Superior Court in 1972. He then clerked for Vermont U.S. District Court Judge Albert W. Coffrin in 1972-73. In 1973 he joined the U.S. Attorney's Office for the District of Vermont in Rutland as an Assistant U.S. Attorney. He became the First Assistant U.S. Attorney in 1975, moving to Burlington to open the office there in 1976. He served as First Assistant U.S. Attorney until May 1981 when the U.S. District Court Judges for the District of Vermont appointed him U.S. Attorney for the District of Vermont. Since 1981 he has been in private practice in Burlington and was the senior partner of O'Neill Kellner & Green for 26 years. He teaches on trial advocacy topics for the American Association for Justice throughout the United States. Jerry joined Gravel & Shea in January 2014.

d) You will never take another case against the defendant.
e) Your client will not issue a press release announcing the settlement.
f) You will agree not to list the settlement on your website, even with the identity of the defendant concealed.

(2) **JO** You have a survival claim arising from the sexual assault of a woman in a nursing home who died shortly after the assault of causes unrelated to the assault. There is a substantial Medicaid lien that will reduce the heirs' recovery to virtually nothing if paid in full. During a mediation, the mediator tells you the defense has offered to stipulate to the amendment of the complaint to allege wrongful death, and will stipulate that the settlement money is for the wrongful death claim.

(3) **EO** You have a contingent fee agreement with your client, and he is offered a parcel of valuable real property to settle the case.

(4) **JO** You represent five clients who were harmed by the same defendant, and their economic damages alone exceed $2 million. The defendant has an insurance policy with $1 million limits, and files for bankruptcy shortly after you file the lawsuit.

(5) **EO** Your client fires you and hires new counsel after you have invested significant time and money into the case.

(6) **JO** After his deposition, your client is extremely angry at his still-living perpetrator and tells you he knows where he lives and has identified a broken window through which he could access his perpetrator's house.

(7) **EO** You represent the interests of a 10 year-old child through his mother, the court-appointed guardian *ad litem.* In their answer to the complaint, the defendants allege that the mother is also at fault for the child's injuries for failing to adequately supervise the child.

(8) **JD** A fellow plaintiff's attorney calls and offers to refer you a case in exchange for a referral fee of 25% of your standard contingent fee.

-- What if the attorney states she will only refer you the case on these terms if you charge a 45% contingent fee?
-- What if the referral comes from the National Crime Victim Bar Association and they want you to sign an agreement imposing conditions on your receipt of the referral?

(9) **JO** Your client lies about a material matter during his deposition.

(10) **EO** You have resolved a case in which there was a protective order covering all discovery produced by the defense. An attorney friend of yours has a case involving the same defendant, and wants to review the discovery from your case.

(11) **JO** Your client wants to sell his claim to a 1-800 number company for fast cash, as advertised on late-night TV, and demands that you sign the necessary documents for the assignment.

(12) **EO** Your client discloses that since sustaining the head injury in the crash for which you represent him, he has had uncontrollable bursts of anger that have resulted in him striking and injuring his child.

(13) **JO** You suspect that there are other victims of a perpetrator besides your client, and you want to:

a) Issue a press release when you file the lawsuit in the hope that the media attention will lead
more clients to you.
b) Offer a $5,000 donation to "CrimeStoppers" if they will offer a reward for information leading to the prosecution of your client's perpetrator
c) Send your investigator to contact other potential victims under the guise of contacting potential witnesses.

(14) **EO** You want until the last minute to file a complaint, and miscalculated the statute of limitations. The case is dismissed with prejudice, but you believe the judge did not property apply a tolling rule, and want to advance an appeal.

(15) **JO** After completing discovery and extensive motion practice in a negligence case, the sole defendant files for bankruptcy, leaving a $100,000 insurance policy as the sole source of recovery. You have advanced $60,000 in costs, and your fee agreement entitles you to 40% of the gross recovery, with costs coming out of your client's share of the recovery.

--What if your costs are $120,000?

(16) **EO** A former employee of the defendant in one of your cases calls to tell he witnessed the incident at issue in your case, and asks for $10,000 from you to provide the information.

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Please see handout.

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Civil Rights Litigation and Enforcement for Victims of Gender Violence

Sexual violence on our nation's college campuses is under increasing national attention over the last several years. The stories of survivors like Angie Epifano, Anna, and Dana Bolger, recounting not only the horrific and life-altering sexual assaults they suffered but how their universities failed them in response, have gone viral. Amherst's school newspaper published Angie's account of having been sexually assaulted in her dorm by a fellow student and subsequently repeatedly shamed by her school counselor and other administrators, sent to a psychiatric ward against her will, and outright denied educational opportunities, while her rapist walked freely on campus and graduated with honors.[2]

Anna, whose story was featured in *The New York Times*, was gang raped by members of the football team at William, Hobart, and Smith Colleges at a university-affiliated fraternity house and assaulted again on campus property with an eye witness present; the perpetrators were promptly cleared after detrimentally flawed disciplinary proceedings, leaving Anna further traumatized and vulnerable.[3] Dana was told by her dean at Amherst to take a semester off and work at Starbucks in response to her report of sexual assault and stalking. She has since co-founded Know Your IX, a leading student activist organization dedicated to informing and empowering students about their rights under Title IX, rights which she knew nothing about at the time she was interacting with her college.[4] These survivors' voices have inspired waves of other survivors to publicly speak out about an issue that has long been silenced behind societal shame and blaming of victims. Like other major institutions before it – the Catholic Church, the military, Boy Scouts – institutional motives to sweep sexual violence under the rug are being exposed.

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[2] Epifano, Angie. *The Amherst Student*. "An Account of Sexual Assault at Amherst College." Published October 17, 2012. *Available at* http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst- college

[3] Bogdanich, Walt. *The New York Times.* "Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint." Published July 12, 2014. *Available at* http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=0

[4] *See:* http://knowyourix.org

The movement around a school's responsibility to prevent and respond to sexual assault is centered on Title IX of the Education Amendments of 1972, which gives students the right to full access to the benefits of their education free from sex discrimination and its effects.[5] This paper will examine the rights of victims of sexual violence under Title IX and accommodations that can make a difference in the lives of survivors.

In my work with Bode & Fierberg's School Violence Law practice, I represent victims and their families who have been subjected to a wide range of school violence, including survivors of rape and sexual assault on college campuses and in K-12 educational settings. Part of my practice involves representing survivors through school disciplinary proceedings and working with schools to implement Title IX accommodations so the student can safely and fully access the benefits of their education.

Generally when people hear "Title IX", they first think of one thing: sports. Title IX actually says nothing about sports – in reality Title IX's language and its implications is much broader. It states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[5]

Sexual assault is an extreme form of sexual harassment that falls under the umbrella of sex discrimination prohibited under Title IX. The United States Department of Education has for decades issued guidance addressing the obligations schools to address sexual violence. The United States Department of Education Office for Civil Rights provides that, once made aware of student-on-student sexual harassment amounting to a hostile environment, like an instance of sexual assault, a university must take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.[6] In doing so, a school must provide for prompt and equitable resolution of sexual harassment complaints[7] and "tak[e] steps to remedy the effects of the harassment."[8] According to the Department of Education, Office for Civil Rights Assistant Secretary, "If remedies are necessary to ensure equal access to education programs, a school cannot require a student to pay for receipt of those remedies."[9]

For students, the transition into college is generally met with excitement and

[5] 20 U.S.C. §§ 1681 - 1688
[6] 20 U.S.C. §§ 1681 - 1688
[7] Dept. of Education, Office for Civil Rights, June 2001 Revised Sexual Harassment Guidance, 2001.
[8] *Id.*, 34 CFR 106.31 and 106.3; *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 288 (1998) ("In the event of a violation, [under OCR's administrative enforcement scheme] a funding recipient may be required to take 'such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination.' §106.3.").
[9] Catherine E. Lhamon Assistant Secretary for Civil Rights, Letter to Know Your IX and the United States Students Association, November, 17, 2014. *Available at* http://knowyourix.org/letter-from-department-of-education-11-17-2014.

anticipation for a bright and productive future; many students and their families develop an affinity for the pride and solidarity that is offered and encouraged by the school, supporting the student in their endeavors and helping them feel secure and protected. Students are faced with a new load of responsibilities and expectations, and they are continuously working to balance a healthy social circle, care for their well-being, and succeed in their academics. Being a student is already a challenge, and students and their families do not embark on this new path with the thought that they may be dealing with the effects of a sexual assault in the coming years.

When a student is assaulted, they are faced with complex demands which can interfere with the most basic tenets of their daily lives. Their social lives are strained – they may find it more difficult to go out, to trust people, or even to leave their room at all. Their perpetrator is likely to be someone they know, which could prevent them from accessing their mutual circle of friends for support.[10] A victim's personal safety may be compromised, causing them to be hyper-vigilant about encountering their perpetrator when walking to or attending class, getting a meal in the dining hall, being at their work place, or even being in their own dorm. If the victim chooses to report to the police or their school, they also have to deal with the criminal justice system and the school's disciplinary proceedings. This can be overwhelming and challenging as it requires repeatedly sharing a very traumatic story, speaking with law enforcement, providing personal information, or attending interviews or court dates. In the aftermath of an assault, a victim may got to a hospital, undergo a rape kit, and receive treatment for or prevention of STDs and pregnancy. If they are working in addition to going to school, the added burdens following the assault may cause them to underperform at their job and risk losing employment. Many victims suffer from mental health issues, including post-traumatic stress disorder (PTSD), flashbacks, trouble sleeping, or potentially many other heath issues related to the assault. Student victims may have difficulty concentrating or attending class, find it harder to complete their schoolwork, and often see their grades drop dramatically, causing them to withdraw from classes or drop out of school.

Schools are very well positioned to provide Title IX accommodations to support a survivor to get their education back on track in the wake of sexual violence. Those accommodations include safety measures such a no contact directives, the provision of mental health counseling services, and providing changes in housing. The academic impact of sexual assault is an area that requires a serious need for accommodations, and the following, adapted from an article I published in the Washington Post, describes the import of academic accommodations.

Consider the case example of Deena.[11] The semester Deena was raped, her grades plummeted: She received a "D" in one course and failed another. It was the classes requiring participation in which her grades suffered the most, as some days she was too terrified to leave her dorm room, especially after running into her assailant on campus.

When Deena went to her academic dean to explain, he patronized. "Lots of students

[10] United States National Institute of Justice, Dec., 2000, Sexual Victimization of College Women.
[11] Name and identifying information has been changes to protect the privacy of the survivor.

graduate with a 2.0," he said. Sure, Deena was aware that some students did. But Deena graduated at the top of her high school class; she shouldn't have been one of them.

Deena's experience is all too common. Often victims's grades suffer, sometimes dramatically. One in five women are sexually assaulted in college, according to a White House report.[12] The rates are also particularly high in the LGBT community. In the aggregate, this means that millions of college women and LGBT students have seen their grade-point averages unfairly deflated due to sexual violence. As one of my clients bluntly put it, "it's as if my transcript is covered in his semen."

Grades matter. They are the mechanism professors use to assess a student's performance and schools use to rank the student body. They are the means by which students measure their own achievement. Outside of school, employers and graduate programs rely on grades to evaluate candidates among an increasingly competitive field.

These deflated GPAs have a rippling negative impact on survivor's graduate school options and access to professional opportunities. Those lost opportunities are devastating on a micro-level — individual students miss out on what they had worked hard to achieve.

But the problem also has serious consequences on the macro level. It means that we as a society are losing out on the contributions that these students would have made had they been able to start off in professional careers and attend graduate schools that are reflective of their merits, not their rape.

Deena did not earn a "D" or an "F." Those grades belong to her rapist and her school for failing to fully accommodate her academic needs. In her case, the Harvard Law School Gender Violence Program worked with Deena's school to replace the "D" with a "Pass" and ensure the "F" was removed from her transcript. The change in GPA improved her confidence and allowed her to be eligible for her dream to study abroad.

A supportive school is well-positioned to help students like Deena, and lessen the academic impact of sexual violence. I propose here some of the remedial measures a school could offer to do just that.

It is the responsibility of the school, not the student, to ensure the academic accommodation needs are met. One student I worked with had to fend for herself, repeatedly recounting the assault to her professors to request extensions, sometimes receiving no response in return. Rather, a designated campus administrator should be available to contact professors and assure the survivor that academic accommodations are carried out. In particular, survivors may find class participation difficult following sexual violence, and removal of a participation requirement can significantly improve a student's grade.

Where a student's grades have already suffered because of a sexual assault, for example

[12] United States National Institute of Justice, Dec., 2000, Sexual Victimization of College Women.

because the student had not yet informed the school of the assault, or the school failed to provide accommodations, schools should provide opportunities to remedy the survivor's transcript. For example, the school could remove affected grades, allow the survivor to retake a course, replace poor grades with "passes," or offer to attach an official addendum to transcripts explaining impacted grades.

Graduate schools should invite applicants to explain low grades related to sexual violence, and provide opportunities for students to recalculate their GPA without the assault-affected grades. These efforts should be done in a manner that respects the applicant's privacy.

Schools should make every effort to ensure that their misconduct proceedings do not to interfere with academic success. I worked with a student who was required to complete an appeal of his rape case during his exam period. His final grades that semester were the worst of his academic career. Access to campus justice should not have inversely impacted his GPA. Schools should take care not to schedule hearings during midterms or final exams.

Where schools have a GPA requirement for maintaining a scholarship or participation in school programs, survivors should be offered a semester or year-long forgiveness period in which their grades would not count towards eligibility.

Where a student's grades take a sudden downturn, academic deans should be on alert that the student might have experienced sexual violence-related trauma and reach out to that student before placing her or him on academic probation.

Many survivors have gone on to achieve great successes. They have. But they shouldn't be handicapped by grades impacted by sexual violence. And schools can do much to prevent the fallout that all too often follows a sexual assault.[13] 13

Title IX's promise is equality in education. In practice it ensures survivors receive the accommodations they need and deserve to achieve that promise.

[13] Simon, Cari. *The Washington Post.* "On top of everything else, sexual assault hurts the survivors' grades." Published August 6, 2014.

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Civil Rights Litigation and Enforcement for School Bullying Victims

INTRODUCTION

Bullying is devastating our children. It is hurting, traumatizing, and sometimes even killing our kids. The consensus among physicians, social scientists, and educators alike is that bullying can seriously impair the physical and psychological health of victims and their educational achievement. The short- and long-term psychological impact alone can be highly destructive, increasing the risk of suicide. Bullying needs to be treated as the serious problem it is, not as a normal rite of passage to be endured.

Today we stand at a "tipping point" on bullying. Behaviors we once took for granted are no longer acceptable. This normative shift is reflected in state anti-bullying laws and courts throughout the country. All fifty states have anti-bullying laws that require schools to take appropriate action to address and prevent bullying.[2] Although there is no federal law that specifically applies to bullying, when harassment is based on race, color, national origin, sex, disability or religion, schools are obligated to address it.

Far too often, however, schools are not doing what the law and their own anti-bullying policies require. In fact, half of our country's school officials and teachers have not received training on how to respond to bullying.[3] And eight out of every ten times that a child gets bullied at school, no adult intervenes.[4]

Civil rights litigation and enforcement can help to change this. Not only can it obtain justice and compensation for school bullying victims, but it can make systemic change in the ways that schools prevent and respond to bullying. This paper provides an overview of the federal civil

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[2] The U.S. Department of Health and Human Services has a website, www.stopbullying.gov, which provides a wealth of information on bullying, including every state's anti-bullying laws and policies.

[3] Kidpower.org, http://www.kidpower.org/library/article/bullying-facts/ (last visited Jul. 30, 2015).

[4] *Id.*

rights claims and remedies available to school bullying victims, as well as some practical tips for handling these cases.

WHAT IS BULLYING?

Because there is no definition of bullying under federal law, and no uniform definition under state anti-bullying laws, it is helpful to start with a basic understanding of bullying. This will help you evaluate whether a plaintiff is a victim of bullying—or something else.

According to the U.S. Department of Health and Human Services (HHS), bullying is "unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance" and "is repeated, or has the potential to be repeated, over time."[5] It is not garden-variety teasing or a two-way conflict involving peers with equal power or social status. Interpersonal conflicts and "drama" among equal peers is a normal rite of childhood passage. Bullying is not.

HHS, in accordance with educational research, identifies three types of student-on-student or "peer" bullying suffered by school aged children: (1) verbal bullying, which is saying or writing mean things; (2) social or "relational" bullying, which involves hurting someone's reputation or relationships; and (3) physical bullying, which involves hurting a person's body or possessions.[6]

Evaluating potential bullying cases through this definitional lens is useful, particularly when evaluating potential federal civil rights claims to address peer bullying. It will help you weed out garden-variety peer conflict from true bullying. However, a thorough evaluation of potential claims to address peer bullying should also include an examination of your state's anti-bullying laws and policies, as well as the local school district's anti-bullying policies.

OVERVIEW OF FEDERAL CIVIL RIGHTS CLAIMS AND REMEDIES

A school's responsibilities to address bullying are not limited to the responsibilities described in the school's (or the state's) anti-bullying policies. Some types of peer bullying trigger responsibilities under one or more of the federal anti-discrimination statutes, as well as the U.S. Constitution.

If you have evidence that the bullying was based on race, color, national origin, sex, and/or disability, you should consider asserting claims under the following federal anti-discrimination statutes: Title VI of the Civil Rights Act of 1964 (Title VI),[7] which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX),[8] which prohibits discrimination on the basis of sex; and two statutes that prohibit

[5] Stopbullying.gov, http://www.stopbullying.gov/what-is-bullying/definition/index.html (last visited Jul. 30, 2015). This definition is consistent with the one used by most psychologists. *See* Emily Bazelon, "Defining Bullying Down," *The New York Times* (Mar. 11, 2013), *available at* http://www.nytimes.com/2013/03/12/opinion/defining-bullying-down.html.

[6] *Id*.

[7] 42 U.S.C. § 2000d *et seq.*

[8] 20 U.S.C. § 1681 *et seq.*

discrimination on the basis of disability, Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disability Act of 1990 (Title II).[9] School districts may violate these civil rights statutes and the U.S. Department of Education's implementing regulations[10] when peer bullying based on race, color, national origin, sex, or disability "is sufficiently serious that it creates a hostile environment and such harassment is encouraged, not adequately addressed, or ignored by school employees."[11]

Although these statutes do not prohibit discrimination based on sexual orientation or religion, in some circumstances such bullying may be covered by Title IX or Title VI, respectively. If the bullying of a student who is gay or perceived to be gay can be characterized as a form of gender-based stereotyping, then Title IX would apply.[12] Similarly, if, for example, a Jewish, Muslim, or Sikh student is bullied on the basis of actual or perceived shared ancestry or ethnic characteristics, rather than solely on their religious practices, Title VI would apply.[13]

Bullying based on race, color, national origin, sex, disability, or religion may also give rise to a claim under 42 U.S.C. § 1983 for violations of the student's constitutional right to equal treatment under the Fourteenth Amendment's Equal Protection Clause.[14]

Title IX Claims

Title IX prohibits discrimination "on the basis of sex" in schools that receive federal funding—which includes every public school district in the country.[15] The statute prohibits all forms of sex discrimination, including sexual harassment, harassment based on a student's failure to conform to gender stereotypes, and sexual assault.[16] It protects girls and boys alike. In addition, the bully and victim do not need to be of different sexes. Under Title IX, schools must protect

[9] 29 U.S.C. § 794 (Section 504); 42 U.S.C. § 12131 *et seq.* (Title II). Due to space limitations, this paper will not address disability-based harassment cases.

[10] The Department's regulations implementing these statutes are in 34 C.F.R. Parts 100, 104, and 106.

[11] U.S. Department of Education, Office for Civil Rights (OCR), Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

[12] *Id*. at pp.7-8; *see, e.g., Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011) (holding that "harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX").

[13] OCR Dear Colleague Letter: Harassment and Bullying, at pp. 5-6; *see also T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 322, 354 (S.D.N.Y. 2014) (plaintiffs may assert a claim under Title VI for anti-Semitic harassment whether based on national origin or race).

[14] U.S. Const. amend. XIV, § 1. Although, technically, a bullied student might also have a claim under §1983 for a violation of her substantive due process rights under the Fourteenth Amendment, these claims rarely succeed. *See,e.g., Morrow v. Balaski*, 719 F.3d 160, 164 (3d Cir. 2013); *Nabozny v. Pdlesny*, 92 F.3d 446, 460 (7th Cir. 1996).

[15] Under Title IX, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

[16] *See, e.g.*, OCR Dear Colleague Letter: Harassment and Bullying, at pp. 6-8; U.S. Department of Education, Office for Civil Rights (OCR), Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

students from sex-based harassment at school, on the school bus, on field trips, and at any other school-sponsored events.

If your client has a potential Title IX claim, she may only assert the claim against the recipient of the federal funding—*i.e.*, the school district or school board of education—not against individual school officials.[17] If your client also has an equal protection claim under § 1983, then she may sue individual school employees in addition to the school district.

The standard of damages liability for sex-based peer harassment under Title IX is high and often difficult to satisfy. In general, the successful Title IX bullying cases involve egregious fact patterns, both in terms of the nature of the bullying and schools' failure to respond appropriately.

The seminal case on peer harassment is the Supreme Court's decision in *Davis v. Monroe County Board of Education*.[18] In *Davis*, the Court held that students subjected to peer sexual harassment may sue their school districts for damages under Title IX when the districts "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[19] The Court also limited a school district's damages liability under Title IX to circumstances where it exercises "substantial control" over the harasser and the context in which the harassment occurs.[20]

Title IX does not make a school district liable for the conduct of students who bullied their peers. Rather, a district is liable only for its own misconduct in responding to *known* harassment. If bullying is not reported to or observed by school employees or administrators with authority to take corrective action, then a district will not be liable.[21]

For a district to avoid liability for "deliberate indifference," it need not expel bullies, engage in any particular disciplinary action, or remedy peer harassment.[22] The district need only respond to known peer harassment in a manner that is not "clearly unreasonable in light of the known circumstances."[23] "This is not a mere 'reasonableness' standard," and lower courts may conclude as a matter of law that a school district's response was not "clearly unreasonable."[24] Indeed, *Davis* emphasizes that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."[25]

[17] *Smith v. Metro. Sch. Dist.of Perry Twp.*, 128 F.3d 1014, 1019-21 (7th Cir. 1997) (no individual liability under Title IX). If you file an equal protection claim under § 1983, then you can sue individual school employees in addition to the school district.

[18] 526 U.S. 629 (1999).

[19] *Id*. at 650.

[20] *Id*. at 646-47.

[21] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

[22] *Davis*, 526 U.S. at 648.

[23] *Id*. at 648-49.

[24] *Id*. at 649.

[25] *Id*. at 648.

Since *Davis*, lower courts have had the opportunity to decide what qualifies as deliberate indifference to known harassment. Some courts have evaluated the reasonableness of a district's response to known harassment by considering whether the district imposed consequences reasonably calculated to deter known bullies from repeating the harassment.[26] Under this approach, it is difficult to establish deliberate indifference when a victim is bullied by multiple, non-repeat harassers. Other courts, however, have found deliberate indifference by focusing on the victim's identity and the cumulative effects of similar incidents by multiple new bullies, rather than on the identities of known bullies.[27] This approach makes deliberate indifference easier to prove.

The liability standard established in *Davis* applies to private actions for money damages, not to administrative enforcement proceedings or, arguably, suits limited to injunctive relief.[28] Before filing a lawsuit, you should think about filing a complaint with OCR both to exert additional pressure on the district and to obtain significant reforms under an easier-to-satisfy standard. Under OCR's enforcement standards, a school is responsible for addressing peer harassment "about which it knows or reasonably should have known."[29] In addition, if the harassment is "sufficiently severe, pervasive, *or* persistent" that it limits or interferes with a student's educational opportunities, then "a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring."[30] If OCR decides to investigate a complaint you file, this may also give you leverage in reaching a separate settlement with the school district on money damages.

Title VI Claims

The legal standards and remedies for Title VI peer harassment cases are the same as under Title IX: lower courts have relied on *Davis* to hold that students may also sue school districts for deliberate indifference to peer harassment based on race, color, or national origin under Title VI.[31]

[26] *See, e.g., Doe ex rel. Doe v. Bellefonte Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 23718302 (M.D. Pa. Sept 29, 2003), *aff'd*, 106 F. App'x. 798 (3d Cir. 2004).

[27] *See, e.g., Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005).

[28] *See* U.S. Department of Education, OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 2001), *available at* https://www.atixa.org/wordpress/wp-content/uploads/2012/01/OCR-2001-Revised-Sexual-Harassment-Guidance-Title-IX.pdf ("2001 Guidance") at iii-iv.

[29] OCR Dear Colleague Letter: Harassment and Bullying, at p. 2.

[30] *Id.* at pp. 2-3 (emphasis added).

[31] *See, e.g., Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012).

The Second Circuit recently decided a Title VI peer harassment case, *Zeno v. Pine Plains Central School District*,[32] which elaborates on the deliberate indifference standard and offers guidance on evaluating the potential compensatory damages awards in peer harassment cases.

Anthony Zeno, a bi-racial high school student, was harassed by his peers for three-and-a-half years. A jury found that the school district had acted with deliberate indifference to his harassment, in violation of Title VI, and awarded Anthony $1.25 million.[33] The district court denied the school district's motion for judgment as a matter of law, but reduced the jury award to $1 million.[34] The Second Circuit affirmed, holding that there was sufficient evidence to support both the jury's finding that the district had acted with deliberate indifference to Anthony's harassment and a damages award of $1 million.[35] (This is a particularly significant damages award for a purely emotional injury, given that the plaintiff did not have a damages expert.)

In *Zeno*, the school district had suspended nearly every student identified as harassing Anthony, contacted the harassers' parents, withdrew harassers' privileges (such as participation in extracurricular activities), and eventually implemented anti-bullying training for students, parents and teachers. Nonetheless, considering the district's response "in light of the known circumstances"—including the district's knowledge that disciplining Anthony's harassers did not deter others from engaging in serious racial harassment and that the harassment grew increasingly severe—the Second Circuit found there was sufficient evidence to support the jury's finding that the district's remedial response was inadequate.[36]

The Second Circuit's interpretation of "deliberate indifference" in *Zeno* is about as good as it gets for this hard-to-meet standard, and should be pressed in other jurisdictions where the standard is still evolving.

Remedies

There are a variety of remedies available to bullying victims whose federal civil rights have been violated. Compensatory damages are available under all the federal anti-discrimination statutes and for §1983 claims alleging constitutional violations. Punitive damages are available for federal constitutional violations, but are not available for violations of the federal anti-discrimination statutes.[37] In addition, if you prevail on a claim under the federal anti-discrimination statutes or the Constitution, you may seek to recover attorneys' fees under 42 U.S.C. § 1988.

[32] *Zeno*, 702 F.3d 655.

[33] *Id*.

[34] *Id*.

[35] *Id*. at 671, 673.

[36] *Id*. at 669.

[37] *See Barnes v. Gorman*, 536 U.S. 181, 185-89 (2002) (punitive damages not available under ADA or Section 504); *Mercer v. Duke Univ.*, 50 F. App'x. 643, 644 (4th Cir. 2002) (holding that Supreme Court's conclusion in *Barnes* compels the conclusion that punitive damages are not available for Title IX claims); *Smith v. Wade*, 461 U.S. 30, 35-36 (1983) (punitive damages available for constitutional violations by officials sued in their individual capacity).

To help attorneys assess the financial value of their bullying cases, Public Justice tracks verdicts and settlements across the country and update this information three to four times per year. This information is available on Public Justice's website at http://www.publicjustice.net/what-we-do/anti-bullying-campaign.

Our research shows that verdicts and settlements in bullying cases generally range from 5 to 7 figures. The highest reported settlement we know of in a peer harassment case brought under federal civil rights laws was $5.75 million. The case was filed in Hawaii and involved a gang at a public school for the deaf and blind who sexually assaulted and terrorized their classmates for more than a decade.[38] The highest judgment upheld on appeal is $1 million in the *Zeno* case described above.

Apart from damages, plaintiffs who are still in the school district may generally seek declaratory and injunctive relief for civil rights and constitutional violations. For example, they may ask school districts to implement anti-bullying training and education programs for school personnel and students alike. This is the best way to force schools to make systemic changes that will reduce bullying. In addition, if the plaintiff no longer attends a school within the district, an alternative way to try to obtain systemic reforms within a district is through an OCR complaint.

CONCLUSION

We cannot eliminate bullying among school children, but we can make schools respond appropriately to it—and help stop and deter a great deal of it—through effective civil rights litigation and enforcement. Litigation is a critical tool in our arsenal. It can help compensate bullying victims for the injuries they have suffered and help change the culture of schools and districts, so they take appropriate steps to prevent and respond to bullying.

[38] *Doe v. State of Hawaii*, No. 11-cv-0550-KSC (D. Haw. 2011).

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Public Nuisance in Child Sex Abuse Cases

Introduction

Applying the age-old doctrine of nuisance to child sexual abuse cases, plaintiffs are able to shed light on the serious and ongoing problem of institutions failing to protect children. By exposing the patterns and practices of these institutions, the public is better informed of the risks in their communities and so, better able to protect their children and families.

In the *Doe 1 v. Archdiocese of St. Paul and Minneapolis, et al.* case, nuisance was used in this innovative way to force disclosure of thousands of internal documents of the Archdiocese of St. Paul and Minneapolis. We will briefly review the history and evolution of common law nuisance which sets the stage for use in a wide variety of cases. Next, we will highlight some important aspects of pleading a private cause of action for public nuisance. Finally, we will discuss our experience litigating public nuisance in Minnesota.

History and Evolution of Nuisance

The law of nuisance dates back to at least the thirteenth century, when a nuisance was viewed as an invasion of rights to the public, which could be redressed only by the Crown on the public's behalf.[1] Prior to that, the earliest cases of nuisance involved encroachments upon the rights of the Crown, which could be redressed only by the King.[2] Over time, the term nuisance came to include varied activities including digging up the a wall of a church, helping a "homicidal maniac" to escape, being a common scold, keeping a tiger in a pen next to a highway, selling rotten meat, embezzling public funds and keeping a treasure trove.[3] A century-old definition classified nuisance as any "act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."[4] The concept continued to expand exclusively as a criminal remedy until the 16th century, when it was first recognized as a tort with a private cause of action.[5]

Over the years, nuisance acquired no definite meaning in common law, instead covering a large, miscellaneous group of offenses.[6] A nuisance included immoral activities such as

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[1] RESTATEMENT (SECOND) OF TORTS §821B cmt. a (1979).

[2] *Id.*

[3] J.R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989).

[4] RESTATEMENT (SECOND) OF TORTS §821B cmt. a (quoting J. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (1890)).

[5] RESTATEMENT (SECOND) OF TORTS §821B cmt. a.

[6] *Id.* cmt. a, b.

brothels, saloons, gambling parlors, indecent exposure and sale of obscene materials.[7] As famously described by legal scholar William Prosser, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[8] It "has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."[9]

In 1979, the Restatement (Second) of Torts attempted to codify the amorphous nature of "nuisance" into tort law. The treatise divided nuisance into two categories – private and public nuisance.[10] According to the Restatement, any harm alleged to be a nuisance fell within one of these two categories.[11] Private nuisance encompassed the narrower theory of interference with the free use of land or property interest while public nuisance encompassed a broader concept of interference with the public's common rights.

The Restatement defined public nuisance at common law as "an unreasonable interference with a right common to the general public."[12] In an effort to create parameters around what constitutes a public nuisance, the Restatement provided guidelines for determining the damage that may sustain a public nuisance claim. According to the Restatement, an interference may be considered unreasonable, and so a nuisance, in three circumstances:

(a) where "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience,"

(b) where "the conduct is proscribed by a statute, ordinance or administrative regulation," or

(c) where "the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[13]

Though it crafted three broad categories for determining whether an interference was unreasonable, the authors noted that the listed circumstances were not meant to be exclusive nor set restrictions against developments in public nuisance.[14] Rather, the Restatement simply set forth guiding principles while largely retaining the vague character of "nuisance." Thereafter, many states made efforts to outline the requirements of a public nuisance cause of action in statute.[15] This has resulted in the tort of nuisance taking different shapes in various jurisdictions.

Private Causes of Action for Public Nuisance

[7] John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 266 (2001).
[8] WIILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS §86 at 571 (4th ed. 1971).
[9] *Id.*
[10] RESTATEMENT (SECOND) OF TORTS §821A.
[11] *Id.* cmt. a.
[12] RESTATEMENT (SECOND) OF TORTS §821B(1).
[13] *Id.* at (2)
[14] *Id. c*mt. e.
[15] For example, in Minnesota, the nuisance statute describes nuisance as "anything which is injurious to heath, or indecent or offensive to the senses, or an obstruction to the free use of property." MINN. STAT. §561.01 (2015). Illinois law has codified a list of seventeen acts as public nuisance. *See* 720 ILL. COMP. STAT. ANN. §5/47-5 (2015). The list is not intended to be exhaustive, allowing for additional common law actions. In New York, criminal nuisance is defined as conduct which "creates or maintains a condition which endangers the safety or health of a considerable number of persons." N.Y. PENAL LAW §240.45 (McKinney) (2015).

I. Pleading Requirements

Although nuisance law has evolved differently in different jurisdictions, the Restatement's general principles offer guidance for pleading private actions. At its core, the claim must allege the existence of a public nuisance and the plaintiff must have suffered harm different in kind from the general public.

First, the plaintiff must allege that there is a nuisance, in other words, a real and appreciable invasion of, or a substantial interference with, a common public right. The Restatement describes common rights as those which impact the public's health, safety, peace, comfort or convenience.[16] Public rights are collective in nature and common to all members of the general public.[17] However, the invasion need not affect the entire community to be a nuisance. Rather, the nuisance may affect those who come into contact with it or the interests of the community at large.[18] In most instances, the determination of whether an activity constitutes a nuisance will largely depend on the reasonableness of the activity. Conduct may be lawful and still found to be unreasonable.[19] "Reasonableness" measures the gravity of harm by its extent, character, suitability and social value.[20] Where the gravity of harm outweighs the social value, the activity is unreasonable enough to constitute a nuisance.[21]

Second, the plaintiff must have suffered a special injury different in kind than the general public. This standing requirement is often referred to as the "special injury rule" and poses the greater of the hurdles for a private plaintiff. To maintain a public nuisance action, a plaintiff must plead a kind of injury that is special or peculiar in kind, not merely in degree. In other words, the individual plaintiff must establish some injury materially different from the injury suffered by the public in general. There is no bright-line rule for determining what makes an individual's injuries special or peculiar, though the Restatement's guidance is particularly helpful in this regard. Personal physical harm or pecuniary loss resulting from the nuisance are generally considered to be an injury different in kind.[22]

These two factors, the presence of an unreasonable interference and special injury, are integral to any public nuisance claim by a private plaintiff.

II. Remedies

Where a private plaintiff has suffered injury different in kind from the general public, there are two remedies available. A private plaintiff may recover for his damages as a result of the nuisance and may seek an injunction to abate the nuisance. Any award of damages is

[16] RESTATEMENT (SECOND) OF TORTS §821B(2)(a).
[17] *Id.* cmt. g
[18] "In many cases the interests of the entire community may be affected by a danger to even one individual." *Id.*
[19] *See* RESTATEMENT (SECOND) OF TORTS §821B(2); *see also City of Chicago v. Beretta U.S.A. Corp*., 213 Ill. 2d 351, 389, 821 N.E.2d 1099, 1124 (2004).
[20] RESTATEMENT (SECOND) OF TORTS §821B cmt. e; RESTATEMENT (SECOND) OF TORTS §827 cmt. a (application to public nuisance conduct).
[21] *Id.; see also Sowers v. Forest Hills Subdivision*, 129 Nev. Adv. Op. 9, 294 P.3d 427, 432 (2013), reh'g denied (Apr. 15, 2013), reconsideration en banc denied (June 20, 2013).
[22] RESTATEMENT (SECOND) OF TORTS §821C cmt. d and h.

retroactive and applies only to past conduct.[23] The damages incurred must be for significant actual harm incurred, for example, in the form of pecuniary loss or medical expenses.[24]

On the other hand, an injunction applies only to future activity. In an action for injunctive relief, a court must decide "whether the activity itself is so unreasonable that it must be stopped."[25] This requires "a balancing of the harm or inconvenience to those injured by the nuisance with the overall harm which would occur if the injunction is granted."[26] An injunction may be denied where the harm caused by enjoining the nuisance would be great and payment of money would sufficiently compensate a plaintiff for damages.[27] Alternatively, where there is significant impact on the public, such as an activity that endangers public health, there is a strong argument for an injunction to abate the nuisance.[28]

In private actions for sexual abuse, both remedies may be sought. While the primary goal will be an injunction to abate the nuisance, the existence of special injury allows for the recovery of damages. However, these damages will typically be nominal compared to those available for other claims.

Doe 1 v. Archdiocese of St. Paul and Minneapolis

We applied this nuisance theory in the *Doe 1 v. Archdiocese of St. Paul and Minneapolis, et al.* case in Ramsey County District Court in Minnesota.[29] We pled a public nuisance cause of action alleging that the Archdiocese's conduct in concealing information regarding sexually abusive priests created a public hazard by hiding the problem of child sexual abuse to the present day. We alleged that by keeping the names of priests with allegations of sexual abuse against them secret from the public, the Archdiocese was concealing the names of child molesters and creating a danger in the communities in which the priests live. By such concealment and nondisclosure of information about priests accused of child sexual abuse, the Archdiocese puts children at risk of being sexually abused. This threat of abuse by the Archdiocese's agents unreasonably endangers the safety and health of a considerable number of the public.

As a plaintiff who was sexually abused by one of the priests whose name and history was concealed by the Archdiocese, we alleged that Doe 1 could maintain a private cause of action against the Archdiocese because his legal rights and privileges were wrongfully infringed and injuriously affected. Specifically, Doe 1 had suffered physical, emotional and economic damages, different from the public at large, as a result of the Archdiocese's concealment because he was a victim of abuse by one of its undisclosed priests. So, we argued, Doe 1 could bring a

[23] RESTATEMENT (SECOND) OF TORTS §821B, cmt. i.
[24] *Id.* at cmt. d, h and i.
[25] *Id.* at cmt. i.
[26] *U.S. v. Reserve Min. Co.*, 380 F. Supp. 11, 55 (D. Minn. 1974) *decision modified and remanded sub nom. Reserve Mining Co. v. Envtl. Prot. Agency*, 514 F.2d 492 (8th Cir. 1975) *modified sub nom. Reserve Min. Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976) *aff'd and remanded*, 543 F.2d 1210 (8th Cir. 1976).
[27] *Id.*; *see also City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339, 53 S. Ct. 602, 604, 77 L. Ed. 1208 (1933); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3rd 590 (1970).
[28] *Id.* at 55.
[29] *Doe 1 v. Archdiocese of St. Paul and Minneapolis, et al.*, No. 62-CV-13-4075 (Minn. Dist. Ct. Ramsey Cnty., May 29, 2013) was the first case filed after the passage of the Child Victims Act in Minnesota, which permitted a three-year legislative window reviving previously time-barred actions for child sexual abuse.

private claim for public nuisance on his own behalf and on behalf of members of the public similarly affected.

The novel application of this legal theory was one of the first of its kind in the country and the first aggressive attempt in Minnesota, setting up some significant legal hurdles. The public nuisance theory was first challenged on a motion to dismiss, at which point the Archdiocese argued that Doe 1 had not alleged some special or peculiar injury which gave him a private cause of action. It further argued that the nondisclosure of information did not constitute a public nuisance. These arguments were rejected by the Court, which found that "the specter of unidentified pedophiles living at undisclosed locations in the community could create a cognizable public nuisance claim" even though no similar claim had been previously brought in Minnesota.[30] The issue for the Court turned on whether the plaintiff, as a private citizen, has sufficiently pled his private cause of action with proof of special and peculiar damages. With the case still in the early stages of litigation, the Court determined that Doe 1 should be permitted to demonstrate the uniqueness of his claimed damages. So, the claim was able to proceed through discovery.[31]

Prior to the *Doe 1* case, in 2004 the Archdiocese represented that it possessed a list of thirty-three priests who were credibly accused of sexually molesting minors, often called the "John Jay" list. The Archdiocese had never disclosed the names of these priests publicly, though a sealed document had been filed with the court in a 2006 case.[32] Due to the broad nature of Doe 1's public nuisance claim, we sought public disclosure of the listed priests and discovery of all documents relating to the Archdiocese's awareness of child sexual abuse including, but not limited to, documents on the identified 33 priests and others. We also sought depositions of the Archdiocese's top officials, including Archbishop John Nienstedt, Vicar General Kevin McDonough, former Archbishop Harry Flynn and former Chancellor and current Archbishop of St. Louis Robert Carlson, who we purported had knowledge about the cover-up of clergy sexual abuse, and the resulting nuisance.

The Archdiocese fought Plaintiff's discovery requests, seeking extensions, motions to quash, protective orders, and eventually seeking appellate review. With no legal recourse remaining, the depositions moved forward and the Archdiocese was forced to turn over the personnel files of priests accused of sexual abuse of minors. The Archdiocese ultimately disclosed more than 60,000 pages of internal documents, including names and information regarding over 100 priests who had been accused of child sexual abuse and various letters, memos, and reports pertaining to child sexual abuse by its clergy. It also publicly named the 33 priests whom it had determined, 10 years prior, to be credibly accused child molesters.

Upon our review of the disclosed discovery, we determined that the Archdiocese had significantly underrepresented the number of clerics it knew to have sexually abused children. While the Archdiocese had initially represented that 33 priests were credibly accused of sexual abuse, our review of the files revealed that an additional 36 priests were documented child sex abusers.

[30] *Doe 1 v. Archdiocese of St. Paul and Minneapolis, et al.*, No. 62-CV-13-4075, slip. op. 9 (Minn. Dist. Ct. Ramsey Cnty., November 18, 2013).
[31] *Id.*
[32] *John Doe 76C v. Archdiocese of St. Paul and Minneapolis, et al.*, No. 62-C9-06-3962 (Minn. Dist. Ct. Ramsey Cnty, April 24, 2006).

A process was set up by the Court to deal with this significant discrepancy. For each cleric believed to be a sexually abusive priest based on documents in his file, we sought review by a special master appointed by the Court. If we could show that good cause existed, the priest's name and his file could be made public. By engaging in this process, we were able to publicly disgorge information about 69 priests who had sexually abused minors in the Archdiocese. The nuisance action also allowed us to publicly disclose testimony of the Archdiocese's top officials and accused priests. These disclosures gained statewide and national attention.

The Archdiocese again sought dismissal of the public nuisance claim on summary judgment without success. It argued that Doe 1 lacked a special or peculiar injury from the general public, that the statute of limitations had expired and that allowing plaintiff to bring a nuisance claim was contrary to public policy. The Archdiocese contended that there continued to be a lack of quantifiable special injury that distinguished Doe 1 from the public. The statute of limitations argument attempted to tie the limitations period to the Archdiocese's creation of a list of credibly accused priests in 2004. The Archdiocese's public policy argument challenged the use of public nuisance by private individuals to compel mass disclosure of records which, it argued, had nothing to do with the individual's claim. It described clothing a plaintiff with such quasi-governmental power as a private attorney general as radical. The Court disagreed.

On the issue of special injury, the Court found that Doe 1's emotional injuries were unique to him and other survivors in that as survivors, they processed the abuse differently because of the Archdiocese's concealment.[33] The Court noted that "failing to disclose information about an accused priest is akin to, and conceivably more offensive and dangerous, than other acts that have been considered public nuisances" citing specific priests "as unfortunate examples of the horrendous consequences that can flow from intentional and misguided efforts to protect pedophile priests at the expense of minors."[34] In permitting the nuisance claim to go to trial, the Court held that "whether the Archdiocese … intentionally failed to exercise their common-law duty of due care to the public by not disclosing information about credibly accused and accused pedophile priests" was a question for trial.[35] Indeed, "a reasonable jury could find that [the Archdiocese] maintained or permitted a condition which unreasonably endangered the safety, health, morals comfort or repose of any considerable number of members of the public."[36] The *Doe 1* matter ultimately settled weeks before trial was scheduled.

The nuisance claim allowed us to negotiate a broad settlement in the *Doe 1* case. The settlement acknowledged the abuse by a number of priests who worked in the Archdiocese. It also created an action plan to change the way in which the Archdiocese handled reports of sexual abuse in the future. Seventeen child protection protocols were implemented to ensure the safety of children in diocesan programs moving forward.

The wide dissemination of the documents produced by the Archdiocese and the testimony of Archdiocesan officials caught the attention of the local District Attorney. On the coattails of the *Doe 1* settlement, the Archdiocese of St. Paul and Minneapolis was criminally charged with

[33] *Doe 1 v. Archdiocese of St. Paul and Minneapolis, et al.*, No. 62-CV-13-4075, slip. op. 16-17 (Minn. Dist. Ct. Ramsey Cnty., September 2, 2014).
[34] *Id. at* 10-11.
[35] *Id. at* 11.
[36] *Id.*

six counts related to their failure to protect children. Soon after the criminal charges were brought, two top officials of the Archdiocese, Archbishop John Nienstedt and Auxilary Bishop Lee Piché resigned. The criminal case is pending.

Conclusion

With the success of the nuisance theory in the *Doe 1* case, we have alleged similar claims in other dioceses and religious orders in Minnesota and in other states. This has forced the disclosure of the names of and documents regarding additional sexually abusive priests. As the nuisance theory continues to gain traction, plaintiffs are able to reach other survivors, feel validated in their pursuit of justice and publicly expose institutions that hide their abusers.

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MONSTERS WALK THE EARTH

How Child Sex Predators Get Their Prey and Fool Adults

Dedicated to you, K.S.

I will never forget the horror on your face and never lose hope for your survival.

M.D.

CONTENTS

PREFACE

MONSTERS AMONG US

> … as a society we tend to believe one of two things when it comes to sexual offenses: it won't happen to me or anyone close to me, or as I constantly hear, "I can tell if someone is a sex offender."
>
> Dr. Anna Salter[2]
> A psychologist who specializes in both child sex abuse recovery and offender treatment

Well, it happened to me, as a seven year-old child, before I was even old enough to know what sex or rape was. And it happened to at least three other children that I am aware of who lived on the same street of the Army town where I grew up, all of us at about the same time. Three of us were under age 12 at the time of the abuse. We were each from different homes. And about two dozen of the 40 homes on that street had kids living in them, so a child sex abuse victim lived in every sixth home where a child lived, at a minimum.

There were two abusers I was aware of and they weren't outsiders. They lived among us. They were unrelated, living in different homes, acting independently of each other. Both were entrusted with children who were their own, as well as those who were unrelated. My parents knew the man who bound and raped me, and threatened me into silence with a gun to my head and a knife to my throat, but they did not know he did that. They respected him for his professional position as a uniformed military officer. So unknown child sex abusers lived in every twentieth house on the street I grew up on, at a minimum. None of the adults could tell who they were.

Of us four victims, only one of us spoke up as a child to name the abuser, so only one set of parents knew that "it" had happened to someone close to them. That abuser was arrested; I never saw him again after the police drove him away. The other one, the one who abused me and another child, my friend, in my presence, was not arrested. He remains free today, almost 40 years after he committed his crimes. His many friends recently threw him a big birthday party. He remains active in his church community, his wife by his side. He boasts publicly about his grandchildren, the ones who play in his back yard to this day.

Michael Dolce

ONE

THE ENORMITY OF THE TASK AT HAND

> epidemic – *adj*. … 1. affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time. 2. excessively prevalent.[3]

Child sex abuse is an epidemic and needs to be called that, constantly, to remind us of the enormity of the task that we truly face. The numbers are as shocking as they are heartbreaking. New cases of confirmed child sex abuse are reported to law enforcement and child welfare authorities some 60,000 to 80,000 times a year in the United States alone.[4]

But authorities understand that the true number of new abuse cases each year "is far greater, because the children are afraid to tell anyone what has happened, and the legal procedure for validating an episode is difficult."[5] Some estimates are that child sex abuse crimes are underreported or are delayed in being reported by as much as 85 percent.[6] Further, underreporting is an international problem, indicating that the problem is endemic to the crime, not simply a matter of particular cultural or law enforcement sensibilities confined to the United States. As described by the World Health Organization:

> The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour.[7]

It is also apparent that the rate of child sex abuse is not particularly getting much better, if at all. As studied and determined by the federal government, the estimated incidence of sexual abuse of children (that is, the number of children per 1,000) was only slightly smaller between 1986 and 2006, at 1.9 and 1.8 per 1,000 children, respectively. In raw numbers, complaints of child sexual abuse were higher, at 135,300 compared with 119,200 child victims, on either end of that 20 year period.[8] Similarly, the percentage of child abuse victims who suffer sexual abuse as a component of that abuse has remained essentially the same, fluctuating "only slightly" according to the U.S. Department of Health and Human Services.[9]

In addition to this annual data, the longitudinal data is equally distressing. While estimates vary, there seems to be consensus among experts that 25 to 30 percent of girls, and 16 to 20 percent of boys, will be sexually abused before reaching age 18.[10]

And as if the number of child sex crime victims was not bad enough, experts also agree that, "Only a fraction of those who commit sex offenses are held accountable for their crimes."[11] That fraction totals almost 800,000 registered sex offenders in the United States.[A] So there are, in fact, probably millions of sex offenders walking free on our streets, many of them hunting our children.[12]

[A] The number includes both offenders against adult victims and child victims.

So there is much work to be done to stop the epidemic.

TWO

WHO "THEY" ARE – WHAT YOU MUST KNOW ABOUT CHILD SEX ABUSERS

> *Know your enemy and know yourself and you can fight a hundred battles without disaster.*
>
> Sun Tzu
> The Art of War

It is self-evident that to combat any enemy, at least successfully, one should learn as much as possible about that enemy, exactly who they are, where they commit their misdeeds, exactly what they do, how they do it and why they do it. There is substantial anecdotal evidence, however, that many adults -- including those employed by institutions that have a legal duty to act affirmatively to prevent child sex abuse -- do not want to know the details of who sex abusers are and therefore remain purposefully uneducated and ill-equipped to keep children safe. Those who show such apathy are employed in our schools, day care centers, residential communities, religious facilities, and even law enforcement and child welfare agencies. Far too many of them find the thought of getting to know as much as possible about child sex abusers to be too disturbing, too confusing and too ugly even to look at. This willful ignorance is a systemic problem that has resulted, and continues to result in, the creation of countless avoidable child victims.

We do not have the luxury of being able to look away from the enemy, that is, if we want to keep our kids safe, not only because of how much is at stake, but because the opponents who seek to molest and rape our children, are, more often than not it seems, well-informed, determined and cunning. As a result of their skill and the inaction of otherwise well-meaning adults, child sex abusers victimize hundreds of thousands of our children every year.

Properly educated, those to whom the welfare of children are entrusted, would know the succinct warnings of many experts about abusers, including this simple statement of who we are dealing with:

> Paedophiles are individuals who prefer sexual contact with children to adults. They are usually skilled at planning and executing strategies to involve themselves with children.[13]

Knowing that pedophiles "prefer" sexual contact with children is not nearly enough to combat them and, in fact, that information, simplistically presented, almost trivializes the nature of the problem. Despite the stated "preference" for sexual contact with children that is used to define pedophilia, the fundamental question that bears on understanding what is involved in combatting these predators is this: What really motivates someone to sexually abuse a child? Is it really just "sex"? Or does it take something more to cause child sex predators to be willing to harm an

innocent child, face the risk of decades or even life in prison, and face the profound scorn of society, to bear the modern-day equivalent of the "scarlet letter," the label "sex offender" or "sex predator"? In fact, are the predators actually motivated by a drive for sex with children, as some believe, so that we are fighting against a true "sex" crime? Or is it, as others believe, that sex crimes against children are really about violence and control?

We know that the overwhelming majority of time child sex predators do not leave physical marks or exert any meaningful physical force at all, so the argument goes that sex crimes are truly ones of sex.[14] But many who have studied the issue carefully and comprehensively start to see the question of force in context, concluding, "Force, as it is typically understood, is often not involved, but perpetrators use deception, threats and other forms of coercion."[15] Experts and predators alike paint a compelling picture that sexual abuse of children is more about power and control than it is about sex, even when violent force is not present.

Abusers themselves often describe their crimes in terms of control, even leaving out any real reference to sex. One convicted child sex abuse perpetrator, who was 23 years-old when he raped his girlfriend's four year-old daughter (his second known victim; he had been in and out of prison for the first victim already), described why he abused the four year-old repeatedly, even after telling himself he should stop, and even after the child revealed the abuse the first time he committed it (he had convinced her mother that she was lying after the first attack):

> [Interviewer]: Why did you not stop yourself after the first time?
>
> [Abuser]: *Honestly I had control of the situation. I was out of control in life. I felt like I didn't have any control in the relationship. I didn't have any say so. So I was looking for a way to feel powerful. That was my way. I was able to do what I wanted. …*

He then clarified his answer to emphasize that it was control of the child that mattered to him, a need that overpowered any fear he had of getting caught and returning to prison:

> [Interviewer]: Did you think you would get caught since you said you had control over the situation?
>
> [Abuser]: *I had control not over the situation but over her. That fear was definitely there. …*

The abuser's description of control is all the more significant in light of his acknowledgement later in the interview that he felt sexual attraction to teen and pre-teen girls before committing his crimes:

> *I did have fantasies if I was watching T.V. or something and I saw a teenage girl or a pre-teen on T.V. I would feel aroused. … I would be attracted to what I saw. I guess I always wondered what it was going to be like.*[16]

He made no mention of these fantasies when explaining why he raped the little four year-old girl.

Notably, there are significant psychological differences between rapists of adults and those of children, but control and violence are described to be at the center of those "sex crimes" too. Dr. Ron Sanchez, Supervising Psychologist at Utah State Prison, described the rapists he treats this way:

> The rapists tend to have a little different personality structure than say the child molesters or the pedophiles. Rapists generally tend to be more assertive, aggressive, have trouble with anger, perhaps come from a disordered family, violence, a lot of fights at school, oppositional defiant kind of a problem. Almost to a man they have difficulty expressing feelings.

When asked why he believes the men he treats have raped women, Dr. Sanchez stated:

> I think that certainly the act is an act of aggression, of power and control. There are a wide variety of explanations I guess. But one is to strike out an act of revenge. Even though they may not know the victim, even though the rapist might want to project an image of being invulnerable or being, you know, having a very tough exterior that many of them are very sensitive to rejection. They are very insecure about themselves and their own masculinity and what it means to be a man. … I think sex is part of it. I think it's just a vehicle for their aggression. There again, it's not just about sex. Many of these individuals at least on the surface have a relationship with women and are having sex on a regular basis. But for some reason, they have chosen to go out and victimize people in this fashion. So it's other things besides sex.[17]

So do child sex offenders go undetected for so long simply because the typical child sex abuser lacks an obvious disaffection from society or the outward anger and aggression that many rapists of adults have? The available data suggests that the answer cannot be as simple as that. First, child sex abusers are often, if not usually, prolific in their crimes, abusing dozens, scores, hundreds, and even thousands of children.[18] So, at the least, there are repetitive opportunities to detect what they are doing; there is some reason why that fact is not leading to the exposure of these criminals sooner.

Further, while many child sex predators would have an easier time accessing and controlling their victims because they are related to them and often live in the same home, the fact is that about one-third of sexual abusers are family members of the victim.[19] The remaining two-thirds victimize children over whom they would have much less control, particularly after abuse first occurs. Those predators meet their victims largely as neighbors (an estimated one in four of child sex abuse victims are victimized in their neighborhoods) and as educators (15 percent of child sex abuse victims are abused in their schools.)[20] So the predators would not, most of the time, have the level of immediate control over their victims that they would have if they only victimized children in their homes or families. So predators are silencing these victims in some other manner beyond what that access would provide.

In addition to these factors, predators are sexually abusing children at all ages. Any doubt that we are dealing with true monsters is laid to rest considering that an estimated 25 percent of child victims of completed rape are under age 10.[21] Given that the remaining child victims of completed rape (let alone other forms of sex abuse), some 75 percent of all victims, are in the age range of 11 to 17 and therefore have greater ability, developmentally-speaking, to realize when something being done to them is wrong and to seek and obtain help, it is clear that this fact is still not leading to more predators being exposed and stopped.

So one thing is clear: regardless of where child sex abusers access their victims, regardless of their relationship with the victim and regardless of the age of the victim, child sex abusers are adept at repeatedly accessing and silencing their victims. So they are certainly what the experts say they are, "skilled at planning and executing strategies to involve themselves with children," and they are achieving the control over their victims that they seek to achieve. (Tragically, the control that they achieve is profound and can be very long-lasting, well into the victim's adulthood. As one survivor put it, "… I am a survivor of incest … There are two parts to me. One part … graduated in the top 1% from [college], and the other part of me is the scared, ashamed and abnormal me. … It is difficult to use the word survivor because although he is now dead, he still has a hold on me.")[22]

Who child sex predators are probably appears best in their descriptions of themselves; how they explain who they are. A group of child sex abusers, having been caught and now being in treatment, described themselves in this list:

- *I am probably well-known and liked by you and your child.*
- *I can be a man or a woman, married or single.*
- *I can be a child, adolescent, or adult.*
- *I can be of any race, hold any religious belief and have any sexual preference.*
- *I can be a parent, stepparent, relative, family friend, teacher, clergyman, babysitter or anyone who comes in contact with children.*
- *I am likely to be stable, employed, respected member of the community.*
- *My education and my intelligence don't prevent me from molesting your child.*
- *I can be anybody.*[23]

But even this description, which give a pretty clear picture of who the abusers may be, does not make clear how they are actually effective in committing their crimes and avoiding detection. It tells us that they are typically already involved in the lives of their victims, but not someone one would readily suspect of being a danger. Even the experts have no better ability to spot a child sex abuser in advance. As psychologist Dr. Anna Salter candidly acknowledges:

> I've been doing this for more than 20 years, and I can no more identify a sexual offender than an untrained person. Sexual offenders, particularly child molesters, do so for a variety of reasons and rarely leave telltale signs in their public behavior. We want to believe that child molesters look different on the outside and that we can detect such differences when, in truth, we see them as loyal friends, good employees and responsible community members.[24]

All of this knowledge about who child sex abusers are and how hard they are to identify among us, should tell us, therefore, that the best approach to combatting them is not trying to figure out who they are in advance. We certainly cannot rely solely on whether someone has been arrested or convicted previously for committed a sexual offense against a child before allowing them access to our children – we would miss probably 90 percent of the predators. Rather we should focus on defeating their tactics and depriving them of opportunities to offend against our children.

THREE

THE TASK AT HAND: DEFEATING PREDATORY TACTICS

> There is no foolproof solution, but I do feel that more time should be spent on deflection, not detection. You would be as successful flipping a coin rather than trying to guess someone's propensity for committing a sexual offense. I would argue that looking at structures that limit the risk of a sexual offense would be more beneficial. A parent, church administrator or youth organizer needs to ask themselves the question, "Is this an attractive situation for a pedophile or other sexual offender?"
>
> Dr. Anna Salter[25]

The most knowledgeable people about the tactics child sex abusers use to prey on children are, obviously, the abusers themselves. As chilling as their statements can be, we need to pay close attention to them. This is especially true for those who operate any institution or organization that involves children. In an article jointly-written by convicted child sex abusers in treatment, they have described the process that precedes actual abuse of a targeted child:

> *Child molestation usually begins with a sex offender gaining a child's trust and friendship. The offender then begins "testing" the child's ability to protect themselves by telling sexual jokes, engaging in horseplay, back rubs, kissing or sexual games. If the child appears comfortable with or curious about this type of behavior, (and most healthy, normal children are) the offender will slowly increase the amount and type of touching to include more direct sexual touching. … Many children do not understand that what is happening is sexual or wrong.*[26]

In further detail, the predators provided this list of how they gain access to their victims, while simultaneously working to fool the adults who would otherwise get in the way of their grotesque agenda:

- *I pay attention to your child and make them feel special.*
- *I present the appearance of being someone you and your family can trust and rely on.*
- *I get to know your child's likes and dislikes very well.*
- *I go out of my way to buy gifts or treats your child will like.*
- *I isolate your child by involving them in fun activities so we can be together – alone.*
- *If you are a single parent, I may prey on your fears about your child lacking a father figure or stable home life.*
- *If my career involves working with children, I may also choose to spend my free time helping children or taking them on "special outings" by myself.*
- *I take advantage of your child's natural curiosity about sex by telling "dirty jokes", showing them pornography and playing sexual games.*
- *I will probably know more about what kids like than you do; i.e. music, clothing, video games, language, etc.*
- *I make comments like "Anyone who molests a child should be shot!" or "Sexually abusing a kid is the sickest thing anyone can do."*
- *If I am a parent, it is even easier for me to isolate, control and molest my own children. I can sexually abuse my children without my wife ever suspecting a thing. I gradually block the communication between my children and their mother, and make it look like I'm the "good guy."*
- *I may touch your child in your presence so that he/she thinks you are comfortable with the way I touch them.*[27]

The predators themselves also describe the messages they give to children to gain their silence once they have abused them:

- *After I've begun molesting your child, I maintain their cooperation and silence through guilt, shame, fear and sometimes "love".*
- *I convince your child that they are responsible for my behavior.*
- *I make sure your child thinks no one will believe them if they tell on me.*

- *I tell your child that you will be disappointed in them for what they have done "with" me.*
- *I warn your child that they will be the one who will be punished if they talk.*
- *I may threaten your child with physical violence against them, you, a pet or another loved one.*
- *I may be so good at manipulating children that they may try to protect me because they love me.*[28]

A few important things need to be noticed in analyzing these predatory tactics:

1. As to their interaction with their intended child victims, they first build a relationship and build trust by providing the attention that children need and desire. It is not as simple as luring in children with candy and gifts – that is just one tactic and one that is not always used in isolation. Children who lack adequate attention and care from responsible adults to meet their needs are more vulnerable to these tactics.

2. They create opportunities – if allowed to do so – to be alone with their child victims before actually abusing them.

3. They make sure the child knows that they are known to the parent.

4. They work to create the appearance that they would not abuse a child.

5. As to both their child victims and the adults who would stop them, their goal is to gain trust.

Dr. Anna Salter puts these tactics in full context of what the predators must do before secretly abusing a child, and warns against the failure to see it for what it is:

> We don't give sexual offenders enough credit, but they are much better at it than we assume. … whether it be preying on children of single parents, assuming roles of authority with direct unsupervised contact with children, or targeting children with low self-esteem, the deceiver knows he/she must be careful to construct a scenario conducive to their exploits. This is part of what makes detection very difficult – can't predict private behavior based on public behavior. People often cite "niceness" as the reason why they trust an individual. Author Gavin DeBecker said, "Niceness is a decision – a strategy of social interaction; it is not a character trait."[29]

Illustrating Dr. Salter's warnings, one offender described convincing his four-year old victim to participate willingly in the "game" he staged:

I went to the bedroom. I put on an adult movie. I was home alone with her. I knew that eventually she would come into the room. So when she did I was in there playing with myself. She asked me what I was doing. I told her I was playing. I asked her if she wanted to play. I showed her how to masturbate me and…uhm…lick me, and then I would lick her and go in on her.[30]

Again, the predatory tactics work if responsible adults believe that they can spot who the abusers are, rather than defeating the opportunities for them to offend. Among the primary methods to defeat all of the tactics outlined by the abusers themselves, without ever having to spot them in advance, are these:

1. Recognize that the most vulnerable children are those lacking for due attention to meet their emotional needs and work to fix that problem.

2. Ensure that any non-relative's time with children, especially any "special" or out of the ordinary time, is conducted with at least one other adult present at all times. Institutions that care for or cater to children must adopt and enforce such "two adults" policies. Any predator who realizes that he or she will not be left alone with a child will move on.

3. Recognize that predators, like roaches, run from light. Any institutional that cares for children should make sure all areas where children go must be visible at all times to multiple adults. For example, doors and rooms should have windows; when windows are not practical for any reason (such as bathrooms) it should be a dischargeable offense for one adult to be alone with a child or even multiple children in that room. The importance of zero tolerance policies like these should be impressed on all employees and volunteers, along with a strict duty to report any known or suspected abuse.[B]

4. Counteract predatory messages before they are delivered to a child:

    a. Educate and counsel children in advance of a problem arising what is and is not appropriate touch by adults. This can be as simple as reinforcing to all children that no adult, absent a medical setting where a parent is present, should touch them in an area of their body that a bathing suit covers, and that no adult should ask children to touch them in any such area.

    b. Educate and reinforce to children that they are never responsible for an adult's actions and will never be punished for revealing those actions. Assure them that they will be believed and be protected no matter what.

[B] While training all employees and volunteers on how to spot signs of child sex abuse and predatory tactics, it is important that institutions equally stress the need to report any suspected abuse to law enforcement immediately. Despite any efforts to learn about abuse and how to prevent and respond to it in their environment, only law enforcement and child welfare officials would have the level of skill and resources necessary to investigate reports of abuse adequately. Delays cause loss of evidence. See, O'Connor, Tom, *Understanding the Psychology of Child Molesters: A Key to Getting Confessions*, The Police Chief, vol. 72, no. 12, December 2005.

c. Educate and counsel children in advance of a problem arising that even if someone is nice to them with gifts and privileges, they must speak up if physical boundaries are breached. And because the person who may breach the boundaries may be in a position of authority, children should be counseled in advance to identify multiple, unrelated adults in their lives who they can turn to in order to disclose any abuse (that is, responsible adults in and out of their school, in and out of their religious facility, in and out of their family, etc.)

5. Institutions that care for children should be wary of how the legitimate access to children that their employees and volunteers may have can be misused "after hours" and establish and enforce policies against it. For example, school teachers could be barred from driving children home alone at the end of the school day or after extra-curricular activities, even with parental consent.

Experts concur on these types of tactics. For example, the American Academy of Child & Adolescent Psychiatry offers parents this advice on preventing and stopping child sexual abuse:

> Parents can prevent or lessen the chance of sexual abuse by:
>
> • Telling children that if someone tries to touch your body and do things that make you feel funny, say NO to that person and tell me right away.
>
> • Teaching children that respect does not mean blind obedience to adults and to authority, for example, don't tell children to, Always do everything the teacher or baby-sitter tells you to do.
>
> • Encouraging professional prevention programs in the local school system.[31]

Further succinct advice was provided by a task force established by the Missouri legislature to address child sex abuse in that state:

> Children need to be taught basic and age-appropriate information on boundaries, inappropriate touches and their right to determine who touches them and how. Even a simple strategy such as teaching a child the anatomically correct terms for their body parts decreases the chances that someone will molest them because that child now has the language to describe what is happening to them.
> …
> All organizations that serve children and families must operate under the assumption that some people who sexually abuse children may want to work for them. These organizations have an obligation to create an environment that is inhospitable to people who want to sexually violate children.[32]

And here is critical, very effective advice from the Jacob Wetterling Resource Center for any institution that takes children into its care:

> Adopt a "two deep" supervision policy to defeat predators' efforts to be alone with children in order to victimize them; that is, ensuring that at least two adults are always present with children. Preferably, the adults should be unrelated.[33]

As for teaching children personal safety boundaries and expectations in the environment, age appropriate materials are readily available and are inexpensive for individuals or institutions to access. See, e.g., the *Safer, Smarter Kids* program, available from www.laurenskids.org "… a series of child abuse prevention education curricula designed to empower children to protect themselves in situations where someone could abuse them. Children are armed with protective principles and vocabulary to express their feelings and talk to a trusted adult"; and *Safeguarding God's Children*, available from www.churchpublising.org. "…an in-depth educational and training program for preventing and responding to child sexual abuse in everyday life and in ministry."

It is also critical to recognize the limits of traditional security measures, particularly background checks on applicants for employment to work with or around children. Child safety experts and law enforcement officials make clear what those limits are, related to the data described above as to how few predators are reported to law enforcement and so few convicted (*supra* Part 1). Child safety experts advise:

> Although a background check is important, it will only reveal those who have been convicted of a crime against a child. This is problematic because most sex offenders, even some who have abused hundreds of children, have never been charged much less convicted of a crime.[34]

Law enforcement acknowledges:

> The reality is that most true pedophiles have been molesting children for years, dating all the way back to their own childhood. Few pedophiles are caught the first time they molest a child.[35]

The fact that the foregoing methods work to defeat the ability of child sex predators from gaining access to their victims and silencing them, child sex predators in treatment have provided their own advice on what adults must do to defeat them. Among the advice they offer:

- *Don't expect your child to be able to protect themselves from me or assume that they will be able to tell you that I am abusing them.*
- *Communication: listen, believe and trust what your child tells you. Children rarely lie about sexual abuse.*
- *Education: teach your child healthy values about sexuality. If you don't teach your child… I will.*
- *Watch for any symptoms of sexual abuse your child might demonstrate.*[C]

[C] For a discussion of signs of child sex abuse, see Part Four, *infra*.

- *Give your child specific information about where on their body they should not be touched or touch others.*

- *Let them know that people who touch children's private parts need help because they have a problem with touching.*

- *Remind your child that "secret touching" is never the child's fault. Talk to your child about the ways someone might try to "trick" them into going along with the secret touching" or not telling you that it is happening to them.*

- *Make sure your child knows that you want them to tell you immediately if something should happen and that, despite what anyone else may tell them, they will not be in trouble.*

- *Get to know your child's friends and the homes in which your child plays.*

- *Be wary of older children or adults who want to spend a lot of time alone with your child.*

- *Learn about the prevention program that your school uses and discuss it with your children. Have "safety talks" with your children several times a year.*[36]

Some case examples illustrate how the failure to implement such measures to readily and relatively easily defeat the aims of the predators resulted in tragedy:

CASE EXAMPLE ONE: State v. Stephen Budd, Elementary School Teacher

> *I pay attention to your child and make them feel special.*
>
> *I go out of my way to buy gifts or treats your child will like.*
>
> *I take advantage of your child's natural curiosity about sex by … playing sexual games.*

A recent criminal case in Palm Beach County, Florida, showed how a fourth-grade teacher, Stephen Budd, created an environment that made children feel special for participating in sexual games with him. As the prosecution was described, "The prosecutors said Budd used a popular classroom reward system called 'Budd Bucks' or candy to reward his student victims for the sexual acts under the teacher's desk at the Catholic school during the 2006-07 school year." The result of creating the "Budd Bucks" and providing select students access to the teacher's desk was the exact impact that predators want. As one victim testified, "we felt really special" [being his favorite students]" and "Budd bucks were the cool thing, and I of course I said yes."[37]

Educating students in advance about the type of tactics that were described in this trial would have helped ensure that the abuse did not occur. Likewise, providing a second adult in classrooms, a volunteer parent or teacher's aide, would have also defeated Stephen Budd's ability to abuse his students by making the environment impossible for him to commit his crimes.

CASE EXAMPLE TWO: A.B. v. Mobile Home Park

I pay attention to your child and make them feel special.

I present the appearance of being someone you and your family can trust and rely on.

I isolate your child by involving them in fun activities so we can be together – alone.

A.B. was a 14 year-old girl who lived with her mother in a rented mobile home in a mobile home park. The park, and the mobile homes in it, were owned and operated by a national rental community company.

The park's maintenance employee invited A.B. into one of the vacant mobile homes when she returned home from school on the pretext that he needed her help to clean up the mobile home for a new tenant who would be moving in. This made A.B. feel important and special. But once he had her inside the locked mobile home, he grabbed her from behind when she was leaning into an oven to clean it and raped her on the kitchen floor. This was the first of at least six such attacks she suffered at his hands, each time in a vacant mobile home.

A.B. eventually found the courage to disclose what was done to her and the police were called. When interrogated, the maintenance worker confessed and was later convicted based on that confession.

Once sued by A.B., the park's owner defended on grounds that the worker's background check was clear and therefore there was no way of knowing he was a danger to children. It was true that the maintenance worker had no prior history of arrests or convictions for any crime, let alone sexually assaulting children. In fact, he lived in the park himself, with his wife and young daughter, so everyone believed that he was a good, hard-working, family man.

The park owner ultimately had to admit its liability and pay for A.B.'s damages, however, based on these facts:

- The owner was aware that vacant mobile homes in its parks across the country, and others like them, if not properly secured and managed, attracted very personal crimes, providing the space and privacy that criminals desire to perpetrate their crimes without detection. It is well-known that vacant mobile homes were places where children are victimized by drug crimes, rape and even murder. Children are particularly vulnerable to becoming victimized in the vacant mobile homes of the parks where they reside because they live, roam and play near those vacant homes; as such, predators do not need to transport neighborhood children any significant distance in order to abuse them in private.

- It was well known that mobile home park employees who live on-site become familiar to children, often becoming like extended family members, as did the predator in this case. (The park's own expert witness had published articles on this very point, as well as the

fact that 25 percent of child sex abuse victims are abused by neighbors. He had also testified in a prior case that predators are "hard to spot.")

- The park owner deliberately advertised to attract young families to its rental community, including single parents (divorcees were specifically targeted in ads) with "latch key children," but undertook absolutely no effort to evaluate, let alone guard against, risks to child safety that existed while a single parent was still at work.

- The on-site management office had only one key to each vacant mobile home and that key was maintained by the maintenance worker.

- The park owner provided its on-site manager with a comprehensive procedure manual and related written policies totaling over 300 pages. The detail was astonishing, even providing a three page description on how to answer the telephone. However, there was no policy against employees taking children into vacant mobile homes and, in fact, not one single page among the more than 300 pages of its management policies said a word about child safety. It did, however, have policies barring nepotism and dating between supervisors and subordinates. Restrictions were placed on those relationships, but no restrictions were placed on the nature of permissible relationships between employees and residents or minors.

- There were only two references to safety at all in the 300 plus pages: an outline of fire procedures; and a statement that everyone was responsible for safety and were invited to make suggestions for improved safety.

Clearly, the park owner failed to pay any attention to child safety, despite affirmative efforts to profit by attracting single parent households with "latch key children" to its rental community. Had it bothered to evaluate safety risks, the risk presented by vacant mobile homes was obvious. The risk was easy to mitigate, by establishing a policy that children were not allowed in vacant mobile homes, including with unrelated park employees. All of this was achievable without ever having to attempt to determine who the unknown predators were.

CASE EXAMPLE THREE: R.H. vs. Church

I pay attention to your child and make them feel special.

I present the appearance of being someone you and your family can trust and rely on.

I isolate your child by involving them in fun activities so we can be together – alone.

If you are a single parent, I may prey on your fears about your child lacking a father figure or stable home life.

R.H. was a 14 year-old male, being raised alone by his mother; his father was completely absent from his life. R.H.'s mother joined a church and took her son with her. The leadership of

the church preached that congregants should maintain a very insular life within their community, interacting with "outside" society only as necessary, such as for work, but never socially. Similarly, the tools of "outside" society to "corrupt" youth were expressly rejected, like rock-and-roll music and alcohol.

Single mothers were specifically encouraged to allow male members of the congregation to help them with their households and to mentor any children they were raising alone.

Church leadership enforced their views by restricting the right of "corrupted" members to participate fully in services, shunning and even publically ejecting members who were deemed to be violating what was preached chronically or seriously. Those who were allowed to participate fully in the community therefore, were viewed as good influences, not "corrupting" ones.

D.M. was a single, adult male, who was part of the congregation, with no restrictions on his participation, thus he was seen as a good influence. Consistent with church leadership preaching, he infused himself into the lives of R.H. and his mother, helping with household chores and "mentoring" R.H. He volunteered to drive R.H. to various places while his mother was at work, and even to church-related functions out of town. Consistent with church preaching, R.H.'s mother permitted all of this happen.

Unknown to R.H.'s mother, D.M. started to "groom" her son for abuse and secrecy, encouraging him, for example, to listen secretly to the rock-and-roll music the church condemned and providing him with alcohol. In short order, D.M. began touching and rubbing R.H. on his legs while driving him places, before escalating to raping him in the back of his panel van. D.M. then threatened to expose R.H. for listening to rock-and-roll music and drinking alcohol, as well as making threats of physical violence, if he told anyone about the abuse.

It was established in litigation that certain church leaders knew that D.M. had previously been summarily fired from a job as a school bus driver for unspecified reasons that related to child safety. It was not clear if that information was widely disseminated among church leadership as a whole. D.M. had not, however, been criminally charged or convicted at any time for any crimes. The church officials refused in litigation to reveal anything that they knew about D.M.'s past based on the clergy-penitent privilege and asserted that they could not have revealed to other congregants anything they learned about him in the context of that privilege.

While none of the abuse of R.H. occurred on church grounds or at church functions, and even though D.M. held no official position with the Church, liability was nonetheless established based on the foregoing facts. The Church implicitly placed D.M. into a position of trust and essentially directed R.H.'s mother to allow him into that position away from any scrutiny that would be present at church facilities or functions, including in ways that would cause R.H.to be alone with him. Further the fact that at least some church officials were aware of the suspicious circumstances of D.M.'s discharge from employment as a school bus driver compelled them to investigate further before encouraging and endorsing his "mentoring" of R.H.

The Church's conduct in this case, regardless of their intentions, plainly violated the core precepts of how to avoid creating an environment that predators will find conducive to their malicious goals.

CASE EXAMPLE FOUR: M.S. v. High School

M.S. was a special needs high school student, age 16, challenged with Autism Spectrum Disorder and social communication difficulties. As a result, his developmental age lagged behind his chronological age.

M.S. attended an off-campus school-sponsored dinner/dance event. Many adults were present; his parents were among the chaperones. The event was crowded, with about 200 students and adults present. M.S.'s parents noticed during the event that a woman appearing to be much older than their son was walking hand-in-hand with him and was otherwise very physically close to him, as if they were on a date. Upon investigation, they discovered the woman held a teaching position in the school in the special education program. They demanded that she leave their son alone; her reaction was belligerent and defensive, causing them to conclude she was intoxicated or on drugs. They had to seek the assistance of two other adult school staff members to get the teacher away from M.S. Later in the evening, however, they found her again with their son, this time trying to dance with him. They took M.S. home at that point.

The next day, M.S.'s parents wrote to the school's assistant principal, describing the events in detail, including the following statements about the specific physical contact between M.S. and the teacher that they had witnessed:

- "They were walking 'hand in hand,' at times with their arms around each other."
- The teacher "was 'all over' M.S."
- The teacher "sat down next to him, not letting go of him."
- M.S.'s mother "asked [the teacher] repeatedly to please let go of his hand (she was clasping his hand, which was positioned on his leg)" and "to please keep her face away from his, as she was touching the side of his face with hers."
- After leaving with M.S., "he talked about the 'crazy lady' that was 'all over him,' that slapped his bottom on the dance floor."

The assistant principal asserted to the police two years later that he took no action against the teacher as a result of this written complaint, and did not report the matter to the police at the time, because the complaint from the parents contained "no information about inappropriate touching." How it is that the assistant principal did not find allegations of "inappropriate touching" between an adult teacher and minor student in the foregoing quotes is simply inexplicable.

In response to their complaint, M.S.'s parents were assured that the matter would be fully investigated and their son would be kept safe and receive counseling for what he had been through. Over a year later, the parents discovered that this was not true; that the teacher had remained on staff and, while not in any classroom with M.S., continued to see him at least once a week in the hallways and had chaperoned field trips with M.S. At that time, M.S. specifically disclosed to a psychologist that the teacher had actually touched his penis through his clothing at the event.

The psychologist called the police, who then discovered that the matter had not been reported to any legal authorities; rather, the assistant principal conducted his own "investigation" by: (1) speaking to the two staff members M.S.'s parents had approached for help, who confirmed they helped, but did not witness any interaction between the teacher and MS..; and (2) speaking with the teacher herself, who tearfully denied any wrongdoing. The assistant principal directed that the teacher not be assigned to M.S. for any classes and ended his investigation there.

Among other failures, the assistant principal did not speak with any of M.S.'s teachers about his behaviors after the dinner/dance. Had he done so, he would have found that at least one teacher was so concerned about M.S. after the dinner/dance, that she wrote to his parents to report that he was unable to complete class work because "he was distracted by thoughts and acting 'out of the ordinary' all period yesterday. Something is definitely going on with him."

The assistant principal's misconduct in this case obviously began with his failure to recognize blatantly inappropriate touching by the teacher and how that touching constituted, at the least, overt "grooming" behavior that could have escalated to higher levels of offense. He failed to recognize that such conduct in a public location demonstrated a powerful compulsion on the part of the teacher to engage in sexually abusive conduct. He failed to recognize that M.S. might have initially failed to report all details of the inappropriate touching, as do many abuse victims. And he appears to have been swayed by the "tearful" reaction of the teacher, demonstrating a failure to understand how manipulative and skilled child sex abusers can be in making adults believe that they are safe around children. In light of the facts, he should have, but failed to alert law enforcement immediately.

Upon confrontation by the police some two years after the fact, the teacher refused to answer any questions and hired a criminal defense lawyer. She then resigned the day before a scheduled administrative hearing at the school where she was supposed to provide her response to the complaint that she had sexually abused M.S. Notwithstanding, the sex crimes prosecutor assigned to the case confirmed, in writing, that the delay in reporting caused a prejudicial impact on the ability to prosecute the teacher successfully; that the teacher would have been charged had the case been reported immediately; and that as a result no criminal action could proceed against the teacher.

FOUR

SIGNS THAT A CHILD MAY HAVE BEEN SEXUALLY ABUSED

All available data indicates, unfortunately, that some children will be sexually abused despite the best of efforts to deprive predators of the opportunity to do so. When it does occur, children will sometimes exhibit behavioral abnormalities that reveal they have been abused, even if they are not vocalizing it. It is critical for all who work with children to recognize the signs for two main reasons. One, such signs can indicate the need to report possible abuse to authorities who can investigate further and get necessary help for the child. Two, to act to mitigate any risk that the child victim will act out what was done to him or her on other children in the environment, which is a known risk, despite the fact that not all child victims do so.

Pediatric mental health providers note that, "Often there are no obvious external signs of child sexual abuse," but there are many possible behavioral indicators that some abused children, but far from all, might exhibit.[38] These indicators include:

- Unusual interest in or avoidance of all things of a sexual nature
- Sleep problems or nightmares
- Depression or withdrawal from friends or family
- Seductiveness
- Statements that their bodies are dirty or damaged, or fear that there is something wrong with them in the genital area
- Refusal to go to school
- Delinquency/conduct problems
- Secretiveness
- Aspects of sexual molestation in drawings, games, fantasies
- Unusual aggressiveness, or
- Suicidal behavior.[39]

Some children, particularly younger children, between approximately ages three and six, may also exhibit regressive behaviors as a reaction to sexual abuse; bed wetting, thumb sucking, fear of the dark, or clinging to a favorite toy that was previously abandoned.[40]

The World Health Organization, among others, has also warned about sexualized behavior and child-on-child sexual abuse as a reaction to having been sexually abused previously by an adult, finding specifically that:

> There is a growing body of research on sexualized behaviour in children and its relationship to sexual abuse. Although the majority of sexually abused children do not engage in sexualized behaviour, the presence of inappropriate sexual behaviour may be an indicator of sexual abuse. Generally speaking, sexualized behaviour in children could be defined as problematic when:

— it occurs at a greater frequency or at a much earlier stage than would be developmentally appropriate (e.g. a 10 year-old boy versus a 2 year-old boy playing with his penis in public, or a 6 year-old girl masturbating repeatedly in school);

-- it interferes with the child's development (e.g. a child learning to use sexual behaviours as a way of engaging with other people);

-- it is accompanied by the use of coercion, intimidation or force (e.g. one 4 year-old forcing another to engage in mutual fondling of the genitals or an imitation of intercourse);

…

-- it reoccurs in secrecy after intervention by caregivers."[41]

Due to these risks, governmental agencies that license child care facilities regularly provide instruction on identifying and reacting to signs of child sex abuse, including child-on-child sex abuse.[42] Failure to recognize the signs for what they are and react accordingly can have devastating results, as the next case example illustrates.

CASE EXAMPLE FIVE: A.W. v. Day Care Center

A.W. was a four year-old female child who was placed in a long-established, well-reputed day care center each day while her parents went to work. Another child, T.W., a five year-old male child, approached .A.W. in a play area and jammed his hand down the front of her pants and started rubbing her vaginal area. A.W. protested, pulled away, and told one of the day care workers what T.W. did to her. In response, the day care worker put T.W. in "time out," cautioned him that "we keep our hands and body parts to ourselves." She sent A.W. back to play. Incidents of this type continued every day for six months, as T.W. continued to victimize A.W. in this manner, also sticking his hands into the rear of her pants and fondling her posterior. A.W. was not alone; T.W. behaved this way towards at least seven other children, both male and female, during the six month period.

The day care worker continued to respond to T.W.'s behavior with ordinary discipline of "time outs" and verbal reprimands. Later, she complained that T.W., "daily sexually acts out on other children" and that she was "unable to adequately supervise him and watch all the other children." At the same time, both she and two of her superiors failed to take action to get help for T.W. or act to protect his peers, including A.W. because they, " considered the actions of the child as a 'normal developmental phase and it was normal.'"

The day care center worker simply did not appreciate the gravity of the abuse she witnessed being perpetrated by T.W. on multiple other children, every day, until it escalated literally to T.W. performing oral sex on another child in the middle room. Only then did they call the police, recognizing that T.W. was likely the victim of sexual abuse himself (but as they waited for the police to arrive, as a final act of ignorance, they put both T.W. and the child he performed oral sex on in "time out.")

As a result of disregarding A.W.'s calls for help, and equating what was done to her as no different from ordinary misbehavior for six months, A.W. herself developed severe behavior problems, including attempting to sexually act out on her siblings and stuffed animals, and engaging in chronic masturbation. She withdrew emotionally from her parents, isolated from her peers and avoided playing with them, and exhibited violent outbursts toward her parents and other authority figures. She is expected to require at least weekly mental health counseling well into adulthood and is deemed at high risk for substance abuse and suicidal behavior by her teens.

IN PARTING

WHAT IS AT STAKE

Both individual adults and institutions that take children into their care, must take heed of the potential impact if they fail to take proper measures to defeat the ability of child sex predators to use their institution to access and brutalize children. The impact of abuse on victims is so profound, it should be clear that efforts to defeat predators must absolutely be a priority at all times, with no excuses. Few mistakes that institutions can make can result in such profound impact as allowing a child to be sexually abused.

There are millions of us who have endured child sex abuse. Many of us are surviving, and even thriving, though having paid an incredible price for achieving that and having lost so much that can never be recovered. But even as we celebrate those of us who achieve strength and success in recovery, we watch those in our community who struggle to grasp for the title, "survivor," feeling more like they are still victims. And we all know, all too well, that child sex abuse can inflict extremely vicious physical and mental health damage on children and the consequences can last a lifetime. Some of us never make it, because what is to be endured is simply too much sometimes.

Like "R.S.," child sex abuse victims have endured surgical repair of their genitalia after being raped. Like "A.M.," child sex abuse victims have grown to become so full of rage that they are a danger to others. Like "S.C.G.," child sex abuse victims have suffered from post-traumatic stress disorder into their adult lives and are even afraid to leave their homes. Like "S.G.," child sex abuse victims have developed dissociative identity disorder, their sense of self shattered into multiple distinct parts, unable to integrate into one person. Like "Kay," child sex abuse victims have developed eating disorders that have destroyed their internal organs and killed them. Like "Jeff," child sex abuse victims have placed the barrel of a gun to their own chests and, as his mother explained through her tears, "put a bullet where it hurt most, in his heart." [43]

For the victims of child sex abusers, our very lives are at stake. And it is painfully clear that the epidemic will not end until all of our society's institutions face our enemy, as we had to, and do all that is possible to deprive them of a safe haven to create another victim.

Because this clearly has not happened yet, because so many institutions continue to fail our children miserably, another child will join our ranks just minutes from now.

END NOTES

[1] Michael Dolce is a founding partner of Mager, Dolce & Paruas, LLC, located in Florida. He devotes his state-wide practice to representing victims of crime, in particular, sex crime survivors. Since 2004, he has spoken publicly of the sexual abuse he suffered at the hands of a sadistic child predator and has testified before committees of The Florida Senate and The Florida House of Representatives. He is a featured expert in the award-winning documentary, *Pursuit of Truth; Adult Survivors of Child Abuse Seeking Justice* (2013). He defeated powerful opposition in Florida's legislature after a six year battle to repeal all statutes of limitation for civil and criminal prosecution of child sexual battery (2010). He won one of the top 100 verdicts nationwide in 2009 as determined by Verdict Search on behalf of a child sex crime survivor, $19.2 million. He has volunteered 1,500 hours with domestic violence survivors, helped clients put sex predators behind bars, and represented children to block their abusive parents from maintaining access to them. And he's not done yet.

[2] Schaber, Richard J. (ed.), *Interview with Dr. Anna Salter*, Risk Reporter, Vol. 1, Issue 3; available from www.churchmutual.com, 2002.

[3] "epidemic." Merriam-Webster's Collegiate Dictionary, 10th Ed., 1998.

[4] In context with other childhood afflictions, these numbers are truly staggering. For example, there are about 250,000 children diagnosed with cancer each year, *worldwide*, of which about 16,000 are in the United States. American Childhood Cancer Assoc., /www.acco.org/about-childhood-cancer/diagnosis/childhood-cancer-statistics/. About 25,000 children in the U.S. are diagnosed annually with diabetes. U.S. Centers for Disease Control and Prevention, http://www.cdc.gov/diabetes/risk/age/youth.html.

[5] *Facts for Families*, No. 9, American Academy of Child & Adolescent Psychiatry, www.aacap.org/App_Themes/AACAP/docs/facts_for_families/09_child_sexual_abuse.pdf , March 2011.

[6] Maine Coalition Against Sexual Assault, http://www.mecasa.org/index.php/special-projects/csa; and *Statistics About Sexual Violence*, National Sexual Violence Resource Center (2011) (available at: www.nsvrc.org.)

[7] *Guidelines for medico-legal care for victims of sexual violence*, World Health Organization at p. 75, http://whqlibdoc.who.int/publications/2004/924154628x.pdf, 2003.

[8] Sedlak, A.J., et al. (2010). *Fourth National Incidence Study of Child Abuse and Neglect (NIS–4): Report to Congress.* Washington, DC: U.S. Dept. of Health and Human Services, Administration for Children and Families, 2010, at p. 3-4

[9] *Child Maltreatment 2013*, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau at p. 23, http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf, (2015).

[10] See, e.g., *Report from the Task Force on the Prevention of Sexual Abuse of Children*, Missouri Kids First, at p. 6, http://www.msbanet.org/files/governmental_relations/MoKidsFirst_Report_FINAL.pdf, 2012 (The rate of sexual abuse for girls is estimated to be 5 times that of boys.); Sedlak, A.J., supra n. 9 at p. 4-3; and *Child Sexual Abuse Prevention Overview*, National Sexual Violence Resource Center (2011); available at: www.nsvrc.org.

[11] *Report from the Task Force on the Prevention of Sexual Abuse of Children*, supra n. 10 at p. 6.

[12] See nationwide tabulation at: http://www.parentsformeganslaw.org/public/meganReportCard.html.

[13] *Guidelines for medico-legal care for victims of sexual violence*, *supra* n. 8 at p. 76.

[14] *Id.* at p. 76.

[15] *Report from the Task Force on the Prevention of Sexual Abuse of Children*, supra n. 11 at p. 6.

[16] Rocha, Daniela, *Interview with a sex offender*, The College VOICE (Mercer County Community College, West Windsor, NJ), http://www.mcccvoice.org/interview-with-a-sex-offender/, March 29, 2010.

[17] *No Safe Place: Violence Against Women – Interview: Ron Sanchez, Ph.D.*, PBS - KUED, Salt Lake City, Utah, http://www.pbs.org/kued/nosafeplace/index.html, (March 27, 1998),

[18] O'Connor, Tom, *Understanding the Psychology of Child Molesters: A Key to Getting Confessions*, The Police Chief, vol. 72, no. 12, December 2005.

[19] *Child Sexual Abuse Prevention Overview, National Sexual Violence Resource Center* (2011); available at: www.nsvrc.org; Black, M.C., et al. *The National Intimate Partner and Sexual Violence Survey* (NISVS): 2010 Summary Report. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, at p. 22, http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; and *Child Sexual Abuse Prevention Overview, National Sexual Violence Resource Center* (2011); available at: www.nsvrc.org.

[20] *Sexual Violence Against Youth & Young People,* National Sexual Violence Resource Center (2011); available at: www.nsvrc.org.

[21] Black, M.C., et al., *supra* n. 19 at p. 25.

[22] This statement was made to the author in an on-line support group; based on the rules of confidentiality that apply to that group, neither the site, nor the pseudonym used to identify the participant, can be revealed.

[23] *Protecting Your Children: Advice from Child Molesters*, Center for Behavioral Intervention, Beaverton, Oregon, (Article "developed and written by child molesters in treatment"); available at: http://www.co.marion.or.us/SO/Probation/protect.htm.

[24] Schaber, Richard J. (ed.), *supra* n. 2.

[25] Schaber, Richard J. (ed.), *supra* n. 2.

[26] *Protecting Your Children: Advice from Child Molesters*, Center for Behavioral Intervention, Beaverton, Oregon, (Article "developed and written by child molesters in treatment"); available at: http://www.co.marion.or.us/SO/Probation/protect.htm.

[27] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[28] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[29] Schaber, Richard J. (ed.), *supra* n. 2.

[30] Rocha, Daniela, *supra* n. 16.

[31] *Facts for Families, No. 9, supra* n. 5.

[32] *Report from the Task Force on the Prevention of Sexual Abuse of Children, supra* n. 10 at p. 8.

[33] *Suffer the Children: Developing Effective Church Policies on Child Maltreatment*, Jacob's Hope, Jacob Wetterling Resource Center, Vol 2, Issue 2, June 2011.

[34] Id.

[35] O'Connor, Tom, *supra* n. 18.

[36] *Protecting Your Children: Advice from Child Molesters*, *supra*. n. 26.

[37] Freeman, Marc, "Former teacher sentenced to three life terms for sex crimes," and "Former West Palm Beach Catholic school teacher stands trial on sex crimes against students," Sun-Sentinel, May 28, 2015 and June 2, 2015.

[38] Miller, K. L., Dove, M. K., & Miller, S. M. (2007, October). *A counselor's guide to child sexual abuse: Prevention, reporting and treatment strategies.* Paper based on a program presented at the Association for Counselor Education and Supervision Conference, Columbus, OH; see also, *Guidelines for medico-legal care for victims of sexual violence, supra* n. 8 at pp. 77 -78.

[39] *Facts for Families, No. 9, supra* n. 5.

[40] *Symptoms and Behaviors Associated with Exposure to Trauma*; The National Child Traumatic Stress Network; available at www.nctsn.org/trauma-types/early-childhood-trauma/Symptoms-and-Behaviors-Associated-with-Exposure-to-Trauma.

[41] *Guidelines for medico-legal care for victims of sexual violence, supra* n. 7 at pp. 77 -78.

[42] See, e.g., Child on Child Sexual Abuse Needs Assessment, Florida Dept. of Children and Families (Dec. 2009); http://centerforchildwelfare.fmhi.usf.edu/kb/Implementation/Final%20Child-On-Child%20Sexual%20Abuse%20Needs%20Assessment%20Literature%20Review%20(2)%20(2).pdf.

[43] Each case cited involves a child sex abuse survivor who was either represented by the author, in treatment with the author, or, in the case of "Jeff," his mother was involved with the author's political efforts to repeal the statutes of limitation on civil and criminal prosecution of cases related to child sexual battery.

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Please see handout.

[1] Christopher Anderson is the Executive Director of MaleSurvivor. Chris joined the organization in 2007 after coming to understand the extent to which the sexual abuse he suffered as a child profoundly altered his life. A survivor of multiple forms of childhood trauma with an ACES [Adverse Childhood Experience Study] score of 5, Chris has overcome battles with severe depression, anxiety disorder, and suicidal impulses to become a respected peer advocate. As a peer advocate, he speaks publicly about his own story, how MaleSurvivor helped him progress in his own healing, and the necessity for survivors and healing professionals to work together to provide hope, healing and support to all who have been harmed. Chris routinely presents at numerous conferences including: American Professional Society on the Abuse of Children National Conference; National Children's Advocacy Center National Symposium; MaleSurvivor Conference, Dallas Crimes Against Children Conference; Penn State Child Sexual Abuse Conference, and Institute on Violence, Abuse, and Trauma Conference. Chris has also conducted professional trainings and informational presentations for groups all over North America including: the United Nations (Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict), Department of Defense (SAPRO), Nova Southeastern University, US Congress Victims' Rights Caucus, and hundreds of therapists, social workers, substance abuse counselors, and other mental health professionals in the US and Canada. Chris is also a founding member of the Males For Trauma Recovery workgroup (M4TR) organized by the Substance Abuse and Mental Health Services Administration (SAMSHA). A member of Local One, IATSE, Chris worked as a stagehand on and off Broadway until 2011. He currently lives in New York City with his wife, Jane. Chris graduated in 1996 from St. John's College in Annapolis, MD with a BA in Liberal Arts.

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Prosecuting a Childhood Sexual Abuse Case against the Jehovah's Witness Organization

I. Introduction

The following outlines some of the more prominent issues that arise in prosecuting a childhood sexual abuse ("CSA") case against the Jehovah's Witness ("JW") organization. First, there is a discussion of common issues that arise in the prosecution of these cases, namely (1) whether the JWs owed a duty to plaintiff, (2) whether the perpetrator was the JWs agent, and (3) whether the religious protections found in the First Amendment immunize the JWs from liability. Incorporated within these discussions is a broader discussion of how the JWs organize themselves and how they select and control their members. Within each section, there is a discussion of the JWs arguments, and plaintiff's response to these arguments.

II. Common Issues And Arguments That Arise In Prosecution Of A Childhood Sexual Abuse Case Against The Jehovah's Witness Organization

[1] Mr. Zalkin joined The Zalkin Law Firm in 2011 as a graduate from the Gould School of Law at the University of Southern California. Throughout law school, Mr. Zalkin was actively involved in the Hale Moot Court Honors Program, serving as both a participant in the 2010 competition and as a board member for 2011. Mr. Zalkin also completed an externship with the Los Angeles County District Attorney's office, cold case division. Additionally, Mr. Zalkin served as a judicial extern for the Honorable Peter D. Lichtman of the Superior Court of the State of California in the complex litigation division. Prior to law school, Mr. Zalkin worked as a paralegal for a national bankruptcy law firm. Mr. Zalkin attended UCLA for his undergraduate education where he majored in history with a minor in political science.

[2] Devin Storey joined The Zalkin Law Firm PC (formerly Zalkin & Zimmer LLP) in December 2004. Since that time, he has handled a wide range of personal injury matters including product defect, wrongful death, medical malpractice and brain injury cases. He has also zealously represented victims of childhood sexual abuse, obtaining remarkable results for the firm's clients.
Storey has been one of the lead attorneys representing victims of sexual abuse by Catholic clergy in the Statewide coordinated action entitled The Clergy Cases.He has successfully briefed and argued motions affecting hundreds of plaintiffs in these complex matters, and successfully opposed a motion to publicly identify scores of victims of childhood sexual abuse who had otherwise been permitted to proceed anonymously. Storey participated in negotiating the groundbreaking $198 million settlement of 144 clergy sexual abuse claims against the Roman Catholic Bishop of San Diego, and worked with a team of attorneys to secure the public release of thousands of pages of Church documents relating to Catholic priests accused of abusing children in Southern California.

a. ISSUE #1: Do the Watchtower and/or local congregation owe a duty to Plaintiff?

This issue relates directly to a plaintiff's negligence theories. In order to establish negligence, a plaintiff must first establish that the Watchtower and/or the local congregation owed a duty of care to the plaintiff.

i. JW's Argument

The JWs always argue that neither a local congregation, nor the Watchtower, owed a duty of care to the child victim. They will often bring up arguments such as (1) the victim was not in a special relationship with the local congregation or the Watchtower, or (2) their leaders are not clergy, just volunteers, and are therefore not employees. As discussed further below, plaintiffs do not base their duty arguments on these specific ways of creating a duty.

ii. Plaintiff's Argument

Plaintiffs plead several duties owed by Watchtower/local congregation. Because a plaintiff is suing on a negligence theory, these duty arguments pre-suppose that the JWs knew, or had reason to know, of the perpetrator's sexually violent propensities. Plaintiff's generally assert the following duties:

1. Duty to exercise reasonable care in their supervision of the perpetrator

This theory is premised on Restatement (Second) of Agency § 213, which recognizes the employer's liability in four distinct circumstances:

> (a) in giving improper or ambiguous order of [sic] in failing to make proper regulations; or (b) in the employment of improper persons or instrumentalities in work involving the risk of harm to others: [sic] (c) in the supervision of the activity; or in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.[3]

[3] The language of Restatement (Second) of Agency § 213 contains two typographical errors. *See* Restatement (Third) of Agency § 7.05, reporter's note a. The first, in subdivision (a), is of no consequence here. The second appears at the conclusion of subdivision (b), which states that a principal may be negligent "in the employment of improper persons or instrumentalities in work involving the risk of harm to others:" As reporter's note a to Restatement (Third) of Agency § 7.05, makes clear, the colon at the end of subdivision (b) should have been a semicolon as are present at the end of subdivisions (a) and (c), thereby creating a list of four independent bases of liability. Defendant seeks to exploit this typographical error by suggesting that to be liable for employing an improper person under subdivision (b), either subdivision (c) or (d) must also be proved. This is belied by the fact that the Restatement numbers subdivisions (c) and (d) independently, rather than as (b)(1) and (b)(2).

If any of these four circumstances are established, the principal is negligent. These circumstances are, however, not intended to be the exclusive means by which a principal may be liable for negligent supervision. *See* Restatement (Second) of Agency § 213, comment a (rule "is not intended to exhaust the ways in which a master or other principal may be negligent in the conduct of his business).

2. Duty to protect the plaintiff from a known pedophile in the congregation

Often times, the following scenario occurs in a JW CSA case: a minor is molested by a member of the congregation. The minor then complains to the elders about the molestation. The elders then form a judicial committee, an internal, resolution mechanism for sins committed by JW members. Here, a number of outcomes can occur, but for the sake of example, assume one of the following occurs: (1) the elders can sanction the perpetrator if he is sufficiently repentant, with a small sanction, such as a private reproof, or (2) the elders, despite overwhelming evidence that the victim was molested by the perpetrator, do nothing because the perpetrator did not confess, and there were not two witnesses to the act of molestation. This sets up a factual scenario in which the elders have knowledge of the perpetrators sexually deviant propensities, but have done nothing substantive about it.

In this scenario, plaintiffs can rely on Restatement (Second) of Torts § 323, which provides:

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . [¶] . . . (a) his failure to exercise such care increases the risk of such harm, or . . . [¶] . . . (b) the harm is suffered because of the other's reliance upon the undertaking.

When coupled with the JWs stated policy to "vigilantly monitor" accused child molesters within their organization, Restatement § 323 creates a duty to do so competently.

b. ISSUE #2: Is the perpetrator an agent of the Watchtower and/or local congregation?

This issue specifically implicates a plaintiff's ability to hold the JW organization vicariously liable for the actual sexual abuse itself. A pre-requisite for imposing vicarious liability on a principal is that there must be an agency relationship with the person whom has committed the wrong. The following represents both the JW's arguments, and plaintiffs' arguments as they relate to the issue of agency.

i. JW's Argument

A common argument raised by this particular Defendant is that certain of their members – usually Publishers, but more recently Ministerial Servants - are not agents of the local congregation or Watchtower. This is significant for the possible imposition of liability on Watchtower based on vicarious liability via the theory of ratification. More often than not, the Elders of the local congregation will have known about the abuse of a plaintiff, informed representatives of the Watchtower of the abuse, yet do nothing meaningful in response to the abuse. Though, usually, sexual abuse is not within the "course and scope" of an agency relationship, a plaintiff can nonetheless prevail on a vicarious liability argument based on the inaction of the local congregation and Watchtower, after receiving notice of the abuse.

ii. Plaintiff's Agency Argument

In order to understand how to defeat this argument, it is necessary to understand the way in which the JWs are organized, and how they select and control their members.

JW's Hierarchical Structure

The Jehovah's Witness Organization is organized in a hierarchical structure. During the relevant periods of time, Watchtower sat atop the organization with respect to issues of appointment of leaders (called Elders and Ministerial Servants) in local congregations, and provided local congregation leaders with direction when difficult issues arose, including issues relating to sexual abuse of children by Jehovah's Witnesses. Local congregations of Jehovah's Witnesses administer the organization on a day-to-day basis and implement church policy and practice that is dictated from higher levels in the organizational structure.

Local congregations of Jehovah's Witnesses are directed by Elders. The Body of Elders is responsible for administering the day to day operations of the congregation. Elders coordinate the activities of the congregation, including meetings and field service. Elders also help members deal with problems that may arise in their personal lives. Elders are viewed reverently by members of the congregation, and members are required to approach one of the congregation's Elders with any accusation of wrongdoing, including childhood sexual abuse.

Prospective Elders are selected from among the congregation's Ministerial Servants and thoroughly vetted by the Body of Elders. If a Ministerial Servant meets the qualifications to become an Elder, the Body of Elders makes a recommendation to Watchtower. Watchtower approves or rejects the appointment. Elders are agents of both the Watchtower and the local congregation to which they are appointed.

Through a published Elder handbook called Pay Attention to Yourselves and to All the Flock, and through letters directed to the Bodies of Elders, the Watchtower provides Elders of local congregations with detailed instruction regarding an extremely broad range of topics including responding to childhood sexual abuse, maintaining congregation files, handling judicial matters, nurturing Baptized males who meet the

requirements to become Ministerial Servants and Elders, among a myriad other major and minor instructions.

A Ministerial Servant is a male Baptized Publisher who has been delegated added responsibilities within the congregation. Male Baptized Publishers are recommended to become Ministerial Servants by the Body of Elders. Watchtower then has the final say as to whether the appointment is confirmed.

A Pioneer is a Baptized Publisher who has committed to spend a certain amount of time per month preaching. To become a Pioneer, a Publisher must be approved by a committee of Elders. In addition to maintaining the requirements of good morals to be a Baptized Publisher, the Elders must also determine that the applicant's track record shows that he will be able to meet his hourly obligations if he is approved.

JW's Vet and Select those who are allowed to be part of their organization

Not everyone is permitted the privilege of representing the Jehovah's Witnesses. To be allowed to represent the Jehovah's Witnesses a person must be approved as a "Publisher." Congregation Elders are given the authority to determine if an aspirant qualifies to represent Jehovah's Witnesses, and that decision will generally be made by two Elders. The Elders will interview the prospective Publisher and determine whether he or she has sufficient knowledge of the Bible to represent Jehovah's Witnesses, and will also determine whether he or she is living a life in accordance with Christian principles. Since Publishers are given the privilege of representing the congregation in the community, they must not be engaged in immorality.

Publishers can be either Baptized or Un-Baptized, with greater rights and responsibilities being reserved for Publishers who have been Baptized. Once a male Publisher has been Baptized, he can lead field service; give Bible Study, and then he is eligible to become a Ministerial Servant or Elder." A Baptized Publisher can also work as a missionary or serve as a Pioneer. Baptism as one of Jehovah's Witness is an ordination as a minister of the Jehovah's Witness faith. To be baptized as one of Jehovah's Witnesses an aspirant must study the Bible.

JW's Monitor, Train and Control Their Publishers

Field Service is an important part of the Jehovah's Witness faith, which involves members of the congregation going door-to-door proselytizing. Field Service is reserved for Publishers who are authorized to represent the Jehovah's Witnesses. It is expected that Publishers will engage in Field Service. Formal Field Service begins with a "meeting for Field Service" which is often led by a congregation Elder, or Ministerial Servant. The meeting for Field Service generally begins with a discussion and a demonstration explaining how to present the material that day, and discussing the literature that will be offered. Then members are divided into car groups by the person conducting the meeting for Field Service and instructed which territory to visit.

During field service, the congregation members call on homes in their assigned territory. They knock on the door and initiate contact with the residents. They distribute literature, attempt to engage the residents in discussion about the Jehovah's Witness faith and invite interested residents to attend meetings at the Kingdom Hall. The congregation members will endeavor to start a home Bible Study with the residents they contact. The Literature distributed by congregation members during Field Service is published by Watchtower New York. The congregants' efforts to invite residents to attend meetings at the Kingdom Hall, or to begin Home Bible Studies are the primary means by which the Jehovah's Witnesses attract new members to their faith. Until 1990 Publishers sold Watchtower literature during Field Service, and subsequently have asked for donations during Field Service.

A Baptized Publisher may also give Bible Study. If he does so he is required to complete a form and turn that form into the Congregation Secretary. The form indicates the name and address of the person to whom the Publisher has given Bible Study as well as the dates of each session. Publishers are also required to file a report with the Congregation Secretary detailing the amount of time they spend in service.

The local congregations provide weekly instruction to congregants regarding methods for approaching individuals and of literature distribution and training to improve the effectiveness of the congregants' presentation. The congregant's progress is tracked and recorded. Congregants are also required to observe Watchtower's dress code and personal grooming guidelines when engaged in formal Field Service.

When a congregation member is accused of serious wrongdoing, two Elders are assigned to investigate. Those two Elders determine if there is a sufficient justification for the creation of a Judicial Committee. If there are either multiple witnesses to the wrong, or if the accused confesses, a Judicial Committee will be formed. The Judicial Committee will be comprised of the original two Elders assigned to investigate, and usually at least one more Elder. The Judicial Committee will then determine what punishment is appropriate. The wrongdoer can be disfellowshipped, which is a period of expulsion from the local congregation, or if the Judicial Committee determines the wrongdoer is truly remorseful, he or she can be reproved, which entails some public or private censorship but no expulsion from the congregation.

Jehovah's Witnesses thoroughly vet their prospective representatives' competence and morals through a lengthy evaluation process prior to becoming a Publisher who is authorized to represent the Jehovah's Witnesses. Additional time and study are required before a Publisher can be ordained as a minister of the Jehovah's Witnesses. Upon ordination, the agent is provided training through weekly meetings designed to improve presentation and reports the time spent in service to the Congregation. The agent is directed where to go in service, who to go with, what materials to offer and how to present the materials. The agent actively recruits others to join the Jehovah's Witnesses.

These facts for the basis of an argument that all members who have reached at least the Publisher level within the organization are agents of both the local congregation and the Watchtower.

c. ISSUE #3: Do the religious protections outlined in the First Amendment immunize the JW's from liability in a CSA case under certain circumstances?

i. JW's Argument

The Jehovah's Witnesses constantly assert the religious protections found in the First Amendment. Specifically, the Jehovah's Witnesses argue that the First Amendment prohibits a Court from attaching liability for sexual abuse, via a ratification theory, in the following circumstances: (1) when a congregation's elders determine that an individual met requisite biblical standards such that they are accepted into the congregation as a Publisher, and (2) when a member has been accused of wrongdoing, and the outcome of their own, internal judicial process does not serve to punish the alleged wrongdoer.

To support their position, the Jehovah's Witnesses cite the so-called "Church Property Cases." This line of cases essentially holds that civil courts cannot interfere in *intra-church*, ecclesiastical disputes. For example, in *Serbian E. Orthodox Diocese v. Milivojevich*, (1976) 426 U.S. 696, the Court held that a civil court could not dispute who was the rightful bishop of the Serbian Eastern Orthodox church, when an internal dispute had arisen as to which of two individuals, according to church doctrine, was the rightful heir to the position.

The JW's take this reasoning and attempt to apply it in the context of selection and/or disciplining of its members. Basically, they argue that imposing liability for their decision to select somebody as a member of their organization, based on their scriptural qualifications for membership, runs afoul of the First Amendment and is equivalent to a court telling them who can and cannot be a member. Similarly, they argue that imposing liability for their internal decision not to punish a perpetrator, based on the scriptural requirements for a finding of guilt, runs afoul of the First Amendment.

ii. Plaintiff's Arguments

This line of argument is essentially a red-herring. The Jehovah's Witnesses do a very good job of framing the issues in CSA cases as being in line with the prohibitions outlined in the Church Property cases. However, when put in the proper context, it becomes clear that the Church Property cases are wholly inapplicable to the issues that generally arise in CSA cases.

Courts may not interfere in *intra-church* internal disputes of "matters of church government, as well as those of faith and doctrine," *Serbian E. Orthodox Diocese v. Milivojevich*, (1976) 426 U.S. 696, 722, but this principle is not breached in this case. Plaintiff is not interested in disputing or debating Defendants' religious beliefs or doctrine. Defendants have an absolute right to believe whatever the organization

chooses. *Cantwell v. Connecticut*, (1940) 310 U.S. 303-04. Rather, Plaintiff is seeking the application of California civil law to Defendants' conduct. It has been accepted that "…churches, their congregations and hierarchy exist and function within the civil community…they are as amenable as other societal entities to rules governing property rights, torts and criminal conduct. *Higgins v. Maher* (1989) 210 Cal.App.3d 1168, 258. The United States Supreme Court has recognized that:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes…But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs…Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

General Council on Finance & Administration, United Methodist Church v. California Superior Court (1978) 439 U.S. 1369, 1372-73 (internal citations omitted). Religious institutions, thus, are subject to "neutral principles of law" like the agency and ratification laws at issue in this case. *See Jones v. Wolf* (1979) 443 U.S. 595, 604; *Employment Div. v. Smith* (1990) 494 U.S. 872, 880 ("valid and neutral laws of general applicability"). A different rule would court anarchy. "T[o] permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States* (1879) 98 U.S. 145, 166-67.

Inevitably, a criminal or tort action against a religious institution will implicate in some way the institution's practices and procedures. Those actions may be motivated or shaped by religious belief, but motives are irrelevant when the law at issue is regulating conduct per se, as it is in this case. The fact that the law imposes an "incidental burden" on religiously motivated conduct does not bar courts from hearing and deciding a case. *Smith*, 494 U.S. at 892. As the United States Supreme Court has explained, "Interaction between church and state is inevitable…and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (internal citations omitted).

Judicial abstention is only required when the courts are put in the position of determining religious belief, doctrine, or ecclesiology. Plaintiff is not asking this Court

to evaluate whether Defendants' decisions complied with their own internal, religious laws and doctrine. However, as established, even religiously motivated conduct has consequences in secular law. Plaintiff is simply asking this Court to apply neutral laws of general applicability to evaluate the consequences of Defendants' conduct.

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Civil Litigation on Behalf of Victims of Human Trafficking

"*Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly*."[1] – Dr. Martin Luther King, Jr.

"*Our fight against human trafficking is one of the great human rights causes of our time, and the United States will continue to lead it*[.]"[2] – President Barack Obama

"*The problem of modern trafficking may be entrenched, but it is solvable. By using every tool at our disposal to put pressure on traffickers, we can set ourselves on a course to eradicate modern slavery*."[3] – (Former) Secretary of State Hillary R. Clinton

INTRODUCTION

As an Alabamian working for civil justice out of Birmingham, Dr. King's words penned from a jail in my hometown (and printed above) more than fifty (50) years ago carries a particularly strong resonance for me. Today, human trafficking is the fastest growing criminal enterprise in the world. It is a social justice issue that the private bar can no longer ignore.

The numbers of people who are victims of human trafficking are staggering. Recent studies have shown that global human trafficking has resulted in annual profits of $44.3 billion causing harm to anywhere from 12,000,000 – 20,000,000 victims

[1] *See* King, Martin Luther, Jr. "Letter from Birmingham Jail." *The Norton Anthology of African American Literature*. Ed. Henry Louis Gates, Jr. and Nellie Y. McKay. New York: Norton, 1997. 1854-66. Print.
[2] *See* https://www.whitehouse.gov/issues/foreign-policy/end-human-trafficking
[3] *See* http://www.state.gov/r/pa/prs/ps/2010/11/150701.htm.

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internationally.[4] Domestically, human trafficking also poses a significant threat. The FBI has identified human sex trafficking as "the fastest-growing business of organized crime and the third-largest criminal enterprise in the world."[5] It is estimated that "50,000 women and children are trafficked each year throughout the United States for commercial sexual exploitation."[6] As many as "2 million children [are] enslaved worldwide in the commercial sex trade. It is also estimated] that that U.S. citizens make up 25 percent of child-sex tourists globally[.]"[7] In addition to sex trafficking, labor trafficking is a separate threat in the United States. Approximately 5,000 children alone may be illegally employed in American sweatshops.[8] There is no way to comprehend these numbers nor is it possible to fathom the devastating effect human trafficking has on its victims here and abroad. As advocates for victims of crime, there are a number of means available to the members of this bar association to represent victims of human trafficking seeking civil justice and to combat the perpetrators of this horrific epidemic.

INITIATING MATTERS FOR VICTIMS OF HUMAN TRAFFICKING

As is the case with representing any victims of crimes, lawyers are tasked with protecting and pursuing their clients' rights while respecting that a client's emotional well being and mental health may have been damaged severely through the criminal acts of

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[4] *See* Hepburn, Stephanie and Rita J. Simon. *Human Trafficking around the World: Hidden in Plain Sight*. New York: Columbia University Press, 2013. 1. Print.
[5] *See* https://leb.fbi.gov/2011/march/human-sex-trafficking

[6] *Id*. at 16. However, "the exact number of trafficking victims in the United States is unknown."
http://victimsofcrime.org/docs/defaultsource/ncvrw2015/2015ncvrw_stats_humantrafficking.pdf?sfvrsn=2
[7] *Id*. at 26.
[8] *Id*. at 25.

others. This issue is of particular concern with respect to victims of human trafficking, and before embarking upon any civil action, counsel should candidly discuss whether the client sought or needs to seek any therapeutic and restorative services.[9] A social worker or therapist can advise whether a victim is ready emotionally to engage in the legal process without betraying the shared client's confidences or breaching privilege. In the aftermath of human trafficking, not only is counseling likely necessary, but survivors also may need assistance obtaining safe, affordable, and stable housing; enrolling in a health insurance plan; identifying appropriate educational opportunities; seeking a job training program; and with any number of other services to rebuild the foundations of their lives.[10]

In addition to counseling and social services other prerequisite concerns include an upfront analysis of parallel or related legal issues. For example, survivors who are not U.S. nationals may need to identify and address any immigration issues.[11] And regardless of immigration status, many survivors also must address criminal matters either as defendants or witnesses before pursuing their civil cases. Unfortunately for victims of human trafficking, law enforcement may charge the victims themselves with crimes.[12] When this occurs, survivors need counsel to resolve their criminal charges before

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[9] *See e.g.*, https://www.polarisproject.org/what-we-do/client-services/how-we-help

[10] *See e.g.*, http://www.acf.hhs.gov/programs/orr/resource/services-available-to-victims-of-human-trafficking

[11] *See e.g.*, http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes

[12] *See e.g.*, http://www.newrepublic.com/article/120418/underage-sex-trafficking-victims-are-treated-criminals-us

pursuing civil causes of action, or at a minimum analyzing the impact pending criminal charges will have on parallel civil case prior to filing. The misapplication of criminal charges to victims of human trafficking has led to a trend towards seeking expungement on behalf of victims.[13] Dr. King's words penned from the Birmingham Jail (and printed *supra*) more than fifty (50) years ago speak directly to this issue. The "injustice anywhere" – charging a victim of trafficking with criminal conduct – threatens "justice everywhere," and hopefully the trend towards to expungement of crimes relating to or arising from trafficking on victims' records will ultimately result in the initiation of fewer criminal charges, if any, against victims. Even if a victim of trafficking is not charged with a crime, the victim may be a witness in ongoing governmental investigation or at a trial in which a trafficker has been charged criminally.[14] In such instances, in order to protect the victim, any work the victim is doing as a witness should run its course before counsel fully evaluates and pursues a victim's potential civil claims insofar as any applicable statutes of limitation on such civil claims will not be adversely affected. If civil claims are filed while the victim is cooperating in an ongoing governmental investigation, the mere existence of a civil suit could compromise the government's criminal inquiry. Likewise, if a victim's civil suit is on file when a victim is subpoenaed as a government witness in a criminal trial against a trafficker, a likely defense strategy will involve attacking the victim's testimony as not credible and motivated exclusively by

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[13] *See* http://www.huffingtonpost.com/2015/05/18/sex-trafficking-prostitution-charges_n_7119474.html

[14] *See generally* https://www.ncjrs.gov/pdffiles1/nij/225759.pdf

the prospects of a civil recovery. A victim's status as a witness is by no means an absolute bar to the filing of a civil suit. Sometimes criminal cases will not go to trial faster than a civil statute of limitation will expire. In such an instance a civil action must be pursued or declined before the victim takes the stand as a witness. In any event, regardless of the eventual sequence, the implications for any criminal action must be considered first.

LISTENING TO THE VOICES OF SURVIVORS

Throughout this paper, the term "victim" has been used interchangeably with the term "survivor" to describe individuals who have suffered from the ravages of human trafficking. For lawyers working with clients in this space to fight against human trafficking two (2) very important issues are worth noting at the outset of the work. First, while members of this Bar are accustomed to talking with and about the clients we serve as being victimized by crime, in the anti human trafficking movement, victims of human trafficking are more commonly identified as survivors. This terminology deemphasizes the horror of the acts perpetrated against the client and focuses the emphasis on the client's resiliency.[15] Second, increasingly survivors of human trafficking have correctly insisted not just on a seat at the table, but a seat at the head of the table in the anti human trafficking movement.[16] As counsel to survivors, it is key that lawyers undertaking this

[15] It should also be noted that many survivors strongly disfavor the term "survivor" as a label defining their personhood exclusively through the lens of human trafficking. Lawyers should be very aware of this discussion in the community and avoid engaging in labeling or employing terminology that has fallen out of favor.

[16] *See e.g.* http://www.equalitynow.org/survivorstories. *See also* http://www.castla.org/caucus-of-survivors

work listen to and take direction from their clients. Whereas in other civil matters counsel may lead a client through a very directed interview to elicit facts to then plug into a complaint, this work requires a different approach. Counsel seeking an engagement to represent a survivor in a civil suit should let the client tell his or her story in whatever way and for however long the client wishes. If the listening is done first the asking can be done later. Counsel must develop rapport, demonstrate their recognition of the client's inherent value, convey empathy, and then, and only then, take up the fight on the client's behalf.

CIVIL LEGAL REMEDIES FOR VICTIMS OF HUMAN TRAFFICKING

The Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. § 7101, *et seq.* ("TVPRA"), allows a victim to bring a federal civil action to recover actual damages, punitive damages and reasonable attorney's fees.[17] The TVPRA identifies human trafficking as either sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or labor trafficking by the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. Even though most of the media attention is on the sex trafficking industry, according to the ILO, the number of victims in private sector labor trafficking (14.2 million victims) far outweighs the estimated number of victims of sex trafficking (4.5 million victims). Work environments where persons are especially vulnerable to

[17] 18 U.S.C. 1595(a)

forced labor conditions include domestic labor, farming, fishing, motels, hotels, resorts, salons and massage parlors.

Currently, thirty-five states and the District of Columbia have enacted legislation that specifically allow survivors to sue their traffickers. For example, in 2010, my home state, Alabama, passed its' human trafficking statute that contained a specific civil remedy that even allows the victim to recover damages against not only the perpetrator of the crime but also any facilitator. For a concise review of the human trafficking statutes in every state, the websites of the Polaris Project and Shared Hope International have pages on their websites dedicated to grading and tracking the each state's legislative progress in the fight against human trafficking. Furthermore, there are a number of ancillary and more traditional statutory and tort claims through which litigation may be pursued against perpetrators and facilitators of human trafficking. For example, The Alien Tort Claims Act provides for civil remedies in the federal courts for human rights violations that may have occurred outside the U.S.[18] The Racketeer Influenced and Corrupt Organizations Act ("RICO"),[19] the Fair Labor Standards Act ("FLSA"),[20] the Migrant and Seasonal Agricultural Worker Protection Act,[21] the Immigration Reform and Control Act, Title VII of the Civil Rights Act, intentional torts and negligence under state law, and contractual and quasi-contractual claims, also provide potential causes of action

[18] 18 U.S.C. § 1350
[19] 18 U.S.C. § 1961, *et seq*.
[20] 29 U.S.C. § 201, *et seq*. Notably, what eventually became the FLSA was drafted originally by Alabama's (the author's home state) own Senator (and future Supreme Court Justice) Hugo Black. Dune, Gerald T. *Hugo Black and the Judicial Revolution*. New York: Simon and Schuster. 1977. 180-181. Print.
[21] 29 U.S.C. § 1801, *et seq.*

through which civil justice for trafficking victims may be obtained. Other practical considerations for practitioners include using pseudonyms in the Complaint to protect the victim's identity and temporary restraining orders and/or protective orders to protect the victim and the victim's records from the trafficker.

RECENT PROGRESS FOR VICTIMS

Federal criminal prosecutions against human traffickers have been steadily increasing over recent years. Naturally, the private bar has a duty to supplement the fight against this crimb by pursuing civil remedies for the victims when appropriate. A few recent civil case successes in the areas of labor trafficking and sex trafficking are worth highlighting. First, in February 2015, five (5) plaintiffs were awarded $14.1 million in damages by a federal jury in a case against Signal International, LLC ("Signal").[22] The plaintiffs were Indian guest workers to the United States who had been subjected to forced labor by Signal along the Gulf Coast in the aftermath of Hurricane Katrina. Several hundred plaintiffs who also were victims of Signal's labor trafficking scheme have claims pending in various federal courts. Signal eventually filed for bankruptcy protection and all of the plaintiffs' claims have been settled for $20 million dollars.

Secondly, in a labor trafficking case in Atlanta, Georgia, an African domestic worker was awarded $365,000.00 in damages by a federal jury after she had been "held as a virtual slave in [the Defendants'] home for nearly two years."[23] Following the

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[22] *See* *http://www.al.com/news/index.ssf/2015/02/judge_rules_in_favor_of_indian.html*

[23] *See* http://www.dailyreportonline.com/id=1202725684405/Ellenwood-Couple-in-Human-Trafficking-Case-Ordered-to-Pay-365K-to-Victim?slreturn=20150412011315

verdict in May of 2015, counsel for the plaintiff stated, "the only way to really stop trafficking is to have civil damages against traffickers."[24]

In July, a Louisiana motel owner entered a guilty plea to financially benefiting from a sex trafficking scheme operated out of the Riviera Motel in New Orleans in which multiple adult women were compelled to engage in prostitution. According to the FBI release on this case, the motel owner "acknowledged that, in his role as the former owner of the Riviera Motel, he regularly rented rooms to individuals who are charged as sex trafficking co-conspirators in connection with this case, knowing they were pimps who forced and coerced women to engage in prostitution. Patel [motel owner] admitted that although he never personally recruited, groomed or coerced any of the victims, he benefited financially from the sex trafficking operation. Evidence presented at the plea hearing and court documents establish that Patel would charge the pimps and sex trafficking co-conspirators higher rates than other motel guests, and would open the motel's gate to allow the women to bring customers back to the hotel." This conviction could be groundbreaking because victims could arguably also obtain a civil remedy against a motel that financially benefitted from an ongoing human trafficking scheme operated out of a motel. Unlike the criminal justice system, however, the civil justice system is equipped to recover damages beyond restitution that can actually give a survivor a new life.

[24] *Id.*

CONCLUSION

Advocacy on behalf of and in solidarity with survivors of human trafficking is a natural fit for members of the National Crime Victim Bar Association. The members of this Bar have countless years of experience representing victims of crimes in a variety of contexts, and the collective experience of this Bar can make a significant impact on anti human trafficking efforts both nationally and globally. To the extent the hard earned expertise and shared passions of the NCVBA's members can be applied to protecting the rights of individuals who have been trafficked, this organization can be at the forefront of a twenty-first (21st) century abolitionist effort to end human trafficking.

Katherine James
Founder
ACT of Communication®

Chapter From Can This Witness Be Saved?
"I'm Truly Terrified."
(The Scared Witness)

•The Phone Call I've Had Lots Of Times

Lawyer

She's scared.

Me

That's okay. I've done "scared" before.

Lawyer

Not like this.

Me

Okay…what's the problem? Why is she so scared?

Lawyer

What happened to her was pretty scary -- but – I don't think that is it.

Me

What is "it"?

Lawyer

She won't tell me.

Me

What makes you think she'll tell me?

Lawyer

I don't. You are my "leave no stone unturned" move for the company she works for.

Me

That makes me feel all warm and fuzzy. See you Thursday.

"I'm Truly Terrified" – Part One

I always love the drive from the airport to this attorney's office. Jazz music on the rental car radio, colorful fall woods whooshing by my window as I climb up the foothill where the small city is nestled – no traffic. The city is a little sleepy, always tranquil and makes me relaxed and happy. This is due in no small part to the wonderful attorney with whom I work here. He is super bright, loads of fun, has great cases to work on, and his clients like him and trust him. And the town – the town itself just makes me kick back and relax. "How could anyone live here and not just glide through their day?" I think.

I arrive at his office. It is late afternoon. Beautiful leaves are gently falling from the trees. I sing a little jazz tune in my head as I walk up to the front door. It is "The Autumn Leaves" – but I am singing it in broken French. Just like Jessie and Lois and I used to do in the 7th grade in our best Charles Aznavour impersonations. The great attorney's receptionist greets me like a long lost relative – how can you not love working in The South? "Miss Katherine!" she crows. She then whispers, "Sit down. He's going to come out and explain everything." The door to the conference room opens. The great attorney greets me loudly from the open doorway with the kind of bravado that his receptionist did. "Katherine! It is so good to see you!" He then carefully closes the door and crosses to me. He looks apologetic. He whispers, "I'm going to have to ask you to turn around and fly home. Julia refuses to work with you. She is terrified."

The first task: Finding the "Why?"

In my experience there is only one reason <u>not</u> to be fearful of facing a legal event as a witness: questionable mental health.

The first question I ask in a preparation session is almost always, "What questions or concerns do you have about having your deposition taken (or whatever legal event this witness is facing)?" When the witness says, "Why should I have any concerns? I can't wait!" my antennae go up. "Danger, Will Robinson," I think, quoting the old television show **Lost In Space** to myself. "We might have a crazy one on our hands."

Let's face it. What sane adult wants to sit in a room with a lawyer who doesn't have his or her best interest at heart but who is allowed to ask him or her questions for six hours? Or in a courtroom being examined by that person in public for all the world to see?

I have met a handful of them and they were all nuts. Totally bonkers. One of them was a major executive in an energy company, another was high up in the banking industry, another was in the middle of a messy 900 million dollar divorce and a couple were accused of crimes, in jail, and awaiting trial.

However, most of the people who answer the question saying that they have "no concerns" actually do upon further reflection. Or if they don't realize it immediately, at some point during our witness preparation sessions fess up to the inner turmoil they have been experiencing for weeks. This is one of the first things that distinguishes "normally"

scared witnesses from "truly terrified" witnesses. The "normally" scared don't live and breathe deep seated terror from deep within that is triggered by the process of preparing for, say, having a deposition taken.

The truly terrified witnesses know they are truly terrified. What's more, they tell you that they are scared immediately.

Again, I am not talking about "normally" scared witnesses. They are, for the most part, scared for good reason. They can, with good reason, be scared of the process ("I can't stand not being in control!" for example). Also, with good reason, they can be scared about a particular issue or fact in this case (the contract wasn't signed, the light was changing from green to red, they had already been warned about that SEC rule before, they don't want to go to prison). Those are all "normal" fears.

The truly terrified are scared for no material or logical reason that you can necessarily associate with the facts of this case. Here's the tricky part – on first blush, the words they use may seem like they are "normally" scared to you. Here are four examples (from the many I have heard) in a chart of what truly terrified witnesses have answered to the question "What questions or concerns do you have about having your deposition taken?" See how the words to these answers don't give you a clue as to whether or not they are "truly terrified" or just "normally" scared?:

What Four Different Potentially Truly Terrified Witnesses Say
1."I'm scared."
2."I'm anxious."
3."I'm terrified."
4."I'm paralyzed with fear."

Here is the part where many attorneys screw up. Not because they are bad attorneys, but because they don't understand that their next job is to find out why the witness is scared. They believe that their job is to "reassure" a scared witness. They are operating under the delusion that all scared witnesses are created equal. They are unaware that these answers point to the potential that this witness is truly terrified. Here are four of the unsuccessful rejoinders I have heard attorneys intone in response to the fear witnesses have expressed. I have added them to the chart:

What Potentially Truly Terrified Witnesses Say:	**What Well Meaning Attorneys Say Back:**
1."I'm scared."	"Don't be scared. I'll be sitting right next to you."
2."I'm anxious."	"That's a perfectly understandable and common response."
3."I'm terrified."	"Me, too."
4."I'm paralyzed with fear."	"No one's ever died from having her deposition taken."

I find that the attorneys are not making these responses to be un-reassuring. On the contrary, they are each saying the exact thing that would assure that attorney if the attorney were afraid. Let's look at that in a chart:

What Potentially Truly Terrified Witnesses Say:	**What Well Meaning Attorneys Say Back:**	**What Well Meaning Attorneys Are Thinking:**
1."I'm scared."	"Don't be scared. I'll be sitting right next to you."	"It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness."
2."I'm anxious."	"That's a perfectly understandable and common response."	"I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear."
3."I'm terrified."	"Me, too."	"She might as well know now that we only have a 50/50 shot at winning this thing."
4."I'm paralyzed with fear."	"No one's ever died from having her deposition taken."	"If you tell me I have to man up, then by golly I man up and you will, too."

Of course if the shoe were on the other foot, the attorney would be assured by the rejoinder. However, often times this rejoinder has the opposite affect. Let's add to our chart what the witness is thinking while the well meaning attorney has just happily reassured himself or herself:

What Potentially Truly Terrified Witnesses Say:	**What Well Meaning Attorneys Say Back:**	**What Well Meaning Attorneys Are Thinking:**	**What Potentially Truly Terrified Witnesses Now Think:**
1."I'm scared."	"Don't be scared. I'll be sitting right next to you."	"It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness."	"Like when my mother sat there when I got my wisdom teeth extracted? I'm so screwed."
2."I'm anxious."	"That's a perfectly understandable and common response."	"I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear."	"Oh my God. I need Dr. Phil and I got one of those laboratory psychologists who chops the heads off of rats."

3.“I’m terrified.”	“Me, too.”	“She might as well know now that we only have a 50/50 shot at winning this thing.”	“Now I totally don’t trust anything you are ever going to say to me about anything ever again.”
4.“I’m paralyzed with fear.”	“No one’s ever died from having her deposition taken.”	“If you tell me I have to man up, then by golly I man up and you will, too.”	“There’s a first time for everything. No matter what, we are settling this thing before my depo is taken. Period.”

But do the witnesses say that? Rarely. Here’s what they say in the room with their out loud voices:

What Potentially Truly Terrified Witnesses Say:	**What Well Meaning Attorneys Say Back:**	**What Well Meaning Attorneys Are Thinking:**	**What Potentially Truly Terrified Witnesses Now Think:**	**What Potentially Truly Terrified Witnesses Say in Response:**
1.“I’m scared.”	“Don’t be scared. I’ll be sitting right next to you.”	“It would scare me to death to think that I could be facing that idiot on the other side alone if I were the witness.”	“Like when my mother sat there when I got my wisdom teeth extracted? I’m so screwed.”	“Oh. Good.”
2.“I’m anxious.”	“That’s a perfectly understandable and common response.”	“I find it so reassuring that modern psychology has a good explanation for the phenomenon of fear.”	“Oh my God. I need Dr. Phil and I got one of those laboratory psychologists who chops the heads off of rats.”	“Great.”
3.“I’m terrified.”	“Me, too.”	“She might as well know now that we only have a 50/50 shot at winning this thing.”	“Now I totally don’t trust anything you are ever going to say to me again.”	“Oh.”
4.“I’m paralyzed with fear.”	“No one’s ever died from having her deposition taken.”	“If you tell me I have to man up, then by golly I man up and you will, too.”	“There’s a first time for everything. No matter what, we are settling this thing before my Depo is taken. Period.”	“Huh.”

Here is what is devastatingly bad about the last column. The attorney may never recover. I'm not just talking about this preparation session. I'm talking about the entire relationship with this witness and the success and failure of whatever the legal event is at hand. The attorney will "go on" to the next "step" in his or her witness preparation list. There will be a giant check mark next to "fix scared" in the legal pad that lives in the attorney's mind, the title of which is "witness preparation". But it is an illusion the attorney has is in thinking that he or she "fixed" a "normally" scared witness. And if the witness is "normally" scared, maybe or maybe not. But if instead of a "normally" scared witness you have a "truly terrified" one you are in big trouble. Like the iceberg, the abject terror is 90% hidden…waiting to sink the Titanic of the case.

There is one and only one response that has a prayer of beginning to be successful with every "normally" scared witness you meet…and is the only hope you have of starting to figure out if this witness is "truly terrified". It is a three-letter word with a question mark at the end of it and it goes like this:

What Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**
1."I'm scared."	"Why?"
2."I'm anxious."	"Why?"
3."I'm terrified."	"Why?"
4."I'm paralyzed with fear."	"Why?"

There will be an initial answer to this "Why?" It needs to be explored. It needs to be followed up. It needs a series of follow up questions that exhaust it more thoroughly than you have ever exhausted a witness you were deposing about a subject matter in a deposition.

How come? Let's start with the obvious - because there are millions of reasons to be scared. You need to figure out which one belongs to this witness. You need to deal with a specific fear that is showing up in the legal setting for which you are preparing this witness. And, ultimately, you need to determine is it "normal"? Or is it "truly terrified"?

Think of it as a differential diagnosis in Western Medicine. If you went to your doctor and said, "My head has hurt for three days," you would not expect your doctor to say, "So does mine. See ya." Nor would you expect your doctor to say, "Here, take two of these. You'll be fine." No – your doctor needs to figure out if you are allergic to dust, your new hat is too tight, you are getting hereditary migraines like your Aunt Sal or if you have a brain tumor.

You are the witness preparation doctor for your witness. Fear in a witness is a symptom – it is not a disease. It is up to you to figure out what disease is being signaled by the symptom. Only then, like a good doctor, can you begin to develop a cure or way of dealing with the disease – be it "normal" fear or "true terror" and hopefully control the symptom.

What are the diseases that are heralded by fear?

Let's look at four of the many possibilities in our chart following the attorney's asking "Why?" to our four witnesses.

What Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**	**Potentially Truly Terrified Witness Insight:**
1."I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."
2."I'm anxious."	"Why?"	"This reminds me of school."
3."I'm terrified."	"Why?"	"What if I get emotional?"
4."I'm paralyzed with fear."	"Why?"	"I don't know."

Now, again, it is very tempting for an attorney to reassure the fear with what the attorney thinks will "solve". It works sometimes on "normally" scared people, but it often acts as the equivalent of a doctor sending a patient home with "take two of these" when that patient turns out to have a brain tumor (is a "truly terrified" witness):

What Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**	**Potentially Truly Terrified Witness Insight:**	**Mistaken Attorney "Solve"**
1."I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"Did I give you the impression that you have to remember everything? I'm sorry!"
2."I'm anxious."	"Why?"	"This reminds me of school."	"This isn't like school at all. All your answers to all the questions will be right."
3."I'm terrified."	"Why?"	"What if I get emotional?"	"That's okay. I expect you to get emotional. That's a good thing."
4."I'm paralyzed with fear."	"Why?"	"I don't know."	"Well…free floating anxiety is pretty common for witnesses. You aren't alone."

What is the problem with the fourth column? On the one hand, absolutely nothing. These responses are "just fine" if, indeed, that's exactly the disease that is causing the fear in the

witness. And that is exactly "the" solve for many "normally" scared witnesses with whom you are dealing.

I think of it as a "Lucky Guess" of what the disease is that is causing a "normal" fear. Here they are:

What Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**	**Potentially Truly Terrified Witness Insight:**	**Mistaken Attorney "Solve"**	**Lucky Guess Disease**
1."I'm scared."	"Why?"	"I'm never going to remember everything you want me to remember."	"Did I give you the impression that you have to remember everything? I'm sorry!"	Witness mistakenly believes that the deposition is a "memory contest".
2."I'm anxious."	"Why?"	"This reminds me of school."	"This isn't like school at all. All your answers to all the questions will be right."	Witness mistakenly believes that all deposition questions have perfect answers that aren't already in the witness' head.
3."I'm terrified."	"Why?"	"What if I get emotional?"	"That's okay. I expect you to get emotional. That's a good thing."	Witness mistakenly believes that crying during the deposition is going to lose the case OR that the witness should cry constantly through

				the deposition.
4.“I’m paralyzed with fear.”	“Why?”	“I don’t know.”	“Well…free floating anxiety is pretty common for witnesses. You aren’t alone.”	Witness is nervous just like every sane witness is nervous.

BUT – none of these witnesses have been diagnosed yet. In fact, these very well intentioned attorney responses might have the same “iceberg” effect that the totally “self assuring” attorney comments made before. You are going to need a <u>minimum</u> of one more round of digging deeper to get an idea of where this disease that is showing up with the “fear” symptom might lie:

What The Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**	**Potentially Truly Terrified Witness Insight:**	**Attorney “Digging Deeper”**
1.“I’m scared.”	“Why?”	“I’m never going to remember everything you want me to remember.”	“What’s going to happen if you don’t remember?”
2.“I’m anxious.”	“Why?”	“This reminds me of school.”	“What about this reminds you of school?”
3.“I’m terrified.”	“Why?”	“What if I get emotional?”	“What about expressing your emotions is…wow…what’s the word for it?”
4.“I’m paralyzed with fear.”	“Why?”	“I don’t know.”	“Ever felt this way before?”

Look what you might discover by “Digging Deeper”:

What The Potentially Truly Terrified Witnesses Say:	**Only Attorney Response:**	**Potentially Truly Terrified Witness Insight:**	**Attorney “Digging Deeper”**	**Potentially Truly Terrified Witness Insight:**
1.“I’m scared.”	“Why?”	“I’m never going to remember everything you	“What’s going to happen if you don’t remember?”	“Everyone’s going to know that I’ve got a little bit of

		want me to remember."		dementia starting."
2."I'm anxious."	"Why?"	"This reminds me of school."	"What about this reminds you of school?"	"The part where I had to repeat the second grade."
3."I'm terrified."	"Why?"	"What if I get emotional?"	"What about expressing your emotions is…wow…what's the word for it?"	"Weak."
4."I'm paralyzed with fear."	"Why?"	"I don't know."	"Ever felt this way before?"	"All the time."

Do you see how we are only beginning to scratch the surface with each of these four witnesses of what disease is presenting the symptom of fear? And even if all four of them turn out to be "normally" scared, look at the great insight you have into the potential fear-based pitfalls they might have as you prepare them for what lies ahead.

"Call Me Terrified" – Part Two

If I am going to drive back to the airport I am going to need to pee. That's a lie. If I am going to do anything at all, including taking a deep breath, I am going to need to pee. I walk back toward the ladies' room very, very slowly so as not to have an "accident". But the ladies room is locked. Running into the empty men's room and locking that door is a "no brainer" for me. I make it. One good hand scrubbing and I am ready to hit the road. As I open the door to the men's room, I poke my head out, checking to see that it is "safe" and that no one has seen me. For some reason, explaining to genteel Southerners why I liberate men's rooms under duress is always awkward for me, so I find it best to not come out until the coast is clear.

Opposite me, peering out of the women's room, seeing if the coast is clear, is another woman. She is clearly the occupant of the ladies' room whose presence didn't allow me in. Our eyes meet. She looks shocked to see me. Of course I know why. Would Scarlett O'Hara pee in the same place as Rhett Butler? I say, "I'm sorry! I couldn't help it. I had to pee so badly and you were in the ladies' room." She trembles. Words come out of her mouth one at a time. They seem to shake as she timidly gets out each one. She painfully pushes them out of her quivering mouth one at a time, "You… scared… me… to… death." I pour out, "I am so sorry! I didn't mean to! Please forgive me!" She looks as if she might start to cry. Instead she kind of smiles in a bizarre way. "Not… now… before… the… idea … of… you… scared… me." Now I'm confused. "You mean women who use men's bathrooms?" I ask. "No… you… the… witness… coach. When he told me you were here I sneaked out of the back door of the conference room so you wouldn't see me." It is my turn to be stunned into silence. "Julia?" I inquire softly. She nods her head. "Still scared of me?" I ask. She shakes her head "no". It is really crazy. I don't want to blow it

with her. And here we are having this conversation with our heads still sticking out of the bathroom doors. But clearly if we are going to work together or if I am going to go back to The City of Angels I am going to have to get more than my head out of this bathroom. I get an idea. "How about if we both come out at the same time?" I say softly. She laughs a funny little laugh at the absurdity of it all and we open our doors simultaneously and come out. "Randy says I should go home. And I'm willing to go home… but… can I try to help you first?" She looks sad and lost. The smile and laugh are gone. She shakes and steels herself. She nods her head. Together, silently, we walk back down the hallway and to the conference room. I open the door for Julia, and we both go in. Randy is gathering up notebooks and papers and yellow pads. I know these are his well-researched and organized materials for our preparation session. No one is ever better prepped for prep than he is. He looks up, completely startled to see us. "I thought you both went home!" he exclaims. The effect of an even slightly raised voice on Julia is like that of a blistering desert wind on a hothouse flower. "Julia decided it would be okay to give me a shot at helping her."

I ask Julia, "Why are you afraid?" She says, "Because of what they did to me." "Which they?" I ask. She trembles and shakes and blinks back tears. "Is it too hard to say?" I ask. She nods. "Should Randy tell me?" I ask. She nods. Randy says, "Julia is in charge of sending out shipments for her company. Her company has a contract with a delivery service. The contract says that the delivery service is to charge her company on a per package basis. Every day there are a different number of packages that her company sends out – sometimes as few as one, never more than ten. Every day, the same two men from the delivery service --" I can see that Julia is shaking even harder. "Are you okay, Julia?" I ask. She shakes her head "no." "Should Randy stop telling me the story?" I ask. She looks at me, trembling. She pauses. She shakes her head "no". "Okay, then – go ahead, Randy." I say. I turn my eyes to her. I will listen to him, but I am looking at her. I want to make sure that "keep talking" is what she was really telling me with the trembling and the head shaking. Randy looks at her and gently asks, "Are you sure? I'm going to tell her what you told me. Stop me if I get anything wrong…okay?" Julia looks at him, trembling, and nods. She then turns to me and our eyeballs are locked. We listen to Randy's words together. I am saying to her with my eyes, "I am here for you." Randy continues the tale. "Then, one day, the men from the delivery service come into the her office without knocking. They say that from now on no matter how few or how many packages they are picking up, there is a new deal that trumps the contract her company had yesterday, and thought was in effect for two more years. Instead of a per package charge, there will be a flat monthly charge. They hand her a new contract and tell her to sign it. She looks at the bottom line and sees that the monthly amount is three times the amount she has ever paid on a per package basis. She calls the delivery service office and asks to speak with the person in charge. The person in charge tells her that she had better just accept the changes, sign the new contract, 'Or Else' and hangs up on her. The delivery service men start moving toward her--" Julia's eyes drop from mine and she starts to cry. I look at Randy and he looks at me. Fighting our instincts to bathe her in reassuring words we are silent. She cries, trembles, and finally looks up at me where my eyes are waiting for hers. "Just like my dad and my brothers, " she whispers.

Once you have an understanding of the nature of the "why" of the "truly terrified", you need to be willing to center the prep around the way the terror manifests itself. This means that you may very well have to change up the order and methodology of how you are going to conduct this session.

I remind myself of this all the time. I am a big believer in learning by doing – that is, role-playing. With the terrified, I curb my tendency to jump to teaching through role-playing as soon as possible. Some "truly terrified" people need to "talk things out" more than they need to role-play. Some need to role-play more than they need to "talk things out". Some need demonstration of how to act. Some need constant reassurance. Just because I like to prepare witnesses by launching into role-playing within a short time of meeting them doesn't mean that is right for every witness. Especially those who are "truly terrified".

Even when role-playing, the rules change with the terrified witness. Often times with other witnesses, a segment of role-playing will involve a subject matter or a document or some other content related way of determining content. For example, when dealing with deposition preparation, the attorney will question the witness thoroughly on one topic, let's say the document marked "39" and the events that lead up to that document, and the events that came out of that document. I think of it as a perfect "bite" of a case in which a witness can learn both form and content. Most attorneys think in terms of a document, or an event, or a troubling fact in the case. Most attorneys are very content driven.

Being content driven in witness preparation for a "truly terrified" witness can be lethal. Instead, looking for the visible and auditory outward signs of the terror, at whatever point it comes in the questioning process is vital. It doesn't matter if you have one more question on this topic or a dozen. Some visible and auditory outward signs of terror are obvious to anyone. For example, the witness has a look of abject terror on his or her face. But there are visible and auditory outward signs of fear that are not necessarily obvious:

- the witness stops breathing after what you think is an "easy" content question.
- the witness stops answering questions.
- the witness starts to shake slightly.
- the witness just sits there as if in another world.
- the witness' voice changes pitch.
- the witness' voice sounds detached
- you can see on the witness' face that he or she literally didn't hear your voice – has tuned not only you, but the whole room out.
- the witness' posture sinks down further and further and they start looking at their hands.

Stop the role-play cold. Sometimes it is just to check in to see if further exploration is needed at this moment to figure out if this is "truly terrified" or "normal" scared behavior or something else – like the need to use the restroom. I say, "Hey – are you okay?" The witness will either say "Yes" or "No". If the witness says "Yes" but continue to manifest either the verbal or non-verbal signs of terror it is time to stop and talk about it. If the

witness says “No”, it is time, it is to test to the heart of the fear to find out if it is “normal” or “truly terrified”. I say, “You’re scared right now, aren’t you? I can see it. What’s going through your mind?” This is the another step in the process of “centering the prep around the ‘why’ of the fear”.

Lets take some concrete examples of the manifestation of fear that completely interfere with a witness’ ability to truthfully answer a question in deposition I’ve heard over the years. Think about three standard answers that you expect your witness to say as truthful responses to at least some of the questions posed by opposing counsel:

“I don’t understand the question.”
“I don’t know that answer.”
“I don’t remember right now.”

The craziest things pop out of the “normally” scared on occasion, but often from the “truly terrified” witness’ mouth. Answers that have nothing to do with the truth when one of the above answers is the truth to the question posed. Many attorneys will concentrate on how the answer is wrong from the point of view of content:

The answer you expect the witness to give to the question posed:	**An example of an untruthful answer to the question posed instead:**	**A content-based critique by the attorney:**
“I don’t understand the question.”	“I guess so.”	“Wait – I used three vocabulary words you couldn’t possibly understand and I asked at least three questions instead of only one. My question wasn’t understandable. That’s why the answer is ‘I don’t understand the question.’ “
“I don’t know that answer.”	“Possibly.”	“Hey – you couldn’t possibly know because you weren’t there. That’s why the answer is ‘I don’t know.’ “
“I don’t remember right now.”	“That sounds right.”	“You don’t remember. So when you don’t remember, just say that you don’t remember. Got it?”

Now, here are those same three examples, but handled with the “fear” as the center point of the preparation rather than the “content”.

The answer you expect the	**On the visible or auditory**	**The Potentially Truly**

witness to give to the question posed:	manifestation of terror, you might say:	Terrified Witness' answer: the "Why":
"I don't understand the question."	"Uh-oh. You've stopped breathing. How come?"	"Just before I flunked second grade, I got more and more scared because I didn't understand the questions. Every time I don't understand one of the questions I get scared."
"I don't know that answer."	"You have that look on your face again – the one when you told me it's like you can see the lawyer's lips moving but you can't hear the words. What's going on?"	"My dad would ask me a question that I didn't know the answer to and when I said, 'I don't know' he'd hit me."
"I don't remember right now."	"I can see on your face that you don't remember. Why are you afraid to say it?"	"I've lost my words. That's what happens with the dementia. I can't remember and I get so scared that someone is going to find out and I'll lose everything."

We have talked about Julia's terror of being raised by a father and two older brothers who used her as a punching bag. We have talked about the story of how the men from the delivery service literally forced her to sign the contract. She is clearly manifesting all kinds of PTSD symptoms. I ask, "Randy – what is our demand for emotional distress in this one?" At this point I have completely forgotten that this is a business dispute over a contract. She looks up at me. She is shakingand her voice is trembling and she is barely speaking over a whisper. But she says, "No. This isn't about what they did to me. This is about them honoring the real contract." Brilliant. Randy and I are both blown away. I take a deep breath. I say, "You know you are going to be scared the whole time. Every minute of your deposition you will be terrified." She says, "Yes, I know." "Want me to show you how to get through it?" I ask. Randy and I both wait as she considers. It takes a long time. She is shaky. She is scared. She looks at me and in a quivering whisper says, "Yes." I say, "We are going to role-play. Randy is going to play the lawyer taking your deposition. Whenever I see you get scared you and I are going to pause and figure out what to do next." She nods. I gather up my wits and my intuition. I say to Randy "Go!" and he asks, "Did you read the contract before you signed it?" She is frozen, trembling. I say, "Why did you freeze?" She says, "Because something popped into my head." I ask, "What popped into your head?" She says, "If I say what pops into my head, something bad will happen to me." I say, "Why?" She says, "Every time I did that with my dad and brothers they…they…" I gently turn her and have her look in my eyes. "Just tell me. Tell me what popped into your head. Not your dad and brothers, not the lawyer who represents the delivery service guys – just me." She nods. I tell Randy, "Ask her again!"

Randy asks in a really mean tone, "Did you read the contract before you signed it?" She looks into my eyes. I say, "Inhale, exhale, inhale and tell me." She inhales and exhales shaking. She inhales and in an unsteady whisper stutters, "Wh-i-ich contract?" Eureka! Randy and I are thrilled. "Perfect!" I say to her. I am smiling and nodding and reassuring her. "Ready for another one?" She nods. Randy switches up his demeanor, thinking that being "nice" might throw her off. "The one you signed this past March." She looks at me. I say, "Inhale, exhale, inhale and.." She says, "One what?" Wow! Her instincts aren't going to let her answer a question that isn't complete! "Good girl!" I exclaim. Randy, adopting yet another attitude seen in some lawyers, that of intellectual superiority says, "Did you read the most recent contract you signed with the Delivery Service this past March?" She looks at me. I nod, and inhale. She joins me – she inhales and exhales. We then inhale and she says to me, "I couldn't. No time." Randy then follows up with something he is convinced her father might have said, "What do you mean you didn't have time?" She looks at me. She inhales and exhales all on her own and starts to shake like crazy. I just look at her, steady as a rock. She inhales, and whispers in a terrified rasp, "He said if I didn't sign it by the time he counted to ten I'd be sorry." "Julia," I say, "Are you willing to breathe and speak the words that pop into your head just like you are doing right now no matter what?" She blinks at me and nods. "You know I won't be there," I say. "Instead of me I want you to talk to the court reporter." "Will she look at me like you are looking at me?" she inquires. My heart sinks. Dang it, of course she won't. Will that throw the whole thing off? "No, she won't," I say hesitantly. "That's a relief," Julia sighs. "It's harder when you look right at me like that." Randy and I have to giggle at me for just one moment. "Julia!" I say, "I thought it was all about me!" "No," she whispers. "Its about them. Because what they did isn't right." I knew she "had" it. "That's it," I said to Randy. "We don't have to torture her by practicing any more."

It is the evening of the day on which Julia's depo is taken. I, of course, am second guessing myself about our "lack" of rehearsing and role-playing for more than like five minutes. The phone rings. It's Randy. I ask him all the burning questions in my head:
"Did Julia ever get her voice above a rasp-y whisper?"
"No".
"Did she ever stop shaking?"
"Absolutely not."
"Did she ever look less than completely terrified?"
"Never."
There is a pause. Somehow until that moment I thought that if she did the routine over and over again for the six hours of the depo she would magically conquer fear.
Randy can barely contain his glee as he chortles, "Was she able to breathe, trust her inner voice, turn to the court reporter and answer every question asked of her by the turkey who represented the Delivery Service? Did she do it over and over again despite the fact that everyone in the room knew she was truly terrified? God love her, she sure did. There is very little in life that is as compelling as watching someone who is truly terrified speak truth to an oppressor." He sighs, "She would have been great in front of a jury."
"Would have been?" I ask.

"Apparently the Delivery Service felt the same way," Randy crows. They settled for everything we had asked for and then some as soon as her depo was over."

Jeff Sugar, MD

How Adversity Becomes Disease:

The Biological Embedding of Experience

While it may come as no surprise that terrible life events lie at the root of many psychological problems, both for children and adults, it is not so well known that other less traumatic, yet psychologically damaging, life events have significant downstream effects on physical—as well as mental—health. Both traumatic early life experiences, such as sexual and physical abuse, and less severe adverse conditions, such as growing up in a home plagued by domestic violence in which family members may abuse substances or have a history of incarceration, may have profound and lasting consequences. In the landmark Adverse Childhood Experiences (ACE) Study, (Felitti, V, and Anda, R 2010), conducted on a sample of unselected adults attending a preventive medicine clinic in San Diego, the incidence of these types of experiences was recorded as part of their routine health assessment. The ACEs may be grouped in three categories: Abuse includes physical, sexual and emotional abuse; Neglect may be emotional or physical; Household Dysfunction includes the presence in the home of a substance abuser, parental separation or divorce, a household member having a mental illness, the mother being treated violently, or a household member having a history of incarceration.

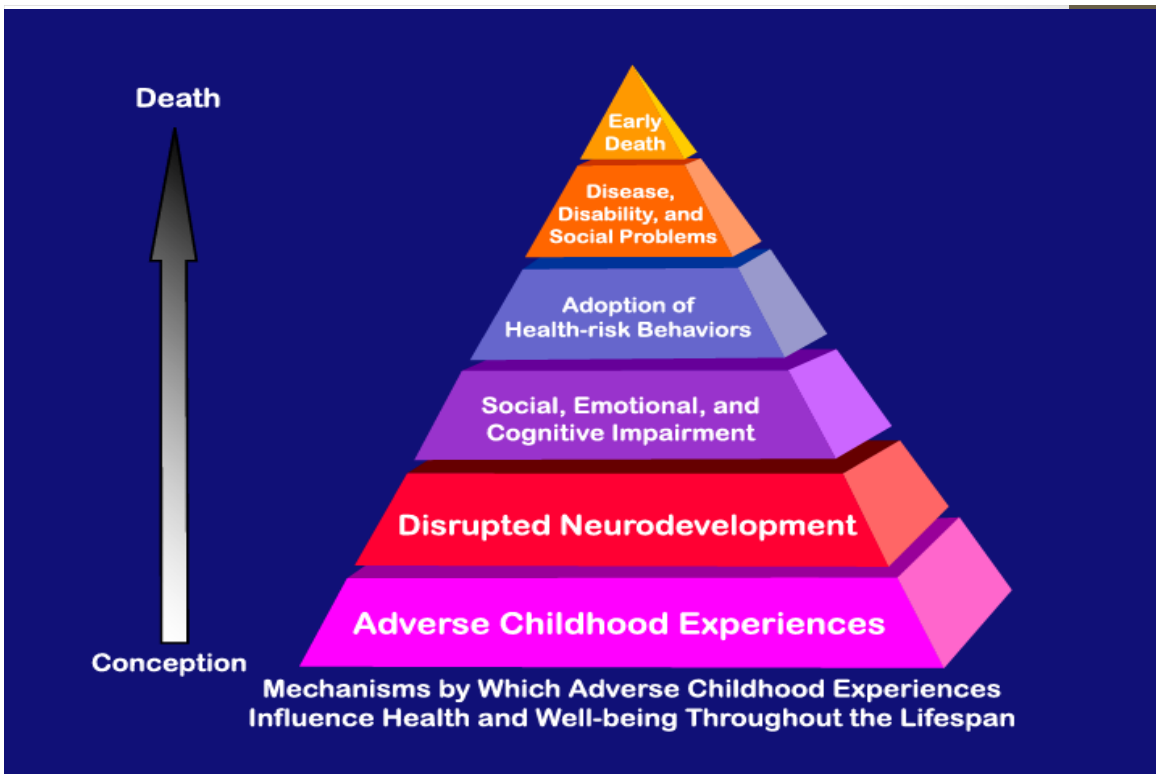
To evaluate the cumulative effects of multiple ACEs, the researchers made the decision—revolutionary at the time—to assign a score of "One" to indicate the presence and "Zero" to indicate the absence of each type of adversity. In other words, for the purposes of this study one instance of sexual abuse counted the same as 10, and any type of adversity was given equal weighting. That is, living in a household, for example, in which the mother was treated violently or parents were separated counted the same as an instance of abuse or neglect. While few would argue that the impact of each of these kinds of adversity is equal, when these experiences are simply counted as present or not, and then the scores are summed, the results are remarkable and consistent. The first notable result of the initial study of 17,000 adults that now totals over 400,000, was that ACEs are extremely common: only one third of the original group had an ACE score of zero indicating no adverse experiences, while nearly a quarter of the group had three or more. Significantly, the presence of one ACE gives an almost 90% chance that at least one other ACE will be present. While these facts would be noteworthy on their own, they become a cause for alarm when we examine how the presence of increasing numbers of ACEs dramatically increases the prevalence of many serious mental and physical health consequences.

As ACE scores increased from 0 to 4 the prevalence of Chronic Depression went up from 10 to 35% in men and from 15 to 55% in women, while Suicide Attempts went from about 2% to nearly 20%. Even a symptom like Hallucinations, generally thought of as being biologically-based, increased from a prevalence of about 1% to 9% as the ACE score rose from zero to greater than seven, and at the highest ACE scores hallucinations were nearly as likely to be present whether or not the subject also abused drugs or

alcohol. Similar, very steep increases in prevalence with increasing ACE scores were found for Smoking, Adult Alcoholism, and Injection Drug Use. Not surprisingly, the risk of becoming a perpetrator of domestic violence, the risk of having impaired work performance, teen sexual behaviors that lead to early pregnancy, and, sadly, the risk of being raped later in life, all rise dramatically with increasing ACE scores.

Considering these profound behavioral effects, many of which, (such as alcohol, tobacco, and drug use), are themselves proximal risk factors for disease, it may not be so surprising to learn that high ACE scores also predict dramatic increases in the prevalence of liver disease, chronic obstructive pulmonary disease, and heart disease.

To help visualize the complex relationships between the Adverse Childhood Experiences and the severe deleterious effects on the development of disease, disability and social problems, all of which may lead to early death, the authors of the ACE study developed the following Adversity Pyramid.



In this graphic representation we can follow the proposed sequence: Adverse Childhood Experiences → Disrupted Neurodevelopment → Social, emotional, and Cognitive Impairment → Adoption of Health-risk Behaviors → Disease, Disability, and Social Problems → Early Death. While this well-executed graphic presents an excellent broad overview of the problem and illustrates how far-reaching the effects of early adversity may be, it is slightly misleading. For it suggests that the layers of the pyramid exert their influence in a linear, causal manner, and that each layer is active only in a particular interval and time and that the interactions proceed from bottom-up. However, a closer

examination of each of these layers of the pyramid will show a less linear, and perhaps even more far-reaching, set of relationships among these factors.

Before exploring some of the putative mechanisms through which these interactions occur, let us consider an illustrative example. Susie is a 22-year-old college student. Although she gets good grades, she is plagued by self-doubt. She has had a string of boyfriends, but none of her romantic relationships have been satisfying. Periodically, she will go to a local bar and pick up a stranger for a one-night stand. She has never been tested for HIV, because she doesn't want to know her status.

Susie was raised by her mother and her stepfather, after her biological father went to prison when Susie was two years old for fracturing her mother's jaw while he was high on crystal meth. When Susie was six, her mother began drinking heavily to cope with Susie's stepfather's increasingly aggressive outbursts. Shortly after Susie turned nine her stepfather began playing sexual games with her and threatened to beat her with his belt if she ever told anyone. When Susie finally did tell her mother that her stepfather had been raping her for the last nine months, just after she turned 13, her mother called her a whore and slapped her so hard that she left a palm print on Susie's face. A teacher saw Susie's bruised face, called children's services, and Susie was placed in emergency foster care.

Susie lived in a series of foster homes for the next two years, during which time her mother completed parenting classes and her stepfather moved out. When Susie was allowed to return home, her mother continued to use harsh corporal punishment, hitting her with belts and shoes. Susie never told anyone about this, because she was afraid she would be sent back to foster care.

When Susie saw a therapist for a few months after beginning college, she only wanted treatment for her depression and trouble falling asleep. She told the therapist that she could not remember anything before the age of 12. She didn't tell her therapist about her one-night stands, or that about once a week she would cut her forearms with a razor blade and watch herself bleed. This self-cutting helped Susie control overwhelming feelings of emptiness and shame. Susie's therapist referred her to a psychiatrist who put her on Prozac, but after two months Susie stopped the Prozac because it gave her headaches. Then she stopped therapy.

Although Susie appears to be physically healthy now at the age of 22, her exposure to at least seven categories of Adverse Childhood Experiences, giving her an ACE score of seven, places her at great risk for developing both physical and mental illness.

The neuroscientist Joseph Le Doux has described two parallel pathways for the processing of frightening information (Phelps, E. and LeDoux, J. 2005). The first of these, that Le Doux has dubbed, "the low road," is for split-second processing of a potential threat to life, when the smallest delays could lead to disastrous results. It is easy to see how such a mechanism could have evolved to protect our primordial ancestors: a caveman confronted at night by a large, dark shadow cannot afford to wait for close inspection to determine whether this shadow is actually a rock or a large black bear.

Therefore, in this case the visual information enters through the caveman's eyes, travels through the optic nerve, enters the visual part of a large, central structure within the brain called the thalamus, and without further processing goes directly to the amygdala, a part of the brain's limbic system critical to emotional responsiveness. From there the information flows out to the control center that prepares the body for fight or flight: the Sympathetic Nervous System. When activated, this system increases heart rate and respiration and shunts blood flow away from the skin and digestive system and toward the muscles to prepare for a flight from or a fight with a potential predator. At the same time that the low road is being activated, information also travels to the "high road:" this pathway begins similarly, with visual information entering through the eyes, and then through the optic nerve to the thalamus; but instead of going directly to the amygdala, information flows to the rear part of the outer shell of the brain called the occipital cortex, responsible for high-level processing of visual information, and only then does the information go on to the amygdala where it will elicit a behavioral response—this time only in the face of actual danger. This means that after our caveman has had another split-second to process the dark shadow he may conclude more definitively that it is, in fact, a bear and continue running, or he may decide that it was only a large boulder and continue a leisurely stroll, thereby conserving precious energy resources. While this mechanism is adaptive when one is faced with extreme danger, it also means that some threatening information is evaluated below the level of conscious (cortical) processing.

Now, let us return to Susie. As a child, Susie learned that her safest response to the threat posed by her sexually abusive stepfather was to avoid confrontation and to comply with his demands. Over time, after what surely began as a series of frightening sexual encounters, Susie may have learned that her most adaptive response would not be to fight, but rather, to passively acquiesce to her stepfather's demands. While this behavior may have served her well in dealing with her stepfather, it is not hard to see how it might be related to her adopting a casual style in her adult sexual practices. In addition, because this frightening information was processed—at least in part—below the level of conscious awareness, Susie may not easily be able to connect her adult behavior to her earlier childhood experiences.

Whether she is aware of these connections or not, her childhood experiences interact with Susie's normal regulatory systems to confer greatly elevated risk for poor adult health outcomes. When a mammal experiences stress a whole cascade of physiologic responses follow. Although conventional wisdom has long suggested that prolonged exposure to stress can have deleterious health effects, it is only within the last decades that the emerging field of psychoneuroimmunology has elucidated some of the mechanisms through which specific life experiences may lead to severe downstream effects. In this conception, the term "experience" includes both the external stressors and the strong negative emotions these stressors may elicit. Stress may be defined as stimulation that activates the body's defensive response system: the hypothalamic – pituitary – adrenal (HPA) axis and/or the sympathetic nervous system (SNS) (Glaser, R. and Kiecolt-Glaser, J.K. 2005). Severe psychological stress may exceed an individual's ability to cope—that is, the ability of the individual to respond to the stressful event and then return to baseline. Just as a piece of metal will tolerate bending and return to its original shape only so long as it remains intact, when an individual's coping resources are

overwhelmed he or she may have great difficulty returning to baseline level of functioning.

Under normal circumstances a stressor will activate both the HPA axis and the sympathetic system. While the sympathetic system allows for an immediate response from the heart, lungs and blood vessels, activation of the HPA axis occurs over a longer time frame (Essex, M., Shirtcliff**,** E.**,** Burk, L. et al, 2011). In Susie's case the repeated and cumulative stress of seeing her mother being beaten, then being raped by her step-father and subjected to harsh corporal punishment would affect her physiological state as her sympathetic system would attempt to prepare her to respond quickly to these repeated threats to her own and her mother's bodily integrity, and her HPA system would attempt to provide her with the steroid hormones necessary to respond to prolonged stress. It is also likely that the stress experienced by Susie's mother who was herself living in a hostile, threatening environment, would have deleterious effects on her mother's ability to provide the necessary nurturing to ensure that Susie would feel securely attachment to her. The combination of poor attachment and later psychophysiological stress would have not just additive but multiplicative effects. This insecure attachment and unresponsive maternal care can then lead to further dysregulation of HPA reactivity.

The cumulative effect is that Susie lives in a heightened state of arousal in which she feels constantly overwhelmed and unable to protect herself. This state of fear produces an activation in the emotional parts of her brain that communicate with her hypothalamus, the brain center that connects directly to her pituitary gland, causing it to release hormones that stimulate the cortex, or outer shell, of her adrenal glands to secrete cortisol. The cortisol produced by her adrenal glands may help her deal with pain, but will also reduce the responsiveness of her immune system, making her more susceptible to a variety of physical illnesses.

Susie's mother's lack of availability gives Susie the biological signal that she lives in a harsh, hostile world, one in which she needs to be always alert and ready to react. This is in contrast to a mother who is available, and by her soothing allows her child to develop an HPA system with less extreme sensitivity, that will then afford the child greater energy to be spent on activities like planning for the future.

In one study by Fisher and Gunnar, (2010), the higher the number of unique caregivers for children in foster care, the lower was their ability to engage in "executive functions," like planning, problem-solving, and initiating and monitoring actions. In animal models repeated small stressors may lead to better self-regulatory skills, while more severe stressors lead to significant impairment.

Of course, genetics, as well as environment and parental care, plays a role in response to adversity. In twin studies genes determine the response to low levels but not to high levels of adversity. In one intriguing study, Suomi (2013) has shown that monkeys who possess a genetically determined variant of the transporter for the neurotransmitter serotonin that would normally confer an intermediate risk for depression, *in a hostile environment* will perform better than their peers carrying the gene for the more robust serotonin transporter.

To understand the effects of adversity a quick review of a few genetic principles is in order. The human genome contains about 20 to 30,000 genes located on 23 chromosomes — but not every gene is expressed, even in the brain. DNA is a double helical molecule that directs cellular machinery to produce specific types of RNA that then lead to the production of proteins that regulate virtually every chemical reaction within the body. Not very long ago as much is 97% of the DNA in the human genome was considered "junk," because it didn't appear to code for any particular protein. More recently, however, it has become apparent that this junk DNA is critical for regulating gene expression (Stahl 2013). Genes may become either silent or active under specific conditions. Changes in the expression of genes can lead to changes in brain connections, then to changes in the functions performed by these connections, and finally to changes in behavior. This process of gene regulation by DNA that is physically close to the genes themselves is called "epigenetics," and it is now believed that epigenetics may underlie both the mechanisms of psychiatric disorders and the actions of psychotropic medications. In a series of elegant animal studies researchers have shown that maternal nurturing behavior (for example, high licking and grooming of pups by mother rats) can alter the epigenetic profile of their offspring (Bagot and Meaney, 2010). Female rat pups exposed to a high degree of maternal nurturance, then, will mature to become mothers who provide good quality nurturing, while female pups exposed to poor mothering will themselves become poor mothers. However, pups born to mothers who are poor nurturers, but who are placed with or "fostered by" mothers who are good nurturers may grow up to be nurturing mothers.

So to return, finally, to Susie: her long chain of adverse experiences has left her with a hyper-reactive HPA axis and chronic feelings of emptiness. She attempts to regulate her poorly modulated emotions by cutting herself, taking drugs, and engaging in high-risk behaviors such as unprotected casual sex. Both her high-risk behaviors themselves and the negative emotional states that these behaviors often produce, lead Susie to feel physically and emotionally drained. While it may certainly appear that the odds of her escaping from the downward cycle that her life has become seem to be poor, it remains possible that some of these effects are reversible. Even as genetics and early life experiences cannot be modified, through epigenetic control, gene expression *is* subject to modification, and although the effects of early life experiences are often long lasting, some of these effects may be reversible. Although Susie's history has shaped her present life, it does not necessarily determine her future.

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Mel Hewitt

I. INTRODUCTION

The purpose of this paper is to discuss liability under the U.S. Constitution and Georgia law for excessive force. The elements of civil rights claims under the U.S. Constitution and Georgia law for excessive force will be outlined. Because most suits in this area are brought under 42 U.S.C. § 1983, more time will be spent on the elements of § 1983 claims. The paper will not cover injunctive relief.

II. GENERAL PROVISIONS OF LIABILITY UNDER 42 U.S.C § 1983

A. HISTORY AND BACKGROUND

Enacted in 1871 as the Ku Klux Klan Act, 42 U.S.S. § 1983 is the workhorse of civil rights statutes. The text of § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[1]

The Supreme Court has explained the purpose of § 1983, which was enacted in implementation of the Fourteenth Amendment, as follows:

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[1]42 U.S.C. § 1983.

As a result of the new structure of law that emerged in the post-Civil War era-and especially of the Fourteenth Amendment, which was its centerpiece-the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section § 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation....

The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." [2]

Until Monroe v. Pape,[3] the Act was dormant. In Monroe, the Supreme Court reversed the dismissal of a suit brought by a plaintiff whose home was ransacked by police officers. The plaintiff was arrested but released without being charged. Breaking new ground, the Court held that action "under color of law" as required by § 1983, could be shown even though the officers had acted in violation of state law.[4] The Court also held that specific intent to deprive a person of a federal right is not required for § 1983 liability,[5] and that a plaintiff need not first exhaust state judicial remedies before bringing suit under § 1983.[6]

Other decisions after Monroe have also broadened the utility of § 1983 for plaintiffs. Importantly, the Supreme Court has held that cities and counties are "persons" that may be sued for

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[2]Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[3]365 U.S. 167 (1961), overruled in part on other grounds, Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

[4]Id. at 171-87.

[5]Id. at 186-87.

[6]Id. at 182-86

damages under § 1983 and that they have no immunity from such suits.[7] For two reasons, states, by contrast, may not, absent waiver, be sued for damages in federal court under § 1983. States are not considered persons for § 1983 purposes and states enjoy Eleventh Amendment immunity.[8]

B. BASIC ELEMENTS OF § 1983 CLAIMS

In order to recover on a § 1983 claim against any defendant (whether an entity, supervisor, or subordinate employee), the plaintiff must plead and prove a number of elements. Damages liability under § 1983 of an individual for his personal misconduct is fairly straightforward but the liability of corporate entities (usually governmental units)[9] and non-participating supervisors is subtle and complex. Liability against entities and supervisors has generally been imposed where the basic elements of a § 1983 are met and either (1) the wrongdoing is directly authorized by the defendant supervisor or some policy-making agent of the defendant entity, or (2) the defendant superior or entity creates or enforces a policy that causes the wrongdoing.

1. DEPRIVATION OF A FEDERALLY PROTECTED RIGHT

Section 1983 creates no substantive rights , but rather provides a vehicle for an injured person

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[7]Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978); Owen v. City of Independence, 445 U.S. 622 (1980).

[8]Will v. Michigan Dept. Of State Police, U.S. 58, 70 (1989(("States are protected by the Eleventh Amendment while municipalities are not...")(cit. Omitted); Edelman v. Jordan, 415 U.S. 651, 665-66 (1974); Quern v. Jordan, 440 U.S. 332 (1979); Schlopler v. Bliss, 903 F.2d 1373, 1378 (11th Cir. 1990).

[9]A non-governmental entity is subject to liability under § 1983 only in the rare situation in which it can be said to have acted under color of state law. See Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (holding that private business corporation acted under color of state law in using state prejudgment attachment procedures to seize property wrongfully).

to pursue money damages or other remedies for violations of federally-protected rights. [10] "The first inquiry in any § 1983 suit...is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' [of the United States]."[11]

Although § 1983 contains no state-of-mind requirement, [12] negligence is not an adequate basis for any § 1983 claim.[13] The Court also suggested that this deliberate indifference standard applies across the board to all constitutional violations alleged against a municipality.[14] In some §

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[10]See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-18 (1979); Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985).

[11]Baker v. McCollan, 443 U.S. 137, 140 (1979); Hamilton by Hamilton v. Cannon, 80 F .3d 1525, 1528 (11th Cir. 1996).

[12]Parratt v. Taylor, 451 U.S. 527, 536-37 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

[13]Daniels, 474 U.S. at 328, 333 ("Where a government official's act causing injury to life, liberty or property is merely negligent, ' no procedure for compensation is constitutionally required.'")(emphasis original). See also County of Sacramento v. Lewis, 523 U.S. 833, 834 (1997)("liability for negligently inflicted harm is categorically beneath the constitutional due process threshold"); Davidson v. Cannon, 474 U.S. 344, 347-48 (1986). Generally, deliberate indifference is required . City of Canton v. Harris, 489 U.S. 378, 388-89 (1989)("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where a municipality's failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with out admonition in Monell, 436 U.S., at 694 and Polk County v. Dodson, 454 U.S. 312, 326 (1981), that a municipality can be liable under § 1983 only where its policies are the its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences "deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."

[14]Id. at 389 n.8 ('The 'deliberate indifference' standard we adopt for § 1983 'failure to train' claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation."). See also Gonzalez v. Yselta Independent School District,996 f .2d 745, 759 (5th Cir. 1993)(observing, in a case involving the liability of a school district for the actions of a policy maker, that deliberate indifference "has apparently become the rule").

1983 cases, the state-of-mind requirement may be even more onerous for the plaintiff.[15]

2. ACTION UNDER COLOR OF STATE LAW

In order for conduct to be state action[16] it must be "made possible only because the wrongdoer is clothed with the authority of state law,"[17] and it must be "chargeable to the state."[18]

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[15]For example, in order to establish a violation of the Eighth Amendment for failing to protect one inmate from another inmate, a § 1983 plaintiff must show a heightened form of deliberate indifference. Farmer v. Brennan, 511 U.S. 825, 848 (1994)(plaintiff must also show that a state actor defendant subjectively knew of a "substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976); LeMarca v. Turner, 995 F .2d 1526 (11th Cir. 1993), cert. denied, 510 U.S. 1164 (1994). And a correctional officer can not be held liable for excessive force against prison inmates unless he intends harm. Hudson v. McMillian, 503 U.S. 1, 6, 11-12 (1992) ("[T]he question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"); Whitley v. Albers, 475 U.S. 312, 320 (1986). The same is true for a police officer sued under § 1983 for actions during a high-speed pursuit. County of Sacramento v. Lewis, 523 U.S. 833, 854 (1997) (high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983 ").

Equal Protection claims, which have been held to require proof of intentional discrimination, provide another example. Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 272 (1979)("even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose"); Washington v. Davis, 426 U.S. 229, 240 (1976); Pearson v. Macon -Bibb County Hospital Authority, 952 F .2d 1274, 1282(11th Cir. 1992)("An equal protection claim will prevail only upon a showing of intentional discrimination.").

[16]The Supreme Court has held that "conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law." Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982).

[17]National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 190 (1988)(cits. Omitted).

[18]Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982). See also Morgan v. Tice, 862 F .2d 1495, 1499 (11th Cir. 1989).

The Court has held that "the under-color-of-state-law element of a § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful"[19]

The Supreme Court has used several methods to determine whether conduct by private persons and entities meets qualifies as state action. Professor Nahmod summarizes:

There are no hard and fast rules for determining the presence of state action. Indeed, the Supreme Court has emphasized repeatedly that the state action inquiry must be made on a case -by case basis. Despite this emphasis on individual cases, certain generalizations are still possible. State action exists (1) where the state and the private person or entity maintain a sufficiently interdependent or symbiotic relationship; (2) where the state requires, encourages, or is otherwise significantly involved in nominally private conduct; and (3) where the private person or entity exercises a traditional state function. On the other hand, it is also true that extensive state regulation, funding, or subsidization of an otherwise private entity is not, without more, sufficient to render the entity's conduct state action. There must be a nexus between the challenged conduct and the state. For this reason, the fact that a statute provides a choice to a private person to act in a particular way does not automatically convert that person's chosen conduct into state action. Moreover, only certain state functions, when delegated to and exercised by private persons, constitute state action.[20]

3. CONDUCT BY A § 1983 "PERSON"

A § 1983 person may be an individual, corporation, city, or county. [21] But, as noted above,

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[19]American Mfrs. Mut. Ins. Co. V. Sullivan, 526 U.S. 40, 50 (1999) (cits. Omitted).

[20]Sheldon Nahmod, 1 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION THE LAW OF SECTION 1983, 2:4, at 2-11 & 2-12 (2004).

[21]Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

a state is not a person for § 1983 purposes.[22]

4. DAMAGES

Just as in a tort case, a § 1983 plaintiff must prove compensatory damages (unless the plaintiff seeks only nominal damages, injunctive, or other non-pecuniary relief). These may include general damages for emotional harm. Damages are not, however, recoverable for the intrinsic value of a violated constitutional right.[23] Punitive damages may be recovered against individuals for egregious misconduct.[24] Punitives may not, however, be recovered against a municipality or governmental entity.[25]

5. PROXIMATE CAUSATION

According to the statute, it must be shown that the defendant "subject[ed] or cause[d plaintiff] to be subjected" to a deprivation of some federally protected right.[26] One aspect of this causation element is "causation-in-fact." The but-for" test is often used to make this determination. In Mount Healthy City Board of Education v. Doyle, [27] a public employee speech case, the Supreme Court adopted a variation of this test by requiring that a plaintiff establish that protected conduct was a "'substantial factor' or, to put in other words, that it was a 'motivating factor'" in the deprivation

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[22]Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 616 (2002); Will v. Michigan Dept. Of State Police, 491 U.S. 58 (1989).

[23]Memphis Community School District v. Stachura, 477 U.S. 299, 309-11 (1986); Carey v. Piphus, 435 U.S. 247, 254, 258 (1978).

[24]Smith v. Wade, 461 U.S. 30 (1983).

[25]City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

[26]42 U.S.C. § 1983

[27]429 U.S. 274 (1977).

of rights.[28] The Court further elaborated this test by allowing the defendant to overcome the plaintiff's evidence of causation through showing "by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."[29]

But it is not enough for a plaintiff to establish causation-in-fact or but-for causation. Proximate causation must also be shown. The Supreme Court has held that the statutory language of § 1983 does not allow the imposition of municipal liability by respondeat superior, which is a variety of causation-in-fact.[30]

In Williams v. Bennett,[31] the Eleventh Circuit held that a plaintiff "must prove that each individual defendant proximately caused the unconstitutional conditions in the prison." The court also pointed out that under 42 U.S.C. § 1988 state law governs the definition of "proximate cause."[32]

In Martinez v. California,[33] the Supreme Court held that the California Parole Board could not be held liable under § 1983 for the death of a 15-year old girl who was killed by a parollee who had been released by the board five months earlier. The Court held that, even assuming the board knew or should have known that the release created such a danger, "appellants' decedent's death is too remote a consequence for the parole officers' action to hold them responsible under the federal

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[28]Id. at 287.

[29]Id.

[30]Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-95(1978); City of Oklahoma City v. Tuttle, 471 U.S. 808, 817-19 (1985).

[31]689 F .2d 1370 (11th Cir. 1982), cert. Denied, 464 U.S. 932 (1983).

[32]689 F .2d at 1389.

[33]444 U.S. 277 (1980).

civil rights law."[34]

The Supreme Court has held that the statutory language of § 1983 does not allow the imposition of municipal liability by respondeat superior, which is a variety of causation-in fact.[35]

As discussed above, a defendant may not be held liable under § 1983 unless the defendant proximately causes a deprivation of federally protected rights. This requirement is the primary source of the differences in the treatment of entities and supervisors sued for the misconduct of their employees or subordinates under § 1983, on the one hand, and under state law, on the other.

A. STANDARD CAUSATION THEORIES

1. Participation

The most obvious form of causation that can yield § 1983 liability is personal participation in a deprivation of federally-protected rights. This applies, of course, to a supervisor who, for example, personally arrests a suspect without probable cause. He can be held liable just as a subordinate officer who does the same thing.[36]

Conspiracy and aiding-and-abetting are forms of personal participation and may include

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[34]Id. at 280, 285.

[35]Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-95 (1978); City of Oklahoma City v. Tuttle, 471 U.S. 808, 817-19 (1985); Williams v. Bennett, 689 F.2d 1370, 1389 (11th Cir. 1982), cert denied, 464 U.S. 932 (1983)(holding that plaintiff "must prove that each individual defendant proximately caused the unconstitutional conditions in the prison.").

[36] See generally Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1192 (11th Circ. 1994)("To recover individually from Lewis and Wilkinson , who were in supervisory or policymaking capacities, the Hills must show that they are liable through the 'personal participation' in the acts comprising the alleged constitutional violation or 'the existence of a causal connection' linking their actions with the violation")(cit. Omitted), overruled in part on other grounds, Hope v. Pelzer, 536 U.S. 730 (2002).

private actors.[37] A conspiracy is an agreement or "understanding."[38] "An express agreement among all the conspirators is not a necessary element of a civil conspiracy."[39]

Although the touchstone of § 1983 liability is personal participation, there are many other varieties of proximate causality. As the Eleventh Circuit has said: "Personal participation...is only one of several ways to establish the requisite and causal connection."[40]

Courts have frequently faced the question of whether a municipality or a person in a supervisory position has proximately caused a deprivation of civil rights. The Supreme Court has stressed that in order for a supervisor or municipality not directly involved in a deprivation of rights to become liable under § 1983 there must be a clear causal connection between conduct of the supervisor or municipality and the deprivation. In finding that there was no such connection in Rizzo v. Goode, [41] the Court said:

> As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners -express

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[37]See Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1289 (11th Cir. 2002); N.A.A.C.P v. Hunt, 891 F .2d 1555 1563 (11th Cir. 1990) (to establish § 1983 liability based on conspiracy, plaintiff must show that private party and government official "reached an understanding" to deny rights); Harvey v. Harvey, 949 F .2d 1127, 1133 (11th Cir. 1992); Halberstam v. Welch, 705 F .2d 472, 477-78, 483-84 (D.C. Cir. 1983) (non-§ 1983 case summarizing civil liability for conspiracy and aiding-and-abetting).

[38]Adickes v. S.H. Kress and Co., 398 U.S. 144, 152 (1970).

[39]Leonard v. Argento, 699 F.2d 874, 882 (7th Cir. 1983).

[40]Zatler v. Wainwright, 802 F .2d 397, 401 (11th Cir. 1986). See also Sims v. Adams, 537 F .2d 829, 831 (5th Cir. 1976)(cit. omitted) ("'Personal participation' is only one of several theories which can be used to establish causation.").

[41]423 U.S. 362 (1976).

or otherwise-showing their authorization or approval of such misconduct.[42]

Note that the Court clarified the required "affirmative link" by saying that it must amount to "authorization or approval"[43] Lower courts have been careful to insist on an "affirmative link" between the actions of a municipality or supervisor and a constitutional deprivation carried out by a subordinate.[44] It must also be remembered that due to the underlying standard of care in civil rights cases based on the Eighth Amendment, the authorization or approval must amount to deliberate indifference.[45]

2. Liability of a supervisor for Direct Authorization

A supervisor may incur liability under § 1983

if he authorizes or approves of the conduct of a subordinate that deprives another of a civil right. He may expressly authorize it, as in Baskin v. Parker,[46] in which the defendant sheriff "authorized the investigation and organized the search party" which deprived plaintiffs of constitutional rights.[47] The Fifth Circuit has also said that a supervisor may be liable if "he directs, orders, participates in,

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[42]Id. at 371 (emphasis added).

[43]As will be discussed shortly, a municipality "may only be held accountable if the deprivation was the result of municipal 'custom or policy.'" City of Oklahoma City v. Tuttle, 471 U.S. at 817.

[44] E.g., Anderson v. City of Atlanta, 778 F.2d 678, 685 (11th Cir. 1985) ("at a minimum, a plaintiff must demonstrate some affirmative link between the policy and the particular constitutional violation alleged"); Rock v. McCoy, 763 F .2d 394, 398 (10th Cir. 1985); Hays v. Jefferson County, Kentucky, 668 F.2d 869, 873-74 (6th Cir. 1982) ("a plaintiff must show that the official at least implicitly authorized, approved or knowingly acquiesced"); Lee v. Downs, 641 F .2d 1117, 1120 n.1 (4th Cir. 1981).

[45]See Williams v. Bennett, 689 F.2d at 1380.

[46]602 F .2d 1205 (5th Cir. 1979)

[47]Id. at 1208.

or approves the acts.[48]

3. Liability for Failure to Intervene

Although a supervisor or co-officer does not expressly direct the offending conduct, the required authorization or approval may be found if he stands by with knowledge of what is happening and refuses to intervene.[49] It is apparent, however, that knowledge acquired by a supervisor after the offending conduct does not satisfy the causality requirement.[50] A subordinate or co-worker who has the opportunity but fails to intervene may also be held liable under § 1983.[51]

4. Formal Policy

It has been held that a supervisory official or a municipality may become liable for a deprivation of civil rights through the creation or execution of a policy. Even though a supervisor or the policymaker s of a municipality know nothing about the conduct of their subordinates on a particular occasion, the supervisor and the municipality may be responsible if they have authorized

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[48]Ford v. Byrd, 544 F .2d 194, 195 (5th Cir. 1976). See also Howell v. Tanner, 650 F .2d 322 (5th Cir. 1984); Reimer v. Short, 578 F.2d 621, 6265 (5th Cir. 1978).

[49]See Torres-Rivera. O'Neill Cancel, 406 F .3d 43, 54 (1st Cir. 2005) ("'A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers.'" (cit. omitted); Mercado v. City of Orlando, 407 F .3d 1152, 1158 (11th Cir. 2005); Smith v. Mensinger, 293 F .3d 641, 650 (3rd Cir. 2002) ("a corrections officer's failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so"); Richardson v. City of Indianapolis, 658 F .2d 494, 500 (7th Cir. 1981); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983); McQuarter v. City of Atlanta, 572 F Supp. 1401, 1415-16 (N.D. Ga 1983), overruled in part on other grounds, Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988).

[50]Chestnut v. City of Quincy, 513 F .2d 91, 92 (5th Cir. 1975).

[51]Smith v. Mnsinger, 293 F .3d 641, 650 (3rd Cir. 2002).

a policy that in some fashion causes the offending conduct.[52] But in order to impose liability in this manner, there must be an "authoriz[ed]" policy and conduct "pursuant to [that] policy."[53]

In its landmark decision in Monell v. Department of Social Services of City of New York,[54] the Supreme Court held that a municipality may be sued under § 1983 but recovery can be had only if the conduct of its agents is pursuant to an "official" municipal policy. In the Court's words:

> Local governing bodies, therefore can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.[55]

The Court went on to say:

> [T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tort-feasor-or in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.[56]

Later the Court restated its holding as follows:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts of acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[57]

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[52]See Hill v, Dekalb Regional Youth Detention Center, 40 F .3d 1176, 1192 (11th Circ. 1994) ("In addition to personally participating in acts causing constitutional deprivations, [supervisors and policymakers] Lewis and Wilkinson also could be liable to the Hills indirectly if they personalty instigated or adopted a policy that violated Hills constitutional rights.')(cit. omitted.), overruled in part on other grounds, Hope v. Pelzer, 536 U.S. 730 (2002).

[53]Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983).

[54]436 U.S. 658 (1978).

[55]436 U.S. at 690.

[56]Id. at 69. (emphasis original).

[57]Id. at 694.

It is clear, then, that a municipality can be held responsible only for conduct which it authorizes by "official" policy. Since Monell, the Court has reiterated this rule. In Tuttle, the Court said: "Monell teaches that the city may only be held accountable if the deprivation was the result of municipal 'custom or policy.'[58] Moreover, the "official policy must be 'the moving force of the constitutional violation.'"[59] To be the "moving force" there must be a clear connection between the policy and the violation.[60]

The same standard has been applied to other non-participating defendants such as supervisory officials.[61] In other words, a supervisory official who creates or implements an unconstitutional policy may also incur liability for such actions.

Several additional points should be made about the general nature of these policies. In order to support § 1983 liability, a policy must be culpable and deliberate.[62] Although a number of early

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[58]471 U.S. at 817. See also McMillian v. Monroe County, 520 U.S. 781, 783-85 (1997); Collins v. City of Harbor Heights, Tx., 503 U.S. 115, 121 (1992) ("municipalities may not be held liable 'unless action pursuant to official municipal policy of some nature caused a constitutional tort'); Pembaur v. City of Cincinnati, 475 U.S. 469, 471, 478-80 (1986) (plurality opinion).

[59]Polk County v. Dodson, 454 U.S. 312, 326 (1981), quoting Monell, 436 U.S. at 694.

[60]See, e.g., Piotrowski v. City of Houston, 237 F .3d 567, 581 (5th Cir.2001) (even assuming that "acquiescence in police officers' moonlighting" was a city policy, "evidence is nevertheless insufficient to establish that it was the moving force that caused " plaintiff to be shot by ex-boyfriend whose private investigator hired moonlighting police officers).

[61]See McLaughlin v. City of LaGrange, 662 F.2d 1385, 1388 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982); Marchese v. Lucas, 758 F .2d 181, 186 (6th Cir. 1985) (all § 1983 "person[s]" may incur liability for deprivations pursuant to policy); Turpin v. Mailet, 619 F .2d 196, 201 n.3 (2nd Cir.), cert. denied, 449 U.S. 1016 (1980), overruled in part on other grounds, Leatherman v. Tarrant County, 507 U.S. 163 (1993).

[62]See Owens v. City of Atlanta, 780 F.2d 1564, 1567 (11th Cir. 1986) (holding that in order to result in § 1983 liability a policy must contain a "fault element"); Rizzo v. Goode, 423 U.S. 362, 373-77 ((1976) (only "deliberate policies" can subject nonparticipating defendants to § 1983 liability); Farred v. Hicks, 915 F .2d 1530 , 1532-33 (11th Cir. 1990).

§ 1983 decisions held that non-participating defendants could not be liable for failing to adopt or enforce adequate policies, that position is no longer well supported.

The courts have also said that in order for a municipality or supervisor to be liable for the conduct of a subordinate pursuant to a policy, a § 1983 plaintiff must show there is "an authoriz[ed]" policy and conduct" "pursuant to [that] policy."[63]

An offending policy may be formal or informal. The clearest examples of official policies are those officially adopted and promulgated. In Monell, for example, the offending policy required pregnant employees to take unpaid leave prior to any medical necessity. This official policy was formally adopted by the New York Department of Social Services and Board of Education.[64]

Official policies of this type may be made not only by lawmakers but also "by those whose edicts or acts may fairly be said to represent official policy."[65] In order for municipal liability to attach, "the decision-maker [must] possess [] final authority to establish municipal policy with respect to the action ordered."[66] And the Court has held that State law determines whether state or local government officials are policymakers.[67] It is important to recognize that, unlike with respect

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[63]Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983). See also Rizzo, 423 U.S. at 371 ("As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners–express or otherwise-showing their authorization or approval of such misconduct.") (emphasis added).

[64]436 U.S. at 660-661, 694-95. See also Little v. City of North Miami, 805 F .2d 961, 967 (11th Cir. 1986) (City resolution censuring law professor for First Amendment protected expression could form basis for municipal liability);

[65]Monell, 436, U.S. at 694.

[66]Pembaur, 475 U.S. at 481 (plurality opinion).

[67]McMillian v. Monroe County, 520 U.S. 781, 784-86 (1997); Jett v Dallas Independent School Dist., 491 U.S. 701, 737 (1989) ("'[W]hether a particular official has "final policymaking authority is a question of state law.'"). See also Riddick v. School Bd. Of City of Portsmouth, 238 F .3d 518, 523 (4th Cir. 2000); Berdin v. Duggan, 701 F.2d 909, 913-14 (11th Cir. 1983);

to an informal policy or custom, a single decision of a policymaker can subject both the policymaker and the entity to liability.[68]

Policies leading to § 1983 liability need not be written. For example, in Wanger v. Bonner, [69] The Sheriff of DeKalb County, Georgia was held liable under § 1983 on the basis of three unwritten policies that he had communicated to his deputies.[70]

The existence and implementation of an effective policy forbidding unconstitutional conduct, although not a necessary part of an entity or supervisor's defense, precludes, of course, liability against the entity or supervisor.[71]

Rhode v. Denson, 776 F. 2d 107, 108-09 (5th Cir. 1985)(a policymaking official has the authority to define objectives and choose the means of achieving them"); Wellington v. Daniels, 717 F.2d 932, 936-37 (4th Cir.1983).

[68]Pembaur, 475 U.S. at 470 (plurality opinion)("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (plurality opinion); Cooper v. Dillon, 403 F .3d 1208, 12111-12, 1222-23 (11th Cir. 2005)(City of Key West, Florida held liable for single enforcement by police chief , who was final policymaking official, of unconstitutional state criminal statute forbidding disclosure by a participant of a pending police internal investigation; "we reject [Police Chief] Dillon's argument that the single enforcement of the statute against Cooper could not constitute a 'policy' for § 1983 purposes"; "we find that the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper's constitutional rights which rendered the municipality liable under § 1983").

[69] 621 F.2d 675 (5th Cir. 1980).

[70]Id. at 679-83. See also Pembaur, 475 U.S. at 473-74.

[71]See Hill v, Dekalb Regional Youth Detention Center, 40 F .3d 1176, 1192-93 (11th Cir. 1994), overruled in part on other grounds , Hope v. Pelzer, 536 U.S. 730 (2002); McLelland v. Facteau, 610 F .2d 693, 696 (10th Cir. 1980), citing Kite v. Kelly, 546 f.2d 334, 338 (10th Cir. 1976); Painter v. Baltimore County, 535 F. Supp. 321, 324 (D. Md. 1982).

5. Failure to Have Adequate Policy

In Rizzo, the Court ruled that a mere "failure to act" by superiors is insufficient for § 1983 liability.[72]

But numerous more recent cases hold that entities and supervisors may indeed be liable for failing, after adequate warning, to enact or enforce policies that could have prevented unconstitutional harm.[73]

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[72]423 U.S. at 376, See also Batista v. Rodriguez, 702 F.2d 393, 399 (2nd Cir. 1983) (A causal link cannot be inferred from municipal inaction.") Wanger v. Bonner, 621 F .2d 675, 680 (5th Cir. 1980) (the "failure to adopt policies to prevent constitutional violations" is "not...an adequate basis for liability under § 1983").

[73]See, e.g., Fairley v. Luman, 281 F .3d 913, 917-18 (2002)(inadequate "warrant procedures" that led to a 12-day detention of twin brother of person named in warrants supported liability against city; "the policy was one of inaction: wait and see if someone complains"); Vineyard v County of Murray, GA, 990 F .2d 1207 (11th Cir. 1993) (liability of county for excessive force upheld where "the Sheriff's Department had inadequate procedures for recording and following up complaints against individual officers"); Oviatt v. Pearce , 954 F .2d 1470, 1474, 1477-79 (9th Cir. 1992)("a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights"; deciding city could be liable under because it failed to implement internal procedures for tracking inmate arraignments); Rhyme v. Henderson, 973 F .2d 386, 392 (5th Cir.1992) ("A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights."); Larez v. City of Los Angeles, 946 F .2d 630, 645 (9th Cir. 1991)("Policy or custom may be inferred if, after [constitutional violations], ...officials took no steps to reprimand or discharge the[ir] subordinates], or if they otherwise failed to admit the [subordinates'] conduct was in error.") (cit. omitted); Rivas v. Freeman, 940 F .2d 1491, 1495 (11th Cir. 1991)("liability may be imposed due to the existence of an improper policy or from the absence of a policy."); Guiterrez-Rodriguez v. Cartagena, 882 F.2d 553, 572-75(1st Cir. 1989) (upholding judgment against police supervisors who "failed to properly investigate a potentially violent officer"); Kerr v. City of West Palm Beach , 875 F.2d 1546, 1551, 1555-56 (11th Cir. 1989) (upholding jury verdict against City of West Palm Beach and its police chief for pattern of unconstitutional uses of force involving police dogs; the police department "had no specialized procedures for monitoring the performance of the canine unit"); Fiacco v. City of Rensselaer, N.Y., 783 F .2d 319, 332 (2nd Cir. 1986) ("the evidence was sufficient as a matter of law to permit a rational juror to find that the City had a policy of nonsupervision ofits police officers that amounted to a deliberate indifference to their use of excessive force"); Turpin v. Mailet, 619 F .2d 196, 198, 201 (2nd Cir.), cert. denied, 449 U.S. 1016 (1980) (collecting cases), overruled in part on other grounds, Leatherman v. Tarrant County, 507 U.S. 163 (1993); Timberlake v.

Answering the question of what a plaintiff actually must show in order to impose liability for a lack of policy, the Eleventh Circuit has ruled: "[A]ny alleged failure to adopt adequate policies for inmate protection must amount to a breach of [defendant's] duty and must evidence reckless disregard or deliberate indifference to [plaintiff's] constitutional rights."[74]

6. Informal Policy (Custom and Practice)

A policy need not be formal. It may be informal and take the shape of a custom or practice. In Rizzo, the Supreme Court stated that official policies could be "express or otherwise"[75] Indeed, the very language of § 1983 compels this conclusion. It creates an action against person's who act "under color of any statute, ordinance, regulation, custom or usage." (Emphasis added). As the Court said in Monell:

> "[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a depravation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels.[76]

Benton, 786 F. Supp. 442, 447 (D. N.J. 1992). See also Candace Cohn, Note, Municipality Liability Under Section 1983: The Failure to act as "Custom or Policy, " 29 Wayne L. Rev. 1225, 1244 (1983) ("municipalities can and should be deemed liable for a custom or policy of inaction where action is necessary to protect the civil rights of the citizenry from abuse by government employees and officials"); Diane M. Allen, Annotation, Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers who Violate Plaintiff's Civil Rights Under 42 USCS § 1983, 70 A.L.R. Fed. 17.

[74]Zatler v. Wainwright, 802 F .2d 397, 402 (11th Cir.1986).

[75]Rizzo, 423 U.S. at 371.

[76]Monell, 436 U.S. at 690-691.

But, the Court went on to hold that the action must be "pursuant to official municipal policy of some nature."[77] Moreover, as the Court held in Adickes v. S.H. Kress and Co., [78] and reaffirmed in Monell:'[W]e think it clear that a 'custom or usage, of [a] State' for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials." [79] The "social habits" or other "'customs of the people'"do not satisfy the § 1983 standard.[80]

A great deal of judicial effort has gone into determining the parameters of an informal policy or custom. The most significant decision is probably Rizzo. There the Court said that in addition to a significant number of deprivations there must be a "common thread running through them."[81],[82] The precise number of deprivations required for an informal policy depends on the case. However, one incident or isolated incidents are never enough.[83]

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[77]Id. at 691.

[78]398 U.S. 144 (1970).

[79]Adickes, 398 U.S. at 167 (emphasis added).

[80]Id at 166, 167 n.38.

[81]Rizzo, 423 U.S. at 375.

[82]Of course, there must still be an "affirmative link between the occurrence of the various incidents...and the adoption of [a] plan or policy." Rizzo, 423 U.S. at 371. In cases of informal policies or customs, the link is demonstrated by showing that constitutional violations are so widespread that the official "must have been aware of them." Holland v. Connors , 491 F .2d 539, 541 (5th Cir. 1974).

Rather, the deprivations must be "persistent and widespread . . . practices."[85] There must be a "pattern"[86] or "systematic" practices.[87]

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[83]Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. 397 (1997) (holding that a single instance of inadequate employment screening of a deputy sheriff could not support § 1983 liability); City of Oklahoma City v. Tuttle, 471 U.S. at 821-23 (plurality opinion) (municipal liability cannot be based on isolated misconduct of a subordinate); id; at 830-32 (Brennan J., concurring) (same); Webb v. Goord, 340 F.3d 105, 110 (2nd cir. 2003) ("plaintiffs have not shown that more than forty unrelated incidents occurring over ten years at thirteen separate DOCS facilities can satisfy their burden of proving that "the conditions of [their] confinement violate contemporary standards of decency") (cit. omitted); Pineda v. City of Houston, 291 F.3d 325, 330 (5th Cir. 2002) (Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails both because the inference of illegality is truly uncompelling-giving presumptive weight as it does to the absence of a warrant and because the sample of alleged unconstitutional events is just too small"); Gable v. City of Chicago, 296 F.3d

[84] Taken Alive v. Litzau, 551 F.2d 196, 200 (8th Cir. 1977); Chestnut, 513 F.2d at 92.

[85]Adickes, 398 U.S. at 167.

[86]Rizzo, 423 U.S. at 374-75; see also Calhoun v. Ramsey, 408 F.3d 375, 378-82 (7th Cir. 2005. (jury instruction upheld requiring inmate to show "widespread policy or practice that was so permanent and well settled as to constitute a custom or usage with the force of law"); Artis v. Francis Howell North Band Booster Ass'n, 161 F.3d 1178, 1181-82 (8th Cir. 1998) ("For the School District to be liable, Artis must prove that the School District had an official policy or widespread custom that violated the law and caused his injury . . . . An alleged illegal custom must be widespread and may only subject a school district to liability if it is pervasive enough to have the 'force of law.' ") (cits. omitted); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994) ("A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations. When the supervisor is on notice and fails to take corrective action, say, by better training or closer oversight, liability may attach."); Brown v. Crawford, 906 F.2d 667,671 (11th Cir. 1990) ("The deprivations that constitute widespread abuse.

In Rizzo, the Court held that 16 constitutional violations by 7,500 policemen in Philadelphia—a city of three million inhabitants—over a period of a year did not show an informal policy or custom.[88] Some indication of what the Court considers sufficient to establish an informal policy can be seen in its discussion in Rizzo of other cases. For example, the Court cited Lankford v. Gelston,[89] in which a police department conducted some 300 warrantless searches over a 19-day period in a black residential area.[90] In Slakan v. Porter,[91] the Fourth Circuit found that a pattern of seven recent unjustified water hosings of inmates, in addition to the one involving plaintiff, formed a pattern of which the defendant supervisory officials were aware and which supported §1983 liability.[92] There must be a sufficient number of incidents in order for municipal policymakers or supervisors to become aware of the conditions in question.[93]

Crawford, 906 F.2d 667, 671 (11th Cir. 1990) ("The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.") (quoted in Braddy v. Florida Dep't of Labor and Employment Security, 133 F.3d 797, 802 (11th Cir. 1998)); Watson v. Interstate Fire & Casualty Co., 611 F.2d 120, 123 (5th Cir. 1980),

[87] Hirst V. GerPen, 676 F.2d 1252, 1263 (9th Cir. 1982).

[88]423 U.S. at 603, 605.

[89]364 F.2d 197 (4th Cir. 1966).

[90]Rizzo, 423 U.S. at 373 n.8.

[91]737 F.2d 368 (4th Cir. 1984).

[92]Id. at 373-75. See also McKenna v. Nassau County, 538 F. Supp. 737, 741 (E.D. N.Y.), aff'd, 714 F.2d 115 (2d Cir. 1982) (other inmate assaults had occurred in overcrowded prison and guards knew an assault was likely, yet did nothing to prevent or interrupt an assault); Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) (defendant police officers had been the subject of numerous complaints, some of which had been sustained).

In Anderson v. City of Atlanta ,[94] the Eleventh Circuit concluded that the evidence supported the finding of a "pattern or practice of incidents of indifference" regarding prison under staffing. In another civil rights case against Atlanta, "[n]o evidence was presented of any other potential or actual adverse effects resulting from use of the restraint" which had resulted in the death of plaintiffs decedent.[95]

Finally, any plaintiff seeking to impose liability on an entity or supervisor based on an informal policy or custom should be very careful in describing the allegedly offending policy or custom. For instance, in Woodward v. Correctional Medical Services of Illinois, Inc.,[96] the Seventh Circuit held that the lack of previous suicides in a county jail did not defeat a claim against the city because the pattern or practice in question was not previous suicides but the condoning of employees' violations of its written policies'?" Denying summary judgment, the district court in Galindez v. Miller [98] held that there was an issue of fact not as to whether city directly authorized excessive force but rather as to whether city condoned excessive force by allowing civilian complaints of excessive force to "molder and gray without adequate attention (until the epiphany of federal civil rights litigation inspires action)".[99]

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[93]See, e.g., Ross v. Reed, 719 F.2d 689, 699 (4th Cir. 1973).

[94]778 F.2d 678 (11th Cir. 1985).

[95] Owens v. City of Atlanta, 780 F.2d at 1568.

[96]368 F.3d 917 (7th Cir. 2004).

[97]1d. at 929.

7. Authorization by Training and Supervision Practices (a Policy Subset)

As pointed out earlier, the training and supervision of subordinates is sometimes treated as a distinct policy area. But, especially with respect to supervision, it is impossible to draw meaningful lines between this area and other practices.[100] For example, the policies that led to the sheriffs liability in Wanger v. Bonner[101], could be said to be matters of training, supervision, or simply procedure. It must be remembered that, as with respect to other policies, training and supervision practices may not be a basis for § 1983 liability unless they amount to defective (or at-fault) official policies.[102]

It is important at this point to distinguish two cases. Most § 1983 liability exposure for training and supervision practices probably results from the implementation of official policies, formal or informal, that through defective content proximately cause unconstitutional conduct. For example, as in Wanger,[103] a peace officer might be directed through training or supervision to make unreasonable searches and seizures. On the other hand, an entity or its supervisory personnel might incur § 1983 exposure by completely failing to train a subordinate. Taking the same example, liability might result from an unreasonable search by a policeman who had received no training with respect to searches. Such a failure to train might be seen as an informal policy or custom.

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[98]285 F.Supp.2d 190 (D. Conn. 2003).

[99]1d. at 199.

[100]See City of Oklahoma City v. Tuttle, 471 U.S. 808, 820 (1985) (plurality opinion) (pointing out that training and supervision practices fall under the policy label); McCoy v. City of Monticello, 411 F.3d 920, 922 (8th Cir. 2005); Taylor v. Canton, Ohio Police Dept., 544 F. Supp. 783,790 (N.D. Ohio 1982).

[101] F.2d 675 (5th Cir. 1980).

Thus, even where there is no defective policy content, there may still be § 1983 liability if there is a complete failure to train or supervise. In Monell, however, the Court intimated that a complete failure to supervise could result in §1983 liability. The Court said: "By our decision in Rizzo v. Goode, we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."[104]

Although deficiencies may be present, only deliberate indifference in training or supervision may result in civil rights liability. Mere negligence in training or supervision is insufficient to support §1983 liability.[105] In City of Canton, the Court explained, "To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983."[106] Moreover, according to the Court, such a lesser standard would "result in de facto respondeat superior liability on municipalities" inasmuch as "[i]n virtually every instance . . . a § 1983 plaintiff will be able to point to something the city 'could have done' to

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[102]See Williams v. Bennett, 689 F.2d at 1380.

[103]621 F.2d at 679-83.

[104]436 U.S. at 694 n.58 (cits. omitted).

[105] City of Canton vs Harris, 489 U.S. 378, 388-89 (1989) ("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."). See also J.H. v. West Valley City, 840 P.2d 115, 118-22 (Utah 1992) (although police officer who molested minor was not supervised in his duties involving youth and received no additional training regarding dealing with youth, summary judgment to city upheld inasmuch plaintiff could not show deliberate indifference or a "close nexus between city policy and his damages"); Taylor, 544 F. Supp. at 789-90 (training deficient but not "grossly inadequate"-- so no supervisory liability).

[106]489 U.S. at 391.

prevent the unfortunate incident."[107]

Generally, completion of state-mandated training is sufficient to avoid liability based on training deficiencies. In Cannon v. Taylor,[108] the Eleventh Circuit held that a Columbus, Georgia police officer who caused the death of Lema Cannon in an automobile collision was adequately trained and supervised.

> The testimony and documentary evidence reveals that Officer Taylor received the standard police academy training on operating his vehicle and on applicable state laws. Additionally, the state law on operating police vehicles over the speed limit was reproduced in the Columbus police manual. This Court is unwilling to say that this training procedure is so inherently inadequate as to subject the City to liability in the absence of past officer misconduct resulting from lack of training.[109]

In many other cases, compliance with state training requirements has been held sufficient to defeat § 1983 claims based on inadequate training.[110]

Moreover, a single instance of inadequate training cannot support § 1983 liability.[111] Any other rule would, of course, circumvent the Supreme Court's above-discussed holding that entity and supervisory liability cannot be based on a single instance or a sporadic pattern of unconstitutional subordinate conduct.

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[107]1d. at 392.

[108]782 F.2d 947, 951 (1 1ft Cir. 1986).

[109]Id. at 951. Because Cannon predated City of Canton v. Harris, the court in Cannon applied the less stringent standard of "gross negligence." Yet, even under this more plaintiff friendly standard, the court found the training in Cannon adequate.

[110]Walker v. Norris, 917 F.2d 1449, 1457 (6th Cir. 1990) (prison guard who completed a three-week state academy course, and received animal in-service training was adequately trained); Colburn v. Upper Darby Township, 946 F.2d 1017, 1028 (3d Cir. 1991) (no deliberate indifference shown where police officers had completed state police academy course); Vine v. County of Ingham, 884 F. Supp. 1153, 1159 (W.D. Mich. 1995).

[111]Gilmere, 774 F.7d 1504.

b. RATIFICATION

In some circumstances, § 1983 liability of a supervisor or entity may be based on ratification of the unconstitutional conduct of a subordinate.[112] For example, plaintiffs sometimes argue that a city or county is liable for unconstitutional conduct of a police officer because the entity upheld or approved the officer's conduct through an internal affairs report or personnel board decision clearing him.

Support for ratification as a theory of § 1983 liability can be found in a number of decisions. In the leading case of City of St. Louis u. Proprotnik,[103] a plurality of the Court said:

> [W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.[114]

The Court labeled this statement as a guiding "principle,"[115] but did not apply the

ratification doctrine in Proprotnik. Many other federal courts have addressed ratification

in § 1983 cases.[116]

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[112]See "Ratification as an Exception to the 1983 Causation Requirement: Plaintif$_f$'s Opportunity or Illusion?" 89 Neb. L. Rev. 359 (2010).

[113]485 U.S. 112 (1988).

[114]Id. at 127 (emphasis original).

[115]Id.

[116]See Matthews v. Columbia County, 294 F.3d 1294, 1297-98 (11 th Cir. 2002) ("County liability on the basis of ratification exists when a subordinate public official makes an unconstitutional decision and when that decision is then adopted by someone who does have final policymaking authority. The final policymaker, however, must ratify not only the decision

Inasmuch as § 1983 is "read against the background of tort liability,"[117] it is instructive to consult tort law on ratification. American law generally allows tort liability by ratification.[118]

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itself, but also the unconstitutional basis for it"); Christie v. Iopa, 176 F.3d 1231, 1239-40 (9th Cir. 1999) (reversing the district court's grant of summary judgment on a § 1983 claim against a supervising prosecutor because there was evidence that he had ratified his subordinate's selective prosecution of the plaintiff); K. Au Hoon v. City of Honolulu, 1991 WL 1677 (9th Cir. 1991) ("[I]t is not correct to say that only actions approved in advance are 'ratified' for purposes of imposing liability on a municipality under section 1983. To do so confuses decision making authority with policymaking authority, and further ignores the fact that ratification demonstrates that the act was consonant with the policy of the entity."); Lares v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) ("evidence that Chief Gates, an authorized policymaker on police matters, . . . made, or ratified a decision that deprived plaintiffs of their constitutional rights would suffice for official liability under Pembaur"); Hammond v. County of Madeira, 859 F.2d 797, 802 (9th Cir. 1988) ("The Board therefore ratified the misconduct which gives rise to the County's liability."), overruled in part on other grounds, L. W. v. Grubb, 92 F.3d 894, 897-98 (1996); Gaza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987) (upholding jury verdict against city because "the disparate treatment of which Gaza complained took place over a period of several years" and was "both investigated and ratified by persons in the highest positions of management subordinate supervisory personnel"); Godson v. City of Atlanta, 763 F.2d 1381, 1388 (11th Cir. 1985) (holding that by failing to take action on complaints about conditions at the City of Atlanta Jail, "it appears that the City Council ratified the customs, policies, and procedures of the Director .. . . during the time period immediately after and prior to the incidents complained of by [plaintiff] Godson"); Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985) (failure to conduct "serious investigation" into assault by police held to be "ratification of the illegal acts of the unidentified officers whom the jury found to have inflicted injuries upon plaintiff Marchese which plaintiff claims warranted a judgment in his favor of $125,000 from the Sheriff and the County"); Batista v. Rodriguez, 702 F.2d 391 . 397 (2d Cir. 1983) ("We have held that municipal inaction such as the persistent failure to discipline subordinates who violate civil rights could give rise to an inference of an unlawful municipal policy of ratification of unconstitutional conduct, with the meaning of Monell.") (citing cases). Contra McQuarter v. City of Atlanta, 572 F. Supp. 1401, 1420 (N.D. Ga. 1983) ("ratification" by failure to discipline police officers involved in an excessive use of force did not support the inference that the City's police department had a policy of using excessive force and failing to give medical attention).

[117]Monroe v. Pape, 365 U.S. 167, 187 (1961), overruled in part on other grounds', Monell Department of Social Services of City of New York, 436 U.S. 658 (1978).

[118]RESTATEMENT (SECOND) OF AGENCY §§ 93-104. At the time this paper was prepared, the Restatements (Third) of the Law-Agency were pending but had not yet been adopted by the American Law Institute.

C. STATUTE OF LIMITATIONS

In Georgia, the statute of limitations for § 1983 claims is two years. Under Supreme Court authority, the two-year Georgia statute of limitations governing personal injury claim O.C.G.A. § 9-3-33, is borrowed.[119] The applicability of this Georgia provision has been recognized by the Eleventh Circuit.[120] Although the length of the limitations period is governed by state law, "[accrual of a cause of action under 42 U.S.C. § 1983 is a question of federal law."[121]

D. LIABILITY UNDER § 1983 FOR EXCESSIVE FORCE

Law enforcement officers may use force through a variety of weapons and methods. They may use their hands, handcuffs, clubs, batons, flashlights, pepper spray, tear gas, Takers, stun guns, smoke grenades, and firearms. The use of firearms is considered deadly or lethal force.

a. THREE CONSTITUTIONAL STANDARDS FOR USE OF FORCE

Any use of force may be excessive and potentially lead to liability in court. There are generally three standards under the U.S. Constitution for the use of force: the Fourth Amendment standard applying to arrest, the Eighth Amendment applying to convicts, and the substantive due process component of the Fifth and Fourteenth Amendments that may apply to pretrial detainees. The violation of any of these standards may result in liability

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[119]Wilson v. Garcia, 471 U.S. 261, 276-79 (1985); Owens v. Acer, 488 U.S. 235 (1989).

[120]Kel1y v. Senna, 87 F.3d 1235, 1238 (11th Cir. 1996); Mullidae. v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987).

[121]Kelly, 87 F.3d at 1238-39.

under § 1983.

a. Fourth Amendment Standard

In 1989, the Supreme Court settled controversy over the standard to be applied during arrest or seizure. In Graham y. Connor,[122] the Court held that the Fourth Amendment, not substantive due process, governs the level of force that may be used at this stage:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of " `the, nature and quality of the intrusion on the individual's Fourth Amendment interests' " against the countervailing governmental interests at stake . . . Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular ease, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. . . .
>
> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The 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.
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> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case 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.[123]

[122]490 U.S. 386 (1989).

[123]490 U.S. at 396 (cits. omitted).

Thus, the Fourth Amendment imposes a standard of "objective reasonableness." In reaching this conclusion, the Court followed its decision in Tennessee v. Garner, [124] in which it held that police violate the Fourth Amendment by using "deadly force to prevent the escape of an apparently unarmed suspected felon . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[125]

In applying the objective reasonableness standard, one may ask whether law enforcement officers must use the least amount of force necessary to exercise control. Most police departments require by policy that officers follow the "continuum of force" and use only the least amount of force necessary to overcome the resistance of the subject.[126] But some courts have held that force may be reasonable although it is not the least amount of force available.[127]

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[124]471 U.S. 1 (1985).

[125]471 U.S. at 2-3.

[126]The "Standards for Law Enforcement Agencies" issued by the Commission on Accreditation for Law Enforcement Agencies, Inc. ("CALEA") require that agencies operate under "A written directive [that] states personnel will use only the force necessary to accomplish lawful objectives." Commission on Accreditation for Law Enforcement Agencies, STANDARDS FOR LAW ENFORCEMENT, sec. 1.3 (4th ed. 1998).

[127] See Brewer y. City of Napa, 210 F.3d 1093, 1097 (9th Cir. 2000) (court not required to instruct jury in force case involving police dog that it must "consider 'alternative courses of action' available to the officers in evaluating whether [plaintiff] Brewer was the victim of excessive force," where jury was instructed that "the use of force to effect an arrest or detention violates the Fourth Amendment if a police officer uses force that is not reasonably necessary to the particular circumstances presented"); Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997) ("The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force. The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm. It is not, as Forrett would have it, any alternative that might lead to apprehension in the future. The option must be reasonable in light of the community's strong interests in security and preventing further harm."), overruled in part on other grounds, Chroma Lighting v. GTE Products Corp., 127 F.3d 1 136, 1136 (9th Cir. 1997).

It may be asked when it is in fact objectively reasonable for law enforcement officers to use deadly force. This requires a case-by-case determination. According to Graham, a court must pay "careful attention to the facts and circumstances of each particular case." The factors that must be evaluated include: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[128] Case law since Graham provides general guidance in applying these factors.[129]

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[128]Graham, 490 U.S. at 396.

[129]Brosseau y. Haugen, 543 U.S. 194, 198-201 (2004) (officer entitled to qualified immunity for shooting subject in back as he attempted to flee in his vehicle where officer was attempting to arrest him for drug crime, there was probable cause to believe he had committed a burglary, and the officer "believed" he had a gun and that his errant driving would pose a danger to others); Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) (officers who shot a motorist who was driving at them were entitled to qualified immunity, but jury could find that continued shooting after motorist passed by officers was unjustified); Scott v. Edinburg, 346 F.3d 752 (7th Cir. 2003) (use of deadly force justified due to threat posed to bystanders); Vaughn v. Cox, 343 F.3d 1323 (11th Cir. 2003) (jury could find that officer's use of deadly force was unreasonable where, although vehicle had accelerated to 80-85 miles per hour in a 70 mph zone and subject was evading arrest, it could be found that escape did not pose an immediate threat of serious harm and vehicle was easily identifiable and could be tracked); Thompson v. Hubbard, 257 F.3d 896, 899 (8th Cir. 2001) ("An officer is not constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."); Cox v. County of Prince William, 249 F.3d 295 (4th Cir. 2001) (shooting drunken man in his own house and bed was objectively reasonable where he had pointed firearm at officers); Pittman v. Nelms, 87 F.3d 116 (4th Cir. 1996 (firing at car was reasonable where it was dragging officer whose arm was caught in window); Ludwig v. Anderson, 54 F.3d 465,472 (8th Cir. 1995 (whether plaintiff was emotionally disturbed is material to reasonableness of use of deadly force); Drewitt v. Pratt, 999 F.2d 774 (4th Cir. 1993) (officer justified in shooting at driver of car he believed was trying to run over him); Ellis v. Wynalda, 999 F.2d 243 (7th Cir. 1993) (shooting not justified where officer in responding to robbery ordered plaintiff to stop, plaintiff threw a bag at officer, and started to run but there was no evidence plaintiff had a gun or was dangerous); McKinney by McKinney v. DeKalb County, Ga., 997 F.2d 1440 (11th Cir. 1993) (shooting an emotionally disturbed 16-year-old five times violated the 4th Amendment where child had locked himself in his bedroom with a knife,

Moreover questions also arise regarding the scope of events that must be evaluated in order to decide if police officers acted reasonably. For example, if police enter a home without a warrant and then shoot someone hiding in a closet, do we look at the reasonableness of the entire sequence of events or merely at the moment when force is used? In some cases, courts have said that a broad view should be used,[130] while in other cases courts have used a more narrow perspective.[131]

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was sitting with knife and stick for 10 minutes, threw stick at officer, and was attempting to rise from seated position); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993 (firing at tractor-trailer driver was reasonable where rig had been "careening through traffic" for 50 miles, had forced several motorists off road, posed an imminent threat to other motorists, and had failed to stop in response to other measures including shots at its tires and radiator).

[130]See Tennessee v. Garner, 471 U.S. 1, 8-9 (1985) (courts should ask "whether the totality of the circumstances justified a particular sort of search or seizure"); Young v. City of Providence ex re. Napolitano, 404 F.3d 4, 41-42 (1st Cir. 2005) ("once it is clear that a seizure has occurred, 'the court should examine the actions of the government officials leading up to the seizure' "; evidence that officer left cover prior to shooting was admissible and jury could consider it as contributing factor in whether shooting violated the 4th Amendment); Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002 ("where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force," but negligent selection of bad tactics would not make excessive an otherwise justifiable use of force); Medina v. Cram, 252 F.3d 1124, 1132 (10th Cir. 2001) ("[W]e have considered ' "whether [the officers'] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." ' An officer's conduct before the suspect threatens force is therefore relevant provided it is 'immediately connected' to the seizure and the threat of force."); Abraham v. Raso, 183 F.3d 279, 291 (3rd Cir. 1999) (framing issue as whether "in light of the totality of the circumstances, that deadly force was necessary to prevent the suspect's escape, and that the suspect posed a significant threat of death or serious physical injury to the officer or others"); Gilmere v. Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (officer cannot claim immunity from a deadly force claim by arguing self defense if the officer created the circumstances necessitating use of deadly force in self defense), cert. denied, 476 U.S. 1115, 1124 (1986).

[131]Some courts refer to the approach of considering only the officer's conduct at the moment force is used as "segmenting." See ex rel Rohm v. Lubelan, 476 F.3d 397, 406-407 (6th Cir. 2007) ("The proper approach under Sixth Circuit precedent is to view excessive force claims in segments. That is, the court should first identify the 'seizure' at issue here and then 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."') (cits. omitted);

b. Eighth Amendment Standard

The Supreme Court has held that after a person has been convicted the Eighth Amendment, which prohibits "cruel and unusual punishments," governs the use of force by law enforcement or correctional personnel. In Whitley n. Aibers,[132] which involved an effort to quell a prison riot, the Court held that only force that constitutes the "unnecessary

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Dickerson v. McClellan, 101 F.3d 1151, 1161 (6th Cir. 1996) ("The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing."); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) (scrutinizing "only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment' because the "Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general."); Salim v. Pruoix, 93 F.3d 86, 92 (2nd Cir. 1996) (rejecting argument that officer was "liable for using excessive force because he created a situation in which the use of deadly force became necessary" by "various violations of police procedure, such as failing to carry a radio or call for back-up, and also for failing to disengage when the other children entered the fray"; officer's "actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force" because "reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force") (cits. omitted); Menuet v. City of Atlanta, 25 F.3d 990, 996-997 (11th Cir. 1994) (in fatal shooting of mentally disturbed subject, officers not required 'to use all feasible alternatives to avoid a situation where deadly force can justifiably be used' "; "there is no constitutional duty to use non-deadly alternatives first . . . . [t]he Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases," rather "[t]he only test is whether what the police officers actually did was reasonable").

Consideration of entire sequence of events may either support or undermine the reasonableness of the use of force. For example, in Patterson v. Fuller, 654 F. Supp. 418 (N.D. Ga. 1987, an escaped felon who was lying on the living room floor of a trailer and posing no threat was shot and killed by a deputy who contended the shooting was accidental. The deputy argued that when the subject was in a bedroom earlier in the sequence of events and before he lay on the floor the deputy would have been justified in shooting him. The court rejected this argument, labeling it "verbal eyewash." The court said: "Taken to an extreme, one could argue that [a deputy] was justified in shooting an individual today because he could have legally shot the individual in self defense yesterday." Id. at 428.

[132]475 U.S. 312 (1986).

and wanton infliction of pain," not merely unreasonable force, violates the Eighth Amendment. The Court ruled that the issue is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[133] In Hudson u. McMillian,[134] the Court applied this same Eighth Amendment standard in a non-riot prison context.

Although malicious and sadistic intent is required, the Supreme Court has held that a convicted inmate who sues for excessive force does not have to prove a "serious injury,"[135] or even that his injuries were greater than "de minimis."[136]

c. Standard Applicable to Pre-Trial Detainees

What force standard applies to the large expanse of territory between arrest and conviction? The Supreme Court has not resolved this issue and the lower courts are in disagreement. Some courts have held that the Graham Fourth Amendment standard applies to force used between arrest and the initial court appearance.137 Other courts have used the Eighth Amendment standard.138 Still other courts have employed a substantive

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[133]475 U.S. at 320-21.

[134]503 U.S. 1 (1992).

[135]Id. At 4.

[136]Wilkins V. Gaddy, 130 S. Ct. 1175, 1176-77 (2010).

[137]See Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002) (4th Amendment applies while arrestee is in custody of arresting officers); Wilson v. Spain, 209 F.3d 713 (8th Cir. 2000); Pierce v. Multnonah County, Or., 76 F.3d 1032 (9th Cit. 1996); Frohmader v. Warne, 958 F.2d 1024 (10th Cir. 1992); Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991 (en banc); Powell v. Gardner, 891 F.2d 1039 (2d Cir. 1989) (4th Amendment applied to beating of arrestee at police station).

[138]See Fennell v. Gilstrap, 559 F.3d 1212, 1217 (11th Cir. 2009); Rankin v. Klevenhagen, 5 F.3d 103 (5th Cir. 1993); Valencia v. Wiggins, 981 F.2d 1440 (5th Cir. 1993).

due process analysis or a hybrid approach.[139]

Courts have applied these varying standards to law enforcement shootings. The standard depends on the stage at which force is used.[140]

One interesting question is whether pointing a firearm, without shooting, may violate the Constitution and thus be redressable under § 1983. In several cases, courts have held that this may violate the Constitution, particularly when there is no probable cause for arrest or not threat to the police or others.[141] Other courts have found no violation from

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[139]See Jones v. City of Dothan, Alabama, 121 F.3d 1456, 1461 (11th Cir. 1997) (in describing elements of substantive due process force claim, court nods toward 4th Amendment but holds that "the standard used to evaluate substantive due process excessive force claims looks to a number of factors, including 'the need for force and the amount of force used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm'") (cits. omitted); Jordan v. Cobb County, 227 F. Supp.2d 1322, 1332-39 (N.D. Ga. 2001) ("[T]he Court will merge the . . . tests to conclude that, in the context of an excessive force claim, the Fourteenth Amendment prohibits conduct that is wanton, arbitrary, or intended to punish. Further, to evaluate whether Officer Worley's force violated plaintiff's Fourteenth Amendment rights, the Court must look to the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm") (Carnes, J.).

[140]Clem v. Corbeau, 284 F.3d 543, 552 (4th Cir. 2002) (4th Amendment applied to police shooting of "mentally disabled" man); Gates v. Collier 501 F.2d 1291, 1306 (5th Cir. 1974) ("shooting at and around inmates to keep them standing or moving" held to violate Eighth Amendment and Mississippi's use of "trusty" system, which included using armed inmates to guard other inmates also held to violate the Eighth Amendment); Jordan v. Cobb County, 227 F. Supp.2d 1322, 1332-39 (N.D. Ga. 2001) (substantive due process standard applied to shooting of DUI arrestee at police precinct) (Carnes, J.).

[141] Turmon y. Jordan, 405 F.3d 202 (4th Cir. 2005) (finding violation of clearly established law where officer pointed gun at plaintiff when there was no reasonable suspicion that a crime had been committed and no threat to officer); Motley v. Parks, 432 F.3d 1072 (9th Cir. 2005) (pointing gun at five-week-old infant was excessive force); Baldwin v. Placer County, 418 F.3d 966 (9th Cir. 2005 (officers executing marijuana search warrant used excessive force by pointing guns at plaintiffs where there was no reason to believe they were armed or would resist or flee); Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002 (4th Amendment violation where

pointing a gun at a subject.[142]

2. EXPERT WITNESSES

Experts may testify in federal court "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The Federal Rules of Evidence identify an expert as a "witness qualified as an expert by knowledge, skill, experience, training, or education." Under the Rules, an expert may testify "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[143]

Under Daubert v. Merrell Dow Pharmaceuticals, Inc.,[144] the trial court acts as a "gatekeeper" in determining the reliability of expert testimony. Since Daubert, the Court has ruled that "this basic gatekeeping obligation . . . applies to all expert testimony."[145] The reliability factors, which the court should consider in its "gatekeeping" role, include "whether [the theory or technique] can be (and has been) tested," publication, and "the

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officers pointed guns at plaintiff who posed no threat of harm and other factors justified force); Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992) (prisoner stated claim by alleging that officer placed gun to his head and threatened to kill him); McDonald by McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992) (placing gun to head of nine-year-old and threatening to pull trigger without cause during search of residence violated 4th Amendment); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) (brandishing revolver and threatening to shoot violated Constitution).

[142]Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989); Hinojosa v. City of Terrell, Tex., 834 F.2d 1223 (5th Cir. 1988); Hopson y Frederickensen, 961 F.2d 1374 (8th Cir. 1992); McNair v. Coffey, 279 F.3d 463 (7th Cir. 2002).

[143]Fed. R. Evid. 702.

[144]509 U.S. 579 (1993).

[145]Kumho Tire v. Carmichael, 526 U.S. 137, 147 (1999).

known or potential rate of error."[146]

Prior to Daubert, expert testimony was freely admitted in federal courts, including in excessive force cases.[147] Since Daubert, it is much more difficult to secure the admission of expert testimony in genera1.[148] The same holds true for expert testimony on the use of force per se.[149] However, scientific testimony, such as might be provided by a ballistics expert, related to a use of force is less problematic and should be more readily admitted.[150]

E. QUALIFIED IMMUNITY

Under the objective test of qualified immunity, a public employee is protected unless

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[146]Daubert, 509 U.S. at 593-94.

[147] See, e.g., Samples v. City of Atlanta, 916 F.2d 1548, 1551 (11th Cir. 1990) (upholding admissibility of "'use of force' expert" based on "the industry standards for judging the appropriate use of force").

[148] See generally Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092, 1113 (11th Fla. 2005) (in jail suicide case, upholding exclusion of all opinions of a corrections expert including opinion that defendants were deliberately indifferent).

[149]See Giles v. Rhodes, 2000 WL 1425046 (S.D. N.Y. 2000) (excluding proposed expert testimony on use of force as unreliable); Doby v. Berry, 2006 WL 351861 1, *5 (M.D. Fla. 2006) (excluding in part proposed expert testimony on use of force in prison). Cf. Young v. City of Providence ex rel Napolitano, 404 F.3d 4, 14, 22, 28-29 (1st Cir. 2005) (upholding admissibility of "Plaintiffs expert witness, Dr. James Fyfe, an expert on police tactics, [who] testified that Solitro's leaving of cover was 'inconsistent with accepted police practices'" and who also testified on training issues).

[150]See, e.g., Livermore ex rel Rohm v. Lubelan, 476 F.3d 397,402 (6th Cir. 2007) (opinions of ballistics and "law enforcement practices" experts considered on summary judgment in shooting case); Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d 756, 758-59, 763 (2d Cir. 2003) (expert testimony reconstructing fatal shooting of driver by officer); Baker v. Putnal, 75 F.3d 190, 198 (5th Cir. 1996) (reversing defense summary judgment because "County of Galveston Medical Examiner's Office" report showed that decedent "received four gunshot wounds, one to the left arm, one through the right upper back, one through the left flank, and one through the left temple," which indicated that he "was not facing [officer] Putnal when he was shot" and "[t]he number of shots and the nature of the wounds raise a serious question as to the reasonableness of his conduct"); Price v. U.S., 728 F.2d 385 (6th Cir. 1984) ("Laboratory Report of the Michigan State Police" indicated decedent was shot in back while trying to escape).

his conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[151] In other words, it must be shown "that in the light of preexisting law the unlawfulness [was] apparent" at the time of the allegedly wrongful act.[152] The defense is established if "a reasonable officer could have believed [his actions] to be lawful, in light of clearly established law and information [he] possessed."[153] As the Supreme Court said in Malley u. Briggs,[154] qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[155]

In the Eleventh Circuit, the first prong of the test for qualified immunity is whether the defendant government official acted in a discretionary capacity.[156] The burden is therefore "first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority."[157] A defendant may satisfy this requirement by demonstrating merely that he or she was "(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his

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[151]Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[8352]Anderson v. Creighton. 483 U.S. 635, 639 (1987).

[153]Id. at 641.

[154]475 U.S. 335 (1986).

[155]Id. at 341. See also Saucier y. Katz, 533 U.S. 194, 201-205 (2001) ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); Montoute v. Carr, 114 F.3d 181, 185-86 (11th Cir. 1997) ("To defeat Sergeant Carr's qualified immunity defense, Montoute had the burden of establishing that under the circumstances no reasonable officer could have believed that Montoute posed a risk of serious physical injury to Carr or others. He failed to carry that burden.")

[156]See Kingsland v. City of Miami, 382 F3d 1220, 1232 (11th Cir. 2004).

[157]Harbert Intern., Inc. v. James, 157 F.3d 1271, 1281 (11th Cir. 1998); Madiwale v. Savaiko, 117 F.3d 1321, 1324 (11th Cir. 1997).

power to utilize."[158]

Once a defendant has shown he acted in a discretionary capacity, the court should then determin[e] . . . whether the plaintiff as asserted a violation of a constitutional right at all."[159] This issue should be addressed before the court reaches the "core qualified immunity issue[]" of "whether a reasonable public official could have believed that the questioned conduct was lawful under clearly established law."[160]

Once a defendant has shown he acted in a discretionary capacity, the burden shifts to the plaintiff to show, under the objective test of qualified immunity, that the Defendant's conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[161]

Other aspects of the qualified immunity defense should be mentioned. The "subjective beliefs" of the defendant are generally irrelevant.[162] Moreover, the clearly established status of a general right like due process or equal protection does not defeat a qualified immunity defense.[163]

The relevant "clearly established" law may be shown by precedents of the Supreme Court, Eleventh Circuit, and highest court of the state.[164] In some circumstances, clearly

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[158]5ee Hollotnan v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004); Harbert, 157 F.3d at 1282.

[159]Siegert v. Gulley, 500 U.S. 226, 232 (1991). See also Saucier v. Katz, 533 U.S. 194, 199200 (2001); Wilson 12. Layne, 526 U.S. 603, 609 (1999).

[160]Koch v. Rugg, 221 F.3d 1283, 1295-96 (1 1th Cir. 2000).

[161]Har/ow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Woody. Kesler, 323 F.3d 872, 877 (1 Cir. 2003); Lee v. Ferraro, 284 F.3d 1 188, 1 194 (11th Cir. 2002).

[162] Busby v. City of Orlando, 931 F.2d 764, 773 (11'h Cir. 1991).

[163]Anderson, 483 U.S. at 639-40; Saucier, 533 U.S. at 201-204; Wilson, 526 U.S. at 615.

[164] See Hamilton y. Cannon, 80 F.3d 1525, 1531 (1 1th Cir. 1996); Courson v. McMillian,

established law can also be established by "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[165] Violations of administrative or statutory policies or rules do not strip officials of their qualified immunity.[166]

In Hope v. Pelzer,[167] the Supreme Court rejected the Eleventh Circuit's previous requirement of a precedent presenting "materially similar" facts in order for qualified immunity to be denied to state actors.[168] The Court reaffirmed its holding in United States u. Lanier,[169] that only "fair warning" is required in order for qualified immunity to be overcome.[170]

At one time the issue was in doubt but the Supreme Court has now held that qualified immunity is available to law enforcement personnel accused of excessive force in violation of the Fourth Amendment.[171] The Court has rejected the argument that the qualified immunity reasonableness inquiry is duplicative of the Fourth Amendment reasonableness question. [172]

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939 F.2d 1479, 1497-97 & n.32 (11th Cir. 1991).

[165]Wilson y. Layne, 526 U.S. 603, 609 (1999).

[166]Vinson v. Clarke County, Ala., 10 F. Supp.2d 1282, 1302 n.19 (S.D. Ala. 1998).

[167]U.S. 730 (2002).

[168]1d. at 742-48.

[169]520 U.S. 259, 270 (1997).

[170]Hope, 536 U.S. at 740-41; see also Vinyard v. Wilson, 311 F.3d 1340, 1350 (1 1th Cir. 2002).

[17I]Brosseau v. Haugen, 543 U.S. 194, 198-201 (2004) (officer entitled to qualified immunity for shooting subject in back as he attempted to flee in his vehicle); Saucier v. Katz, 533 U.S. 194, 197-202 (2001).

[172]Saucier, 533 U.S. at 203-06; Anderson v. Creighton, 483 U.S. 635, 643 44(1987).

However, qualified immunity is probably not available to officers who violate the Eighth Amendment. By way of rationale, it is difficult to see how a prison guard could regarded as reasonably believing his conduct was lawful when he violated the Eighth Amendment by imposing force in a malicious and sadistic manner.[173]

In many cases, courts have held that police officers who have shot[174] or pointed a firearm[175] at a subject are entitled to qualified immunity. In other cases, courts have held that officers were not protected by qualified immunity for shooting[176] or pointing a firearm

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[173]Skrtich v. Thornton, 280 F.3d 1295, 1301 (11th Cir. 2002) ("In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution by the Supreme Court decisions in Hudson and Whitley. There is simply no room for a qualified immunity defense when the plaintiff alleges such a violation.") (cit. omitted); Johnson v. Breeden, 280 F.3d 1308 (11 th Cir. 2002).

[174] Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) (officers who shot a motorist who was driving at them were entitled to qualified immunity, but jury could find that continued shooting after motorist passed by officers was unjustified); Parks V. Pomeroy, 387 F.3d 949 (8th Cir. 2004) (holding that officer who shot and killed a subject involved in a domestic dispute was entitled to qualified immunity, although a jury could find the shooting unconstitutional); Williams v. Loughnan, 321 F.3d 1299, 1304 (11th Cir. 2003) (officers protected by qualified immunity who shot and killed woman within "split second" of her having "attempted to kill one officer and assaulted another"); Salim v. Pruoix, 93 F.3d 86, 91-92 (2d Cir. 1996) (officer who shot and killed juvenile during attempted arrest was protected by qualified immunity because "at the moment Officer Proulx fired his weapon, Eric was actively resisting arrest, and Proulx was being pummeled by more than five people" and the officer shot "'instinctively' in reaction to seeing Eric's hand on the barrel of his gun while the two were locked in a struggle") (cits. omitted).

[175]Robinson y. Solano County, 278 F.3d 1007 (9th Cir. 2002 (although officers violated the 4th Amendment by pointing their guns at plaintiff who posed no threat of harm and other factors justified force, they were entitled to qualified immunity).

[176] Vaughn r. Cox, 343 F.3d 1323 (1 1th Cir. 2003) (officer not entitled to qualified immunity for shooting passenger in motor vehicle where, although vehicle had accelerated to 80-85 miles per hour in a 70 mph zone and motorist was evading arrest, it could be found that escape did not pose an immediate threat of serious harm and vehicle was easily identifiable and could be tracked); Clem v. Corbeau, 284 F.3d 543, 552-54 (4th Cir. 2002) (officer not entitled to qualified immunity for shooting three times "a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his

at a subject.[177] Obviously, the availability of qualified immunity depends on the circumstances of the case.

Some courts have held that an officer who uses de minimus force is always protected by qualified immunity.[178] It is unlikely that the use of a firearm, which is deadly force, could ever be considered de minimus, even where the firearm is merely pointed and not discharged. But, for other reasons, pointing a firearm may of course be protected by qualified immunity.

III. GENERAL PRINCIPLES OF LAW ENFORCEMENT LIABILITY UNDER GEORGIA LAW

A. LIABILITY OF GOVERNMENT EMPLOYEES

Law enforcement officers, supervisors, and governmental entities in Georgia may also sometimes be liable under state law for police misconduct. The tort title of the Georgia

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eyes, unable to threaten anyone"); McKinney by McKinney v. DeKalb County, Ga., 997 F.2d 1440 (11th Cir. 1993) (officer not entitled to qualified immunity for shooting an emotionally disturbed 16-year-old five times who had locked himself in his bedroom with a knife, was sitting with knife and stick for 10 minutes, threw stick at officer, and was attempting to rise from his seated position when shot).

[177] Motley v. Parks, 432 F.3d 1072 (9th Cir. 2005) (no qualified immunity for pointing gun at five-week-old infant); McDonald by McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992) (no qualified immunity for placing gun to head of nine-year-old and threatening to pull trigger without cause during search of residence).

[178] Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000); Jones v. City of Dothan Alabama, 121 F.3d 1456, 1460-61 (11th Cir. 1997) (officers entitled to qualified immunity; although the force "may have been unnecessary, the actual force used and the injury inflicted were both minor in nature"); Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993) (spinning an unresisting arrestee around, placing him against a display case, applying a choke hold to him for about five seconds, telling him to 'shut up,' and pushing him into a wall after he had already been handcuffed although perhaps "unnecessary" was de minimus and did not defeat qualified immunity); Hodges v. Waters, 843 F. Supp. 1470, 1476-77 (S.D. Ga. 1994) (striking plaintiff with flashlight not unreasonable when only injuries consisted of '"nickel' size bruises").

Code recognizes a claim for the use of excessive force. Under O.C.G.A. § 51-1-13, -14, one may recover damages for assault and battery. The Georgia Court of Appeals has recognized that a state tort claim may be brought against a law enforcement officer who uses excessive force.[179]

However, state employees may not be sued for commit[ting] a tort while acting within the scope of his or her official duties or employment."[180] And county and city employees may be protected from state law claims by official or governmental immunity. This amounts to a qualified or conditional immunity for discretionary acts, but is somewhat different from the qualified immunity that individual state actors have to § 1983 claims. If a public official or employee is acting in a discretionary manner, Georgia courts recognize immunity to claims for negligence and require a showing of "wilfulness, malice, or corruption" in order to impose liability.[181] "[A]ctual malice" is required to overcome this immunity.[182] This official immunity attaches even in the face of negligence.[183]

The Georgia appellate courts have used a very broad brush in delineating this official

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[179]Gardner v. Rogers, 224 Ga. App. 165, 169 (1996) (holding that sheriff's deputy may be liable under O.C.G.A. § 51-1-14 for excessive force); Gilmere v. City of Atlanta, 774 F.2d 1495, 1497-1500, 1504 (11th Cir. 1985) (§ 1983 claim for police shooting not barred by availability of state tort claims under Georgia law), overruling in part on other grounds recognized, Nolin v. Isbell, 207 F.3d 1253, 1256 (1 1'h Cir. 2000).

[180]O.C.G.A. § 51-21-25(a).

[181]Hennessy V. Webb, 245 Ga. 329, 330-31 (1980), overruled in part on other grounds, Brantley v. Dept. of Human Resources, 271 Ga. 679, 682 n.20 (1999); Gray v. Linahan, 157 Ga. App. 227, 228-29 (1981).

[182]Merrow v. Hawkins, 266 Ga. 390, 391-92 (1996).

[183]See Logue v. Wright, 260 Ga. 206, 207-08 (1990), overruled in part on other grounds, Brantley v. Dept. of Human Resources, 271 Ga. 679, 682 n.20 (1999); McLemore v. City County of Augusta, 212 Ga. App. 862, 865 (1994); Bitterman v. Atkins, 217 Ga. App. 652, 524 (1995).

or governmental immunity. The Court of Appeals has described the distinction between ministerial and discretionary acts as follows:

> "A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed."[184]

Georgia law supports the conclusion that hiring and supervision decisions are discretionary.[185]

B. LIABILITY OF GOVERNMENTAL ENTITIES

1. LIABILITY OF THE STATE

Under the Georgia Constitution, the state enjoys sovereign immunity. The constitution provides in part:

> (d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions, and may be liable for injuries and damages if they act with actual malice or with actual intent

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[184] Joyce v. Van Arsdale, 196 Ga. App. 95, 96 (1990) (cit. omitted), overruled in part on other grounds, Northwest Georgia Regional Hospital v. Wilkins, 225 Ga. App. 534, 536 (1996).

[185] Limper v. City of East Point, 237 Ga. App. 375, 379 (1999) ("Hiring, firing, and disciplining an individual as a police officer require the exercise of professional deliberation and judgment. Chief McLendon's actions in this matter were part of his discretionary governmental functions."), overruled in part, Munroe v. Universal Health Services, Inc., 277 Ga. 861, 863-64 (2004); Bontwell v. Georgia Department of Corrections, 226 Ga. App. 524, 525, 527-28 (1997) ("the operation of a state or county correctional institution . . ., including the degree of training and supervision to be provided over its officers, is a discretionary governmental function") (emphasis original) physical precedent); Holsey v. Hind, 189 Ga. App. 656, 657 (1988) ("No one, for example, would seriously contend that a decision by a prosecutor on such a matter as hiring or firing a secretary would be anything other than administrative, although such a decision would obviously involve an exercise of judgment or discretion connected with the duties of his office.") (emphasis added).

to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.[186]

Thus this amendment restored sovereign immunity to "the state and all of its departments and agencies." It is applicable to all claims accruing after January 1, 1991.[187]

The Georgia Tort Claims Act ("GTCA"),[188] accomplishes a limited waiver of sovereign immunity. The GTCA requires that a person seeking to sue the state give ante litem notice to the agency involved and to the Georgia Department of Administrative Services within one year of the loss.[189]

The GTCA contains numerous limitations on liability that affect claims for police misconduct. It provides that individual state employees may not be sued for "commit[ting] a tort while acting within the scope of his or her official duties or employment."[190] Only the state may be sued. And, according to the GTCA, "[t]he state shall have no liability for losses resulting from" the following:

(1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such

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[186]Ga. Const., Art. I, § II, ¶ IX(d, e).

[187]Donaldson v. Department of Transportation, 262 Ga. 49, 53 (1992).

[188]O.C.G.A. § 50-21-26, et seq.

[189]O.C.G.A. § 50-21-26(a).

[190]O.C.G.A. § 51-21-25(a).

statute, regulation, rule, or ordinance is valid;

(2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

(3) The assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer;

(4) Legislative, judicial, quasi-judicial, or prosecutorial action or inaction;

(5) Administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature;

(6) Civil disturbance, riot, insurrection, or rebellion or the failure to provide, or the method of providing, law enforcement, police, or fire protection;

(7) Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights;

(8) Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

(9) Licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

* * *

(10) Activities of the Georgia National Guard when engaged in state or federal training or duty, but this exception does not apply to vehicular accidents. . . .[191]

2. LIABILITY OF COUNTIES

In order to sue a Georgia county under state law, one must first give ante litem notice within 12 months of accrual of the claim.[192]

Under current Georgia law, counties are protected by sovereign immunity. Counties are considered as included in the "the state and all of its departments and agencies"

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[191]O.C.G.A. § 50-21-24 (emphasis added).

[192]O.C.G.A. § 36-1 1-1.

language of Ga. Const., Art. I, § II, ¶ IX(d, e). In Woodard y. Laurens County,[193] the Georgia Supreme Court affirmed the sovereign immunity of counties. The court ruled that the unequal waiver of sovereign immunity by the Georgia Assembly with respect to various governmental entities is not unconstitutional.[194] The court thus upheld summary judgment to Laurens County and several of its officials and employees against plaintiffs' tort claims.[195]

Other than with respect to motor vehicle liability, the sovereign immunity of counties is not waived by the purchase of insurance. As to motor vehicle liability, immunity is waived to the extent of the insurance.[196]

3. LIABILITY OF CITIES OR MUNICIPALITIES

Cites must be given ante litem notice before they may be held liable. The notice period is six months.[197]

Cities do not share the sovereign immunity of the state or counties. City of Thomaston u. Bridges.[198] Thus, cities may be held liable to the extent of their insurance.[199] This waiver applies for police misconduct, even though O.C.G.A. § 36-33-3 provides that "[a] municipal corporation shall not be liable for the torts of policemen or other officers

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[193]265 Ga. 404 (1995).

[194]1d. at 406.

[195]See also Gilbert y. Richardson, 264 Ga. 744, 746-48 (1994); Kordares y. Gwinnett County, 220 Ga. App. 848, 851 (1996); Canfield v. Cook County, 213 Ga. App. 625, 625-26 (1994); Toombs County it. O'Neal, 254 Ga. 390, 391 (1985).

[196]O.C.G.A. § 33-24-51(a); Chamlee y. Ilerny County Bd. of Ed., 239 Ga. App. 183, 184-85 (1999).

[197]O.C.G.A. § 36-33-5.

[198]264Ga. 4, 4-7 (1994).

[199]O.C.G.A. § 36-33-1.

engaged in the discharge of the duties imposed on them by law."[200]

Assuming insurance coverage, cities may be held liable by respondeat superior for the torts of police officers. But cites may not be held liable via respondeat superior for criminal conduct of their employees. Under O.C.G.A. § 51-2-2, an employer may be liable for the torts of his employee if they are "within the scope of his business." The general rule of respondeat superior liability is:

> When a servant causes an injury to another, the test to determine if the master is liable is whether or not the servant was at the time of injury acting within the scope of his employment and on the business of the master.[201]

Scope of employment is not established by evidence that the employee committed an act during the employment relationship.[202] The Georgia Court of Appeals has held that when alleged conduct is not committed in the furtherance of the employer's business the employer cannot be liable.[203]

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[200]See Williams v. Solomon, 242 Ga. App. 807, 808-09 (2000).

[201]Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 777 (1979).

[202]Aubrey Silvey Enterprises v. Bohannon, 182 Ga. App. 738, 739 (1987) ("The test is not that the act of the servant was done during the existence of the employment, but whether the servant was at that time serving the master.")

[203]Mountain v. Southern Bell Telephone & Telegraph Co., 205 Ga. App. 119, 121 (1992) ("The alleged rape was not related to Chandler s employment and did not further appellee's business. It was a purely personal act for which appellee cannot be deemed vicariously liable."); B.C.B. Company, Inc. et al y. Troutman, 200 Ga. App. 671, 672 (1991); Favors v. Alco Manufacturing Company, 186 Ga. App. 480, 482 (1988) (employer held not liable under doctrine of respondeat superior for the shop foreman's sexual harassment of a female employee); Coley v. Evans Memorial Hospital, 192 Ga. App. 423, 424 (1989) (even assuming an employment relationship, "the hospital cannot be deemed vicariously liable for the act of the physician" because "the alleged sexual assault committed by the physician did nor further the hospital's business"); Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 183 Ga. App. 496, 498 (1987) (although volunteer may have been "advancing Big Brother's interest by spending time with Sheridan, he clearly abandoned Big Brother's interest and pursued only his own when he sodomized the child"; thus, Big Brother could not be held liable under respondeat superior); Cox v. Brazo, 165 Ga. App.

Cities may also be held liable on the basis of standard theories of entity liability such as negligent hiring, retention, supervision, etc.[204]
Of course, before a city can be held liable, proximate causation must be proven. Proximate causation is an element of all negligence tort claims.[205] The standards for proving proximate causation were discussed earlier in this paper.

C. PUBLIC DUTY DOCTRINE

Under the public duty doctrine, as recognized in City of Rome v. Jordan,[206] law enforcement officers and authorities may not be liable, except in special circumstances, for failing to protect citizens from various harms.[207]

In the following special circumstances, liability may be imposed for failing to provide protection: "explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party"; "knowledge on the part of the municipality that

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888 (1983).

[204]See Govea v. City of Norcross, 271 Ga. App. 36 (2004) (allowing claim against employer for negligent hiring and retention of police officer and prior employer for misrepresenting background of officer); Harper v. City of East Point, 237 Ga. App. 375, 376-78 (1999), overruled in part, Munroe v. Universal Health Services, Inc., 277 Ga. 861, 863-64 (2004); Bunn-Penn v. Southern Regional Medical Corp., 227 Ga. App. 291, 293-94 (1997); Alpharetta Methodist Church v. Stewart, 221 Ga. App. 748, 752 (1996) (a plaintiff asserting such a claim must show that "the employer knew or should have known of the employee's violent and criminal propensities."); Rogers v. Carmike Cinemas, Inc., 211 Ga. App. 427, 429-30 (1993); Harvey Freeman & Sons, Inc. V. Stanley, 189 Ga. App. 256 (1988), rev 'd in part on other grounds, 259 Ga. 233 (1989).

[205]Robertson v. Metropolitan Atlanta Rapid Transit Authority, 199 Ga. App. 681, 681-82 (1991).

[206]263 Ga. 26 (1993).

[207]See also Rowe v. Coffey, 270 Ga. 715 (1999); Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996) (certifying questions), 287 Ga. 655 (1997) (answering certified questions); Department of Transportation v. Brown, 267 Ga. 6, 8 (1996); Tilley v. City of Hapeville, 218 Ga. App. 39 (1995);

inaction could lead to harm"; or "justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking."[208]

Landis y. Rockdale County, 212 Ga. App. 700 (1994).

[208] City of Rome, 763 Ga. at 29.

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