Suicide by Cop and Civil Liability for Police

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Suicide by cop (SbC) is a variant of victim-precipitated homicide. In SbC, a citizen intent on dying provokes police, often with credible threats of violence. A fatality results in ambiguity about manner of death (homicide versus suicide). Decedents' families may raise claims of civil-rights violations, asserting insufficient restraint by officers. Police officers, when questioned, may justify their actions as reasonable and necessary force. Defendant officers and municipalities are concerned about police safety and adverse economic and public-perception consequences of litigation. This article explores the history and evolution of the SbC phenomenon, examines related civil case law, and reviews the contours of police-citizen interactions in SbC cases. There is potential liability for officers whose actions must be objectively reasonable to prevail in court. Since SbC can be admitted as evidence, there may be an expanded role for forensic psychiatry in distinguishing manner of death. Expert testimony can also aid fact finders in appreciating the decisions of officers faced with ambiguous and threatening situations. The author recommends collaboration between law enforcement and mental health professionals to improve recognition and handling of difficult situations involving persons with mental illness.

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Suicide by cop (SbC) is a descriptive term for citizens who wish to die by provoking law enforcement into lethal response. Individual dynamics span various psychiatric conditions, and these events raise challenging legal and psychiatric questions. Police responding to a mental health crisis may perceive a threat when language and behavior suggest the citizen wishes to die, to harm them, or to harm a third party. Persons with mental illness or amid domestic crises, especially when intoxicated, psychotic, or armed, are at risk to harm themselves and others. They present a dilemma to officers: whether to employ force or de-escalation to resolve a situation. SbC represents a substantial minority of police-related deaths, about one-third according to Mohandie and colleagues[1] and from one-tenth to nearly half in other analyses.[2]

In a broader context, lethal police actions have come under increasing public scrutiny. There have been thousands of fatalities recorded,[3,4] including those of persons with mental illness.[5,6] It is sometimes obvious that a citizen is despondent, psychotic, or intoxicated and trying to provoke police: suicidal, not homicidal. Officers' decisions can be informed by many factors, most important the presence of a deadly weapon. Others include surface features of citizens, such as agitated behavior and demographics.[4,6] At times, officers must act without knowing if a gun is loaded or not even a real gun. These ambiguities confound the amount of force necessary to mitigate an incident, make an arrest or divert to mental health care, and prevent harm. Officers typically are left to their training, experience, and instinct for a solution. They can be aided by embedded mental health specialists and crisis intervention teams.[7] Their decisions, however, often are motivated by self-protection (when weapons are present), pattern recognition (profiling, heuristics), or dispatch priming (how 911 dispatchers frame the situation to responding officers).[8] Decision-making accuracy can be improved through recognition of observed factors.[9] The best discriminator between completed and averted SbC is the degree of suicidal intent,[2,10] especially among those involved in domestic conflicts.

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While police officers have latitude in responding to perceived threat, immunity is not guaranteed. Immunity must be qualified, when challenged, by legal analyses of necessity and objective reasonableness. The use of deadly force in SbC cases may be questioned by a decedent's family claiming civil rights violations. They argue that officers used excessive force where less drastic interventions, such as verbal de-escalation, moderate physical restraint, or nonlethal force, would have been indicated. When plaintiffs prevail against officers and municipalities, there are implications for police procedure, community relations, and liability for monetary damages or criminal charges.

This article explores SbC from a forensic perspective that includes potential expert testimony. First, the history and phenomenology of SbC will place it in the context of victim-precipitated violence and distinguish it from other suicidal behaviors. The reliability of SbC, as a syndromal diagnosis, will be tested against its admissibility in court. Then the article reviews applications of civil law in SbC litigation alleging excessive force, using appellate decisions. The case discussions focus on how officers' claims of qualified immunity may result in their receiving or being denied summary judgment. Finally, there is a recommendation of a collaborative model between law enforcement and mental health professionals to improve recognition and handling of SbC. The author concludes that there is a role for forensic psychiatry in litigation over SbC.

Understanding SbC

Before discussing applications of SbC concepts to forensic settings, it is fitting to review SbC's conceptual validity and utility. The term "suicide by cop" emerged in the late twentieth century.[11,12] The popularity of the label has outlived criticism and has appeared in police-oriented literature.[13] Therefore, use of the term is adopted here. SbC is one facet of the dynamic interplay between aggression turned toward the self versus others. In this case, outward aggression is employed in the service of self-destruction. The SbC phenomenon appeared as early as the seventeenth and eighteenth centuries in Norway and Denmark. There, according to Wolfgang and Ferracuti,[14] instances of depressed persons provoking death by homicide were "epidemic." Since suicide was regarded as sinful, suicidal citizens killed others, relying on the death penalty to fulfill their self-destructive wishes. So rampant was the practice that laws were passed to eliminate the death penalty for SbC attempters who were captured alive.

Some instances of SbC are rooted in psychosis. A would-be SbC case is well known to forensic psychiatrists.[15] In 1800, James Hadfield was tried for shooting at Britain's King George III in a London theater. The attempt represents a failed SbC. Hadfield, a brain-injured war veteran, developed a delusion that his death would bring on the Millennium (1000 years of peace), but only if he did not kill himself.[16] Accordingly, Hadfield fired a shot that landed near the king at a musical performance, believing he would immediately be dispatched by the crowd.[17] In effect, he would have committed suicide by provoking others. He failed, however, by surviving the incident and later, by averting a death sentence by being found insane.[18] The court sent him for hospitalization, a novel and controversial approach,[17,19] later appearing in twentieth century American jurisprudence.[20]

Description and Classification

To consider SbC an appropriate subject for forensic professionals, its scientific validity must exceed a pop-culture meme. While Hadfield's case, based on delusions, is an outlier in the SbC literature, the broader phenomenon of induced homicide attracted twentieth century criminologists. Von Hentig, in 1940, discussed dynamics of the "interaction of perpetrator and victim" (Ref. 21, p 308). He identified four types of cases (the depressive, the wanton, the greedy of gain, and the tormentor) in which there is "a real mutuality in the connection of perpetrator and victim" (Ref. 21, p 303). About the depressive type, von Hentig wrote: "Some scholars have gone further and contended that the depressed is dominated by a secret and subconscious desire to be annihilated, and there are certainly some murder cases in which the victim seemed to encourage the slayer to have the slain dispatched" (Ref. 21, p 304).

In the 1950s, Wolfgang[22–24] examined psychodynamics in cases of victim-precipitated homicide (VPH), in which "the victim is a direct, positive precipitator in the crime" (Ref. 22, p 2). His dyadic analysis was based on the premise that "motives do not exist in a vacuum" (Ref. 23, p 203) and therefore must be interpreted. Of the VPH cases, Wolfgang wrote: "Physical punishment from outside self rather than direct self-punishment is the conditioned orientation of the victim-precipitated homicide victim.

Hence, he commits suicide indirectly by provoking another person to kill him" (Ref. 24, p 347). While his analysis has merit, Wolfgang was not expressly describing SbC, since he assumed VPH cases to be homicides. Later literature made the distinction explicit, permitting discussion of the official manner of death as suicide.

From the late 1990s onward, criminologists continued to focus on terminology, demographics, and risk factors. Foote,[25] referencing von Hentig's depressive subtype, used the paradoxical term "hetero-suicide" to characterize the SbC scenario. The term suggests the possibility of cognitive dissonance among judges or juries confronted by cases in which SbC attempters are simultaneously aggressor and victim. Hutson and colleagues[26] preferred the term "law-enforcement-assisted suicide." Flynn and Homant[27] preferred "suicide by police," which addressed the slang "cop" but not who died. Keram and Farrell[28] found the prior terminology inaccurate or prejudicial, proposing the alternate labels "assault with intent to commit suicide" and "suicide by proxy," explaining:

> Both terms have the advantage of more accurately reflecting the situation and the dynamics inherent in these incidents. The individual is suicidal. The officer is compelled to carry out the individual's wishes. It is not a murder. It is a suicide (Ref. 28, p 590).

Later in their article, Keram and Farrell[28] discussed the legal principles underlying officers' behavior, discussed below. All such cases must be regarded on their merit, not simply because an officer felt compelled to respond, a subjective element not necessarily relevant in civil litigation.

At the close of the twentieth century, interest in SbC, as well as police mental health, accelerated. The Federal Bureau of Investigation's Behavioral Science Unit held a symposium at its Quantico headquarters in 1999.[29] The meeting covered SbC and suicide among officers. There was also discussion of how to educate police officers about citizens with mental illness. Some of the participants, none from psychiatry but many from law enforcement, were represented in a 2004 compilation.[30] These work products represent a roadmap toward reducing both unnecessary civilian deaths and psychic trauma among officers.

Whatever bonhomie was created in Quantico was eclipsed by post-9/11 developments, including intensification of police tactics and us-versus-them sentiments within communities. Still, academic interest in homicide-suicide dynamics continued. Klinger,[31] citing a dearth of follow-up to Wolfgang's research, argued SbC needed further study. As it is with murder-suicide cases, the lack of survivors frustrates attempts to analyze VPH or SbC cases. Additionally, he noted, little is known about the prevalence of VPH between citizens. Klinger called for focus on suicidal homicide victims in "understanding the nature and determinants of interpersonal violence" (Ref. 31, p 207). He made two key points from the outset: that "the majority of people shot by officers survive their wounds" and that "the vast majority of police shootings occur in defense of life or limb" (Ref. 31, p 209). While supporting Wolfgang's observations about citizens who actively provoke others, Klinger cited outlier groups: "shootings of fleeing felons and mistaken shootings of utterly innocent individuals" (Ref. 31, p 210). On balance, the cited research supported that most officer-involved shootings arise from victim-precipitated acts. Klinger suggested employing a three-step model of integration of homicide and suicide: the initiation of violent desire, the trajectory of the impulse toward self or others, and whether the desire to harm oneself is first directed at another.[31] These considerations could aid courts when expert witnesses distinguish suicide from homicide as a manner of death.

Clinical Features in SbC

Better descriptions of SbC scenarios and characteristics could aid expert witnesses analyzing officers' behavior in civil rights and homicide cases. Mohandie and Meloy[32] described the features of SbC attempters and completers, arguing that all SbC attempts are goal-directed. They are driven, for example, by a desire to avoid incarceration or to express hopelessness or rage. Using mostly publicized cases, they described historical, clinical, and social indicators and risk factors for SbC. They also compiled an array of verbal and behavioral cues to the condition, such as self-mutilation with police present or the individual stating, "I won't be taken alive."[32] Subsequent quantitative reviews suggested that most SbC cases involved males, that there was significant overlap between SbC and hostage or barricade cases, and that most SbC attempters do not survive the encounter with police.[1,33] Fatality was highly correlated with suicidal ideation and intent. Since firearms were involved half the time, SbC attempters were also at risk of injuring officers and others. Further study on the factors involved in SbC could offer guidance to police and

others deployed to de-escalate situations.[34] This is especially so when the initial "clinical" information comes from 911 dispatchers, whereby responding officers must either accept it at face value or assess the situation *de novo*.

Characterization of citizens initiating SbC has been refined. Examining literature on SbC "perpetrators" from 1994 through 2014, Patton and Fremouw[2] endorsed SbC as worthy of study. They distinguished it from other officer-involved shootings. The cited studies showed a profile:

> Perpetrators of SbC are often young adult White males who are single, divorced or widowed and who have significant mental health and criminal backgrounds. Many SbC incidents are short in duration and occur at a residential location, with the perpetrator frequently intoxicated (Ref. 2, p 118).

The authors note that, in contrast to others involved in police matters, "SbC perpetrators are significantly different from other subjects also involved in legal interventions" (Ref. 2, p 118). They also found that nonlethal resolutions were unusual, but prolonging the standoff conferred a better prognosis. In any event, the validity of SbC appeared to have reached forensic standards, which is not to say that a determination of SbC settles questions in civil disputes.

Deaths of SbC-involved citizens frustrate study of their psychology. Characteristics of SbC survivors have also been cited, shedding light on dynamics and dispositions. In five case reports by Miller,[35] each said the aggressive act was committed for the purpose of being killed and had raised a mental health defense afterward. None included an officer's death, and one involved the deaths of two civilians. The others included failed insanity defenses and plea negotiations. Miller's Case B[35] was closest to Mr. Hadfield's scenario. "Mr. B" went on a crime spree and hoped a homeowner would lawfully shoot him as an intruder: "When asked if he knew his actions were wrong, he said he wasn't concerned about that—he was just trying to get himself killed" (Ref. 35, p 317). This confirms Patton and Fremouw's[2] point about perpetrators' intransigence. Miller pointed out that, while depression may underly the suicidal intent, it is not generally a disorder qualifying for an insanity defense. The offender would be aware of the nature and morality of the provocative act. Alternatively, he suggested a *mens rea* analysis in which the perpetrator's actual intent (self-destruction), rather than the manifest intent (to harm or kill an officer), would be argued. This could raise reasonable doubt in relation to the charged offense (but not applicable to an offense requiring only recklessness).

Officers' use of lethal force calls for an analysis of whether the citizen's provocation was objectively threatening. This raises the question of the manner of death: police fired the fatal shot but prompted by the citizen's behavior. There are implications here not only for medical examiners and criminologists, but for mental health professionals. Decedents' families and municipalities are also stakeholders in civil liability analyses. This review will now focus on civil matters involving expert testimony in SbC cases and liability for officers and municipalities. The criminal disposition of SbC survivors will be the subject of a future article.

Expert Testimony on SbC and Police Liability

Whether a death during a police-citizen interaction was homicide or suicide is salient for all stakeholders. Psychiatric testimony on SbC, while not providing a diagnosis, could clarify matters for a civil fact finder. Mental health professionals, historically, have seldom participated except in structured fatality reviews.[36] The psychiatric community in the nineteenth century had access to the philosophy of medical jurisprudence via Benjamin Rush, TR Beck, and Isaac Ray.[37] Ambiguity around whether a death was suicide, homicide, natural, or accidental could be resolved by psychiatric or psychological analysis. The final determination, however, was by forensic pathologists or coroners. It has only recently changed.

SbC has attracted worldwide interest. In America, mental health experts have researched and opined on manner of death in such cases. Wilson and colleagues[38] addressed this topic in 1998. They studied 15 deaths of allegedly suicidal persons who had provoked police. There was no unanimity on homicide versus suicide, including opinions of three forensic pathologists in Portland, Oregon who assigned different manners of death. The authors urged participation by psychiatry. A 1998 Canadian study of SbC acknowledged how the phenomenon could be construed as suicide.[39] The authors emphasized the nuanced scenarios and individualized responses of police officers. In an example from British Columbia, expert testimony was admitted on the psychiatric aspects of VPH. The United Kingdom in 2003 announced the first court finding of SbC in relation

to an inquest jury's deliberation.[40] The SbC manner of death was adjudicated as suicide, with implications for civil litigation involving excessive force by police and insurance benefits of the decedents. There was evidence of provocation and a wish to die. There were negative reactions, however, from citizens concerned about acquittal of the officer as a "dangerous precedent." It appears that the court ruled on clinical findings, such as outlined by Mohandie and Meloy,[1,32] rather than on an analysis of the officer's alternatives to deadly force. This highlights the difference between courts' reliance on research statistics and case-specific analysis, such as supplied by fatality review teams.[36]

A key question, then, is whether SbC should be recognized by law enforcement as a pattern of behavior distinguishable from typical other-directed aggression. This is important since recognition of SbC could raise or lower the threshold for lethal force from the police standpoint. That is, a field determination of SbC could later be argued as a threshold for immunity. As will be illustrated in the cases below, courts rely on an objective analysis of reasonableness and necessity, not the citizen's underlying dynamics or police using the term SbC as a justification. Since SbC is not a diagnosis, its scientific integrity in court proceedings has been questioned. SbC as syndromal evidence was discussed by Flynn and Homant[27] in 2000 in relation to a 1997 Seventh Circuit decision[41] to bar testimony about the decedent's "death wish." The court permitted either side to introduce SbC, but only if the information was known to the officers at the time of the incident. Ordinarily, expert testimony in cases involving the reasonableness of officers' behavior comes from other officers, not from psychiatric analysis of the mental processes of either police or citizens. An officer's prior knowledge of a citizen's mental state and motivation could be aided by attention to known risk factors and other clinically based information prior to a confrontation.[9] The officer's decision-making is therefore a factor in legal determinations of qualified immunity versus liability.

SbC Evidence Admitted or Considered

Questions of police liability in citizens' deaths may not be restricted to evidence from pathologists and law enforcement experts. The admissibility of expert testimony about SbC arose in 1997 in *Palmquist v. Selvik*.[41] Testimony, based on statements in evidence, educated a jury that Mr. Palmquist's death was SbC. The trial court barred testimony about the decedent's "death wish" because the dynamic was unknown to Officer Selvik. The appellate court affirmed. Keram and Farrell[28] observed that evidence not known to police at the time of a shooting is not admissible. This keeps the focus of the qualified-immunity inquiry on how the officers reacted and reasoned with the information and observations at hand.

In *Pearson v. Callahan*,[42] the U.S. Supreme Court interpreted procedural requirements for analyzing qualified immunity of police in relation to a 2001 Ninth Circuit appellate decision.[43] Claims of excessive use of force during arrest undergo a Fourth Amendment analysis, since arrests (and even shooting fleeing suspects) are regarded as seizures of persons.[44] Complaints made under 42 U.S.C. § 1983 must undergo an analysis of "objective reasonableness"[45] that governs the necessity of police actions. The Supreme Court case, *Saucier v. Katz*,[43] suggested that the questions of if excessive force was used and if the action was unconstitutional can be merged. The opinion in *Pearson* permitted a defendant officer immunity via summary judgment, which precludes trial. The case was a Fourth Amendment challenge to officers' raiding a home and finding drugs. A unanimous Court overturned a Tenth Circuit decision denying immunity for the defendants. The new rule permitted the inquiry to cease if there was no "clearly established" law violated (Ref. 43, p 199), thus obviating a full inquiry into whether excessive force was used. Clearly established precedents are difficult to define, however, allowing trial courts to grant immunity without considering the defendant officers' behavior. Flynn and Homant point out that SbC "situations are ambiguously dangerous and that there is little evidence that any particular tactics lead to satisfactory outcomes across situations" (Ref. 27, p 555). The benefit of the doubt favors defendant officers. Since the tests are objective, psychiatric testimony on officers' states of mind is usually excluded. Homant and colleagues[46] have argued that the analysis is closer to a subjective test "as it is the perceived rather than the actual danger that is at issue" (Ref. 46, p 44). These considerations set the stage for admitting psychiatric testimony in cases not clearly eligible for qualified immunity.

In 2009, the U.S. Court of Appeals for the Ninth Circuit decided a *Daubert*[47] (evidentiary) challenge to admitting psychiatric testimony about SbC in a civil rights suit.[48] In *Boyd v. City & County of San Francisco*,[49] a young man with mental illness drew

lethal fire from San Francisco police. This followed a car chase and an evasive maneuver that appeared to the officers to be the suspect reaching into the vehicle for a weapon. Mr. Boyd's family sued under 42 U.S.C. § 1983 in 2006. They objected to proposed defense psychiatric testimony on SbC, calling it irrelevant and prejudicial. The testimony was admitted under Federal Rule of Evidence 702 and the defendants prevailed. The case highlighted the importance of understanding the intent of the criminal suspect, the authenticity of the suspect's aggressive behavior, and the officers' perceived need to defend against lethal threat by proportional force. The decedent's family appealed, claiming abuse of discretion by the trial court, but the verdict was upheld. The appellate decision noted that the trial court had thoroughly vetted the expert's proposed testimony via *Daubert*, and had tied its findings to the existing literature on SbC.

About three months after *Boyd* was argued in 2009, the Ninth Circuit heard arguments in an interlocutory appeal of another civil rights case following police shooting a citizen, *Espinosa v. San Francisco*.[50] The district court had denied the defendant officers summary judgment on their qualified-immunity claim. Factually, the officers entered the home of the decedent, Asa Sullivan, in a manner that raised Fourth Amendment concerns and a question of who provoked whom. The appellate court, in a split opinion, upheld denying the defendants summary judgment, pending the other questions. While the court referenced the use of expert testimony in other cases questioning excessive force, it is not apparent that psychiatric testimony was in focus here. Dissenting, Judge Wu referred to *Boyd*, implying that the scenario of SbC was a legitimate concern. The judge reasoned that there was ample reason for the officers' entry into the home of a dangerous person, thus implying police immunity on that matter.

Pearson was not cited in either *Boyd* or *Espinosa*. The decision and subsequent cases were considered a boon to defendant police and municipalities, prompting criticism from the press. A review of instances of immunity compiled by Reuters,[51] for example, claimed "excessive force, zero justice." The news agency reviewed hundreds of civil rights cases before and after the *Pearson* decision (2015–2019), concluding that implementation of the one-step *Pearson* test was significantly associated with granting immunity. This implied a denial of justice for aggrieved families. Similarly, the *New York Times*' Editorial Board,[52] referencing the killing of George Floyd in Minneapolis in 2020, published "Qualified Immunity Shields Police from Justice" in May 2021. Noting that there had been shifting sentiments among Supreme Court Justices, the Board cited Justice Sotomayor's concern that too low a threshold for immunity confers a shield on officers' behavior that "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished" (quoting a 2018 opinion; Ref. 53, p 1162).

This review did not undertake to determine the degree to which *Pearson* has affected outcomes in civil cases involving SbC. Two recent California cases, however, referenced SbC evidence in relation to the *Boyd* precedent. In *Bui v. San Francisco*,[54] Vinh Van Bui was shot and killed by Officers Ortiz and Wilson during a 2010 incident; the trial was in 2018. The parties entered pretrial motions regarding admissibility of evidence, especially matters not known to the officers at the time of the incident. In the pretrial order, the court contrasted Mr. Bui's case with the facts in Mr. Boyd's, saying the instant case was not focused on Mr. Bui's intent, as in the SbC example. Rather, it turned on the reasonableness of the officers' responses, irrespective of Mr. Bui's mental condition. Psychiatric testimony, accordingly, was not permitted. The jury found in favor of the defendants.[55] It appears that, had it been established that the officers had reason to regard Mr. Bui as a person with mental illness, psychiatric testimony could have played a role in the reasonableness calculus, as in *Boyd*.

In the second California case, *Estate of Casillas v. City of Fresno*,[56] Officer Shipman fatally shot Casimero Casillas after a 2015 traffic stop and pursuit during which Mr. Casillas allegedly charged at the officer with a pipe. The estate claimed excessive force and wrongful death under federal and California laws. The defense sought to exclude evidence about Mr. Casillas that was not known to Officer Shipman at the time of the incident: Mr. Casillas's criminal history, his substance use history, toxicological findings, and statements he made about suicide. The federal court ruled on pretrial motions that the evidence should not be excluded. Trial was held in 2019 and a jury found for the estate, awarding $4.75 million. The city again appealed,[57] but two years later, they agreed to settle, giving the family close to the jury award.[58] Negative reaction from

citizens of Fresno and the press argued that, in the cases of Mr. Casillas and others, the police did nothing wrong and the settlements depleted the city's budget.[59,60] The interplay among stakeholders is of interest. For example, despite the city's protestation, the award could have a therapeutic effect on the citizens, who often feel disenfranchised.

Other cases illuminate various facets of SbC. In 2011, an Illinois court took up an interlocutory question of expert admissibility in another civil suit alleging unreasonable use of force by police.[61] The estate of the decedent sought to exclude testimony of a pharmacology (alcohol) expert and an emergency medicine (wound) expert. The court ruled not to bar their testimony, relying in small part on the admission of SbC psychiatric testimony in *Boyd*. In a variation of the civil rights theme, a Ninth Circuit Memorandum in 2014[62] upheld the qualified immunity of an officer who fatally shot Joseph Bowles during a foot pursuit after Mr. Bowles produced a metallic object at a distance of ten feet. The officer's gun was already drawn; the object turned out to be a cologne bottle. While it does not appear that the estate raised the question of SbC, a dissenting opinion did. The dissent, citing *Boyd*, pointed out the ambiguity of the evidence for necessity of lethal force, which was essentially the testimony of the officer. Noting further that the defendant City of Porterville chose not to offer evidence of SbC to explain Mr. Bowles's behavior, the dissenter argued that the dynamics of the shooting should have been presented to the jury.

Limitations on Officer Immunity

The interplay between homicide and suicide, and criminal and civil law, was illustrated in the following case. The death of a Washington State citizen in 2016 prompted a lawsuit by her estate against King County.[63] Renee Davis was fatally shot during an encounter on the Muckleshoot Indian Reservation. She was armed and possibly suicidal but the officers could not determine if her weapon was loaded. Ms. Davis raised her gun after an officer commanded her to drop it. She pointed it at the police, drawing fire from two officers. She later said the gun was not loaded and then died. It was determined at the scene that the gun was not loaded.[64]

In 2018, Ms. Davis's estate sued claiming negligence, battery, excessive use of force, and outrage. Part of the plaintiff's argument was that police were only protected if the decedent's actions occurred during the commission of a felony. The defendants moved for summary judgment, citing State law RCW 4.24.420(1). The Washington statute reads:

> [I]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.[65]

Thus, the question of police immunity turned on whether Ms. Davis could have been convicted of a felony offense (pointing a gun). Notwithstanding state law, a plaintiff is always free to file a federal civil rights action under 42 U.S.C. § 1983. For example, the Supreme Court, in *Zinermon v. Burch*,[66] stated, "[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983" (Ref. 66, p 124).

In response to the defendants' motion for summary judgment, the plaintiff argued that Ms. Davis was not committing a felony; rather, that she was in the act of SbC. The defendants proffered a psychiatric report, which concluded that Ms. Davis's intent was to provoke police, permitting the plaintiff to argue that Ms. Davis did not intend great bodily harm, negating first-degree assault.[67] The trial judge disagreed, noting that the pointing of the weapon *per se* qualified as a lesser degree of felonious assault. This preserved the officers' immunity under Washington's statute.

The trial court granted summary judgment for the officers and the estate appealed. The 2020 appellate decision, affirming the trial court's decision, noted the inherent problems of interpretation: "[T]he application of RCW 4.24.420 here is problematic because it precludes claims where law enforcement officers' actions and training may have been unreasonable, given their knowledge that the individual they were confronting was suicidal and armed" (Ref. 63, p 7). But the law bars claims of law enforcement negligence. The estate argued that no felony was committed, but the appellate decision, using the common law definition of assault, concluded otherwise. The decision even acknowledged the estate's argument that Ms. Davis's mental illness may have negated intent. Thus, Ms. Davis's actions placed her within the intent of the statute, immunizing the police due to her felonious act.

The estate appealed again, challenging summary judgment and the meaning of "felony" within RCW 4.24.420. The 2021 decision reversed the trial court,

agreeing with the appellant that there was a question of material fact: whether Ms. Davis possessed the requisite intent for felony assault (summary judgment must not be granted if a question of material fact exists). The trial court, the appellate court reasoned, had relied on the officers' testimony that they inferred intent from Ms. Davis's raising the gun. But they could have inferred otherwise (suicide, for example). With regard to the appellant's second argument, about whether felony meant a conviction or admission of conduct, the court rejected it. A new trial was ordered but the parties settled in August 2021.[68]

About two weeks after the appellate decision in *Davis*, the same court ruled in a similar case, *Watness v. City of Seattle*.[69] Here, the estate of Charleena Lyles argued that Ms. Lyles was psychotic and lacked the capacity to intend to assault the officers. Given that this was a "psychological autopsy," without the benefit of an examination, the trial court yielded to the defense. The other experts opined that the officers' use of lethal force was unreasonable. The trial court, however, struck their declarations. The appellate court regarded the question of Ms. Lyles's intent to be one of material fact and barring expert testimony was incorrect. That is, the arguments over whether she had the capacity to commit a felony offense, thus challenging the immunity conferred in RCW 4.24.420, should have been heard and considered. Moreover, the psychologist's opinion should have been admitted and regarded for its weight by the trier of fact.

Following the *Watness* decision, attorneys for defendants King County and others, filed a Petition for Review to the Supreme Court of Washington on April 12. 2021.[67] They cited conflicts between *Davis* and other Washington State decisions, for example, *Watness*. Ms. Davis, they said, intentionally provoked law enforcement officers into shooting her. The defendants' motion for summary judgment was granted, but the appellate court reversed due to the existence of questions of material fact, thus setting the case for trial. The case included declarations by plaintiff's experts in police practices, criminology, and psychology. The psychologist was prepared to testify but the evidence was barred as inadmissible under the *Frye*[70] rule (general-acceptance standard).[67] These dynamics underscore the problems in reconciling questions of subjects' intent with the reactions of police. Given Washington's statutory requirement that officers' immunity from civil actions be premised on the felonious conduct of the decedent, *Davis* and other cases may not have universal applicability. The parties in *Watness* settled the wrongful-death suit in late 2021.[71]

Discussion

Police officers and their municipalities are at risk for civil liability in police-involved deaths of citizens. SbC resides amid concerns over the equitability of police conduct during arrests of persons with mental illness and in communities of color and poverty.[72] This phenomenon straddles criminal and civil considerations as well as cultural interpretation. Within it are citizens attempting to extinguish their lives and police officers having theirs threatened. The outcome is rarely satisfactory, raising questions about prevention. The scope of the SbC problem was stated by Lord:

> SbC subjects often include other innocent victims in their plan; the officer who commits the deadly act is left to deal with the fact the he or she has killed a person; and the public often questions the need for deadly force (Ref. 73, p 3).

This review of SbC establishes its syndromal validity, nomenclature controversies notwithstanding. The multiplicity of causes requires individualized diagnostic considerations. These include suicidal depression, mania, delusional disorders, impulsive actions during crises, and intoxication.[2] As Keram and Farrell observe, however, "Often they cannot be considered potential suicides until the postincident investigation is completed" (Ref. 28, p 592). Responding officers by themselves cannot make clinical determinations on scene. As noted above,[41] they are not responsible for facts unknown at the time of the incident, such as suicidal intent. The official investigation[36] and litigation[28] would be aided by psychiatric expert review and testimony. There is precedent, established in *Boyd* and succeeding cases, for the admissibility of psychiatric evidence of SbC to aid courts in considering both citizens' and officers' roles in effecting resolutions. A residual question, raised in *Pearson*, is whether a streamlined inquiry will foreclose a full hearing of the dynamics.

There is also a role for police practices expertise. As Fyfe[74] explained in this journal in 2000, police should not be overconfident when their actions are called into question:

> After the fact, police have recently been prone to write off such tragedies as "suicide by cop," a classification that, in

> my experience, is far more often a *post hoc* justification for sloppy police work than a valid explanation of why and how somebody died (Ref. 74, p 346).

A Role for Psychiatry

On the subject of suicide, psychiatric testimony can have meaningful contributions to SbC cases. A multidisciplinary approach, examining the complex set of facts and perceptions, would permit fact finders to arrive at decisions without undue influence from decedents' survivors or from the defendant municipalities. The United Kingdom example[40] suggests potential synergy between psychiatric expertise and forensic pathology. An official shift in manner of death from homicide to suicide in SbC cases could relocate emphasis to policies and practices that rely more on field decisions than on psychological autopsy. This could potentially be a boon to defendants in civil rights cases by illuminating the credible-threat element of officers' decisions to use lethal force. It should be noted, as it was in the *Bui* and *Casillas* decisions, that there is fact-based variability in the calculation of reasonableness. Accordingly, legal procedure, in the wake of *Pearson* and related decisions, has been critiqued as unfair to plaintiffs seeking damages, eager to be heard by juries.[75,76] There is also concern that, by sidestepping the question of whether a right has been established, citizens with mental disability may be deprived of a cause of action under the Americans with Disabilities Act.[77,78] Here again, psychiatry can show leadership in bringing facts to the discussion.

Mental health input, both in the field and in court, can aid police and fact finders through a deeper understanding of behavior. It is understandable that judges guided by objective standards may not perceive the need to import subjective matters into the equation. As illustrated in the Washington State cases,[63,69] criminal intent can be material to calculating police immunity for using deadly force. While invoking SbC could aid jurisprudence, its presence *per se* does not answer the question of officers' perceived necessity to employ lethal force. It does, however, have the potential to drive policy (law enforcement practices) and legislation (immunity laws) toward thoughtful analyses.

Moving Ahead

There is a clearer and perhaps more compelling role for mental health participation in response teams and policy. For example, the 2018 Los Angeles Sheriff's Department Mental Evaluation Teams (MET) annual report[79] contained this positive language:

> Nine "suicides-by-cop" never occurred in 2018, because MET units arrived on scene and de-escalated the patient before the patrol deputies on scene were forced to kill them. Here again, some portion of the credit goes to the CIT (Crisis Intervention Team) (training) program as well, and the changing hearts and minds of patrol deputies, who have embraced the training and make extraordinary efforts daily to help, not hurt, the mentally ill (Ref. 79, p 8).

The Los Angeles approach includes 33 Mental Evaluation Units. In 2020,[80] they diverted 98 percent of their cases using "de-escalation of crises, mental health evaluations for potential 'involuntary hold' when necessary, and diversion of mentally ill patients away from the criminal justice system" (Ref. 80, p 1). CIT training is essential, as exemplified in the Oregon Department of Public Safety's 40-hour program.[81] Research on SbC and related scenarios emphasizes the complexity and delicateness of community crises. Crises might better be handled by a combination of law enforcement, mental health specialists, and community leaders.[33] Psychiatry could have a seat at the table. A simple procedural change is to have 911 dispatchers immediately transfer calls to a crisis line instead of having dispatchers interpret the nature of the crisis.[72] While this would not necessarily aid responders to a situation already in progress, it moves a potential SbC situation to an earlier intercept point. Even with crisis specialists, individuals determined to end their lives at the hands of others often succeed. In addition to deaths of citizens with mental illness, psychic trauma to families and to the officers themselves[82] remain potential consequences that may be prolonged by ensuing civil litigation. Additional roles for psychiatrists would include expert opinions on damages in relation to secondary victims, as well as in fitness-for-duty assessments of traumatized officers.

Economic considerations are another facet of SbC and crisis response generally. Since police are usually first responders in mental health crises, there are unresolved concerns. They include reapportionment of municipal resources from police to mental health systems and more sensitive selection of which officers receive CIT training. The CIT model, now implemented in thousands of communities worldwide,[72] could have preventive risk-management implications for police departments. Ensuring that racial inequities are not perpetuated,[72] communities must be engaged

in crisis response systems.[83] Justice systems must also be sensitive to communities' responses to questions of civil rights violations in SbC cases. This can be aided by admitting psychiatric testimony on SbC and by carefully considering the validity of police demands for summary judgment via qualified immunity. The current review illustrates variability in outcomes and fact-specificity interpretable with the aid of forensic psychiatrists. Once there is wider adoption of models that include mental health expertise, researchers can refine response algorithms and courts can consider reasonableness and necessity of use of force in a broader frame.

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