University of Baltimore Law Forum

Volume 26
Number 2 *Spring 1996*

Article 4

1996

Inadequate Training in the Use of Non-Deadly Force as the Next Frontier in Federal Civil Liability: Analysis of the Baltimore City Baton Program

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INADEQUATE TRAINING IN THE USE OF NON-DEADLY FORCE AS THE NEXT FRONTIER IN FEDERAL CIVIL LIABILITY: ANALYSIS OF THE BALTIMORE CITY BATON PROGRAM

Brian L. DeLeonardo

Police officers possess awesome powers. They perform their duties under hazardous conditions and with the vigilant public eye upon them. Police officers are permitted only a margin of error in judgment under conditions that impose high degrees of physical and mental stress. Their general responsibility to preserve peace and enforce the law carries with it the power to arrest and to use force - even deadly force.[1]

I. INTRODUCTION

Police officers face one of the most "hostile" work environments of any profession.[2] Not only is the crime rate significant, with over 14.1 million crimes reported in 1993 alone,[3] but police officers are increasingly likely to be involved in physical confrontations with suspects.[4] Between 1980 and 1989 alone, 1,514 police officers were killed or died in the line of duty.[5] Additionally, police officers have seen their ability to use deadly force in apprehending suspects curtailed over the last decade through a series of United States Supreme Court decisions.[6] This has served to add pressure to officers when making the split-second decision of whether to use deadly force. Moreover, when police officers use deadly force in apprehending a suspect, that decision will frequently spark a public outcry, an internal investigation, and in some situations, a criminal prosecution of the police officer.[7] In addition, a police officer's split-second miscalculation to use deadly force may result in a civil suit and large monetary judgment.[8]

Police departments have responded to this difficult work environment in two ways. First, police departments have vigorously worked to ensure that their police officers are proficient in the use of firearms and knowledgeable in the legal limits for using these weapons. This is accomplished by providing not only the initial training in the academy, but also mandating in-service training and annual certification while the officers are on the force.[9] This increased training has reduced the likelihood of a police officer inappropriately using deadly force, but by no means has that possibility been eliminated. Second, police departments have focused heavily on finding techniques and weapons that effectively and safely allow officers to carry out their duties, while minimizing risk of injury to the suspect.[10] These "non-deadly" weapons include batons, police dogs, tasers (stun guns), pepper spray, and hand-to-hand defense techniques. The demand by police departments for new and improved non-deadly weapons has been so intense that manufacturers work furiously to be the first on the market with some new "gadget" to add to the police arsenal.[11]

Nevertheless, the rapid adoption of non-deadly weapons and techniques by police departments has been a mixed blessing. While such weapons and techniques have substantially reduced the likelihood of death in police officer/suspect confrontations,[12] they have also served to foster a new area of excessive force civil judgments based upon the excessive use of non-deadly weapons and techniques.[13] A primary reason for the civil liability in less than lethal force situations is that the vast majority of police departments have little to no formal rules on the use of non-deadly force. Strangely, unlike the strides made by police departments in the deadly force arena, no detailed requirements for in-service training and annual certification in the use of non-deadly weapons and techniques are in place.[14] This lack of training and fear of liability has led many departments to end the use of some non-deadly weapons altogether.[15] Moreover, the devastating effects of these weapons is systematically underplayed, which in

many situations has led to many unintended deaths of non-violent suspects.

An overview of the new Baltimore City Police Department baton training program provides a good basis for analyzing the deficiencies and problems associated with the adoption and use of non-deadly weapons and techniques. By recognizing the deficiencies in the non-deadly weapons training being provided to its police officers, the Baltimore City Police Department can avoid the civil liability that is sure to follow as courts slowly become as demanding on a police officers' use of non-deadly weapons as courts have become on the use of deadly weapons.[16]

II. MUNICIPALITIES ARE SUBJECT TO FEDERAL CIVIL LIABILITY FOR THE USE OF EXCESSIVE FORCE BY THEIR POLICE OFFICERS BASED ON THE CONCEPT OF INADEQUATE TRAINING

Title 42, section 1983 of the United States Code provides a civil tort remedy for citizens who have their federal constitutional rights violated by government officials.[17] This federal statutory remedy, which was derived from the Civil Rights Act of 1871, was passed in order to provide a mechanism for eliminating Ku Klux Klan activity in the South by providing a neutral federal forum for newly freed slaves to bring claims against government officials who violated their civil rights.[18] Today, section 1983 provides a vehicle for citizens to seek redress of constitutional deprivations by police officers who have used excessive force in violation of the citizen's constitutionally protected rights. In order to maintain a section 1983 action, a plaintiff must demonstrate that he has suffered a constitutional deprivation, the deprivation was the result of an action taken under color of state law, and that the constitutional deprivation resulted in injury to the plaintiff.[19]

A. THE USE OF EXCESSIVE FORCE IN APPREHENDING SUSPECTS BY POLICE OFFICERS CONSTITUTES A CONSTITUTIONAL VIOLATION ENTITLED TO REDRESS UNDER 42 U.S.C. SECTION 1983

At common law, police officers had a privilege to use deadly force when attempting to arrest a fleeing felon, but not when attempting to arrest a fleeing misdemeanant. In 1985, however, the United States Supreme Court in *Tennessee v. Garner*[20] changed the way in which the use of deadly force by police officers against suspects was to be analyzed by holding that the apprehension of a criminal suspect "by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[21]

In determining whether a seizure is reasonable, the *Garner* opinion noted that "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[22] The Court noted that "[t]he intrusiveness of a seizure by means of deadly force is unmatched,"[23] and therefore, such force is only appropriate when "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 harm, either to the officer or others."[24] Thus, the Court found that the reasonableness of the use of deadly force to seize a person must be determined through a balancing test, considering the totality of the circumstances.

The Court later extended this analysis to the use of non-deadly force by a police officer in apprehending a suspect. In *Graham v. Connor*,[25] the Court was confronted with a claim that the police had used excessive non-deadly force with a diabetic man during an investigatory stop. The Court held that the Fourth Amendment's reasonableness standard is the proper standard for analyzing all claims that police officers have used excessive force in making arrests, investigatory stops, or other seizures of citizens.[26] The Court added that in determining the reasonableness of the force used, the analysis must be from the perspective of a reasonable officer at the scene "rather than with the 20/20 vision of hindsight."[27] Furthermore, the Court instructed that this test is an objective one, i.e., whether the officers' actions were objectively reasonable in light of the circumstances confronting them, without considering intent or motivation.[28] The Court noted, in assessing the reasonableness of the degree of force used by police officers, one should consider the severity of the crime the suspect allegedly committed, whether the suspect posed an immediate danger to the police or others, and whether the suspect was resisting or fleeing.[29]

B. A MUNICIPALITY MAY BE LIABLE FOR THE USE OF EXCESSIVE FORCE BY ITS POLICE

OFFICERS IF THE MUNICIPALITY HAS PROVIDED INADEQUATE TRAINING TO THOSE POLICE OFFICERS

The decisions of *Garner* and *Graham* established that if excessive force is used by police officers in apprehending a suspect, whether such force is deadly or not, a Fourth Amendment constitutional violation has occurred. Police officers who use excessive force on the suspect are liable under section 1983 for damages arising from the constitutional violation.[30] Additionally, the United States Supreme Court has held that the municipality that employs police officers may also be liable for the constitutional violation arising from the use of excessive force.[31]

In *Monell v. Dept. of Social Services*,[32] the Court recognized that, although the doctrine of *respondeat superior* was not available as a method for imposing governmental liability under section 1983, local governments could be sued when "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 officer."[33] The Court, however, did not limit the scope of municipal liability to only its formally promulgated policies. Rather, the Court held that the municipality "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 decision-making channels."[34] The Court, however, was clear in its requirement that for the municipality to be found liable for the unconstitutional actions of its employees, there must be a direct causal link between a municipal policy or custom and the unconstitutional harm that was actually suffered.

Several years later, the Court further expanded the liability of municipalities by liberally interpreting what constitutes a "policy" or "custom." The Court, in *Canton v. Harris*,[35] held that the inadequacy of police training may be a basis for section 1983 liability where the failure to adequately train amounts to a deliberate indifference to the rights of persons with whom the police officers come into contact.[36] The Court reasoned that "[t]he issue in a case like this one . . . is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.'" [37] The Court, in addressing the paradox that a lack of action equals policy, explained that:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.[38]

Against this legal backdrop, an analysis of the Baltimore City Police Department's baton program, and the liability and risks associated with the program, can be evaluated. The Baltimore City Police Department can be held liable for the Department's actual excessive force training policies, and for inadequate non-deadly force policies and training programs where such a deficiency in training demonstrates that the Department was deliberately indifferent to the obvious constitutional violations likely to result.

III. THE BALTIMORE CITY POLICE DEPARTMENT'S BATON PROGRAM - INDICATIVE OF THE PROBLEMS AND SECTION 1983 LIABILITY RISKS INCURRED WITH THE ADOPTION OF NON-DEADLY WEAPONRY

The Baltimore City Police Department recently requested an examination of its policies and techniques from a consultant who has provided similar services to many police departments across the country.[39] Robert K. Koga, the founder of the Koga Institute, Inc. ("KOGA"), determined that the Department needed to better train its officers in the use of force against suspects. KOGA recommended that the Baltimore City Police Department replace the 22-inch knurled-ended nightstick, presently used by officers, with a 29-inch straight baton and that officers undergo KOGA's training program on using the baton.[40] This new training program provided by KOGA has been the subject of sharp criticism. Primarily, officers who have gone

through the training have noted that the instructors emphasize a "two-handed strike aimed at the chest or joints," whereas "previous training had officers aiming for large muscle mass or the legs."[41] One officer even commented that "[t]his is the most dangerous thing I've seen."[42]

There appears to be more than a sufficient basis for questioning the propriety of this program in light of the potential for liability that the program creates for the City of Baltimore. The baton program in Baltimore City reflects the general problem with the treatment of non-deadly weapons and techniques by police departments across the country. Inadequate training of police officers can be found not only because of the Baltimore Police Department's actual policies and programs, which underplay the actual force utilized in their baton techniques, but also for the Department's deliberate indifference to the need for better training of the police officers in deciding when the use of non-deadly weapons is appropriate. Both deficiencies have made the Baltimore City Police Department, as well as many other police departments, ripe for section 1983 liability.

A. BALTIMORE CITY POLICE DEPARTMENT'S BATON TRAINING PROGRAM IS PACKAGED AS A NON-DEADLY TECHNIQUE

The baton techniques that are taught to Baltimore City Police Department officers are contained in an instructional manual produced by KOGA.[43] In the manual, KOGA separates the force police officers use into three categories: (1) controlling force, (2) injuring force, and (3) deadly force.[44] KOGA defines controlling force as "physical control ranging all the way from exerting a firm grip on an individual through pain compliance control holds to an actual physical control hold or lock."[45] Injuring force is defined as including the use of a "baton or other impact weapon, as well as some self-defense tactics."[46] Deadly force, on the other hand, is defined to include "the use of a weapon or tactic that carries with it a substantial risk of death or serious bodily injury."[47]

As this breakdown of force indicates, KOGA believes and teaches that the use of the baton is best classified as injuring force, and thus, that the KOGA baton techniques are capable of being performed in situations calling for less than deadly force. As KOGA explains:

> Police officers have often become confused about when the baton may be used in a situation. In most situations, a police officer's best defense is weaponless control. Other rarer situations call for the employment of the firearm. Somewhere in between, however, there may be circumstances which require more force than can reasonably be applied without a weapon, but that fall short of calling for a firearm. These are situations which call for the use of a baton.[48]

Specifically, KOGA teaches that police officers can consider using the baton when:

> 1. They are confronted by an uncontrolled, violently resisting subject, or are being attacked in a manner not calling for the use of deadly force, and they have attempted to or rejected the use of lesser force;
>
> 2. The suspect has a similar weapon, such as a baton, or perhaps a knife;
>
> 3. The suspect is larger than them, and has demonstrated to have superior skill and ability;
>
> 4. Tactical considerations such as a riot demand immediate control.[49]

While the above situations may in some instances actually call for the use of deadly force, KOGA indicates that baton strikes can be used even in non-deadly force situations. KOGA further conveys its belief in the non-deadly nature of certain baton techniques through illustrations in the manual demonstrating use of these baton techniques on an unarmed criminal suspect.

In regard to the actual baton techniques utilized, KOGA establishes a list of preferred areas of the body that a police officer may strike. The police officers are instructed that:

> When striking an aggressor with a baton, the best target areas are those areas where the underlying bone is closest to

> the surface of the skin. Suitable areas are those which are easily accessible and effective for quickly subduing the aggressor, yet unlikely to cause serious injury. In general, these areas are the lower legs, arms, chest, midsection, and the rib cage. [50]

The method of striking these areas takes two forms: thrusting blows and striking blows. Thrusting is defined by KOGA as a "one or two-handed jabbing motion, employing one rounded end of the baton for the strike," while striking is defined as a "one or two-hand[ed] strike with the baton, as if cutting with a sword."[51] In regard to the injury that could result from such a blow, KOGA states that "the aggressor against whom the police baton is used will most probably suffer injury, albeit usually minor."[52]

B. THE BATON STRIKES TO THE CHEST THAT KOGA TEACHES BALTIMORE CITY POLICE OFFICERS AS NON-DEADLY FORCE ACTUALLY CONSTITUTES DEADLY FORCE

While the United States Supreme Court in *Tennessee v. Garner* held that the use of deadly force was a seizure, and thus subject to the Fourth Amendment's reasonableness requirement, the Court did not define what type of force constitutes deadly force. The Model Penal Code, drafted by the American Law Institute, provides a useful definition that has been adopted by many courts.[53] It defines deadly force as:

> Force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.[54]

While not all of the baton techniques taught to Baltimore City police officers constitute deadly force, it is difficult to conceive how the two-handed thrust to the chest can be anything but deadly force. The force that is exerted from such use of the baton is enormous. As a KOGA trained instructor stated, the new baton being used "packs a bigger wallop" and "is better suited for samurai-sword-like swings, which help the officer strike suspects fewer times in areas deemed 'acceptable targets.'"[55] One newspaper reporter, on assessing the KOGA method, noted that "when swung properly, [the baton] can lay a person low without drawing blood. It can also shatter a door, break an ax handle in half or shatter bones."[56] In light of the power that police officers can exert with the butt end of the baton, especially when using both hands to maximize the force, it is obvious that the thrusting baton blows to the chest and ribs create a substantial risk of causing death or serious bodily harm.

Indeed, "[s]erious chest injuries are often fatal due to the possibility of injury to the lungs, heart and great vessels, and the many types of complications that arise from penetrating or blunt traumas to these organs."[57] The chest, which is enclosed by the ribs, contains the heart, lungs, veins and arteries that enter the heart, trachea, bronchi (the airways to the lungs) and the esophagus.[58] The fracturing or breaking of the ribs could result in the puncturing of a lung, which can be fatal.[59] Injury to the arteries of the heart can result in massive internal bleeding.[60] Moreover, a strong blunt force directed at the chest can also "fracture four or more ribs on the same side and produce a condition known as flail chest," a condition where the fractured ribs move separately from the rest of the chest area when breathing, thereby resulting in breathing difficulty.[61] Hospitalized individuals with "injuries only of the chest have a four to eight percent mortality rate. The rate rises to ten to fifteen percent when one additional organ system is involved, and to thirty-five percent when there are multiple-organ-system injuries."[62] In light of all the medical complications that can arise from the use of a thrusting chest blow, the technique is best considered deadly force. Contrary to the assessment made by the Baltimore City Police Department, the conclusion that a baton strike to the chest is deadly force has been reached by the majority of police departments around the country.[63]

C. THE BALTIMORE CITY POLICE DEPARTMENT BATON PROGRAM, BY MISCLASSIFYING BATON USE AS NON-DEADLY FORCE AND FAILING TO PROVIDE PROPER TRAINING IN THE USE OF NON-DEADLY WEAPONS, RUNS THE RISK OF CIVIL LIABILITY FOR INADEQUATE TRAINING

There are two main grounds for finding section 1983 liability against Baltimore City for failing to adequately train its police officers. First, the misclassification of a baton strike to the chest as non-deadly force provides ample ground for a jury to conclude that the police officer's use of excessive force was pursuant to the Department's actual baton policy. Second, the lack of training in non-deadly weapons, including "live" training, proficiency certification, and regular in-service training, could well result in a jury finding that Baltimore City inadequately trained its officers for the type of split-second judgments that they would face in determining the type of force to use. The policy behind instituting such training requirements in the use of firearms is just as strong, if not stronger, in the context of non-deadly weapons, and failing to provide such training could be seen as deliberate indifference.[64]

1. The Misclassification of KOGAs Baton Techniques Provides Grounds for Liability for Inadequate Training

Police officers are generally instructed to use the minimum amount of force necessary to subdue a suspect.[65] The proper amount of force is typically judged on a "continuum of force," which instructs officers to start with little or no force, i.e. verbal commands, and if this is ineffective, then to use physical force, such as wrist holds and other non-deadly force alternatives, and only as a final option to use deadly force.[66] Police officers rely on this continuum as guidance in determining the proper use of force in any given situation they face. Nevertheless, the usefulness and "reasonableness" of the continuum depends on the police department's proper assessment of the nature of the force in a given technique. Thus, by labeling a baton strike to the chest as non-deadly when it is properly considered to be deadly force, police officers who use this technique will, by definition, use excessive force in those situations in which the police officers have been instructed to use the baton.

The history of the use of chokeholds by police officers provides an example of the devastating consequences of a police department's misclassification of a deadly force technique as non-deadly force.[67] Borrowed from the martial art of judo, the chokehold technique has been around for many years.[68] The main type of chokehold is the "carotid" hold. The carotid hold is applied, with the officer behind the person, by placing one of the officer's arms around the person's neck and holding the wrist of that arm with his other hand. Then, by using the muscles in his forearm, the officer applies pressure against the carotid arteries on the sides of the person's neck. The chokehold is designed to stop the flow of blood to the brain by applying pressure to the carotic artery, thereby rendering the person unconscious.[69]

There are many reasons the chokehold poses such a threat to victims. First, the technique, given the amount of force applied and the position of the arm, can result in the officer, even by accident, crushing the victim's larynx, trachea, or thyroid, thereby resulting in the victim suffering a cardiac arrest or asphyxiation.[70] Medical experts recognize that even a temporary carotid hold can result in serious injury or death.[71] Second, because of the violent and frightening nature of such a hold, victims will often violently struggle to free themselves.[72] Such a struggle only encourages the police officer to tighten the hold, thereby increasing the risk of harm to the person.

In 1975, the Los Angeles Police Department ("LAPD") began using the chokehold as a non-deadly technique even where the suspect posed no threat of violence.[73] Despite the fact that the use of the chokehold posed a very "high and unpredictable risk of serious injury or death," the LAPD officers were never instructed that the chokehold could cause death.[74] As a result, between 1975 and 1980, the LAPD officers used the chokehold technique in approximately 975 altercations with suspects, or approximately 75% of officer-suspect confrontations.[75] As a direct result of the chokehold, at least sixteen people died before the LAPD, in 1982, recognized the misclassification and stopped the practice in situations that called for less than deadly force.[76]

The LAPD was not alone in incurring a great deal of problems as a result of authorizing the use of chokeholds in less-than-deadly force situations.[77] Lia-

bility considerations led the Washington, D.C. Police Department and the New York City Police Department to prohibit the use of chokeholds by police officers, except in situations calling for deadly force.[78] Indeed, juries have repeatedly found that police officers used excessive force where the carotid hold has been applied in less than deadly force situations, and that the police department and municipality were "deliberately indifferent" in failing to properly train the police officers in the nature of the force, and the proper method for utilizing such a technique.

For example, in 1992, a forty-three year old homeless man was involved in a six-minute physical struggle with three police officers until the carotid hold was applied. The jury, in awarding the plaintiff's estate $470,000, found that the officer applying the hold used excessive force, and the Commissioner of the California Highway Patrol was liable because of his chokehold training policies.[79] Nevertheless, many citizens in other jurisdictions continue to suffer the consequences of the chokehold technique when used in non-deadly force situations.[80]

The liability risk resulting from inadequate training faced by the Baltimore City Police Department is strikingly similar to that of police departments that have implemented the non-deadly chokehold technique. Striking a person in the chest with the butt-end of a baton poses such a significant risk of causing death or serious injury that a jury would be well supported in finding the police department liable for classifying this baton technique as non-deadly force.

2. The Lack of Regular Training and Certification Procedures in Non-Deadly Weapons and Techniques Provides an Additional Ground for Section 1983 Liability for Inadequate Training

Baltimore City runs the risk of facing inadequate training claims separate and apart from the issue of misclassification of deadly force as non-deadly force. Baltimore City, like many other major jurisdictions, has concentrated heavily on regulating, training, and certifying police officers on the use of firearms to the point where claims against a municipality based on inadequate training in the use of firearms are extremely difficult, if not impossible, to prevail upon.[81] In Maryland, minimum requirements for firearm certification are set by the Maryland Police Training Commission.[82] In-service training in the use of firearms includes two hours of instruction a year in servicing weapons and legal aspects regarding use of firearms.[83] Police officers must also pass a proficiency test in firing their service weapon annually.[84] Additionally, police officers are required to have eighteen hours additional job related courses, and what is taught during these hours is left to the discretion of each individual police department.[85]

Nevertheless, when it comes to policies regarding non-deadly weapons, there are no similar in-service training or proficiency examination requirements.[86] Baltimore City is not alone in this respect. Most police departments have little or no formal guidelines for the use of non-deadly force, nor do these departments provide certification or periodic in-service training requirements.[87] There are many reasons why the failure to require more detailed training, including certification and additional in-service requirements may justify the imposition of excessive force liability on a municipality.[88]

First, police departments know that officers will be called upon to use their weapons in apprehending suspects. Police officers need guidance in determining when and how it is constitutionally appropriate to use the various non-deadly weapons. As the United States Supreme Court recognized in the context of firearms training:

> [C]ity policy-makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be "so obvious," that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights.[89]

The need for police officers to stay within the constitutionally permissible limits when using non-deadly force is no less important and no less obvious. Indeed, an officer is much more likely to be required to use non-deadly force on a suspect than deadly force.[90] Second, in order for officers to be properly trained in using a technique within constitutional limitations, there must be training that occurs under the stress of actual street

situations, and not merely out of a textbook or from a lecture. Although dealing with the training required in the use of firearms, the recent case of *Zuchel v. City of Denver*,[91] provides an excellent framework for analyzing this liability aspect.

In *Zuchel*, the Tenth Circuit affirmed the lower court's refusal to set aside a $330,000 judgment against Denver for inadequate training in the use of deadly force. The court relied heavily on expert testimony produced at trial which revealed that Denver's District Attorney had suggested to the Chief of Police several steps to improve the deadly force training of police officers.[92] Evidence at trial demonstrated that the District Attorney recommended that the police department institute "live" judgment training, such as a "shoot-don't shoot" course, rather than rely on a film lecture series on decisional shooting.[93] This type of judgment training, according to expert testimony produced at trial, is important because there is no other way to teach strategic judgment in the use of force except through periodic "shoot-don't shoot" field exercises.[94] Furthermore, the expert stated that the failure of a large police department to offer this kind of judgment training reflects a deliberate indifference considering the predictability that officers would face situations where such judgment would be called upon.[95] Thus, the expert concluded, without periodic judgment training, mistakes in the use of force are going to be made.[96] In light of this evidence, the Tenth Circuit had no difficulty concluding that the evidence was "clearly sufficient" to find that the failure to implement periodic judgment training "constituted deliberate indifference to the constitutional rights of Denver citizens."[97] Thus, while *Zuchel* concerned the use of firearms, there is an equally compelling argument in requiring "live" training in non-deadly force weaponry. A police officer usually has only a split-second to determine whether a particular suspect poses a threat, what degree of a threat, and what force is proper in response.[98] This is why many perceive in-service training on non-deadly weapons, including "live" training, as critical in ensuring the proper use of force by a police officer.[99] As testimony in *Zuchel* supports, it is predictable that police officers who are given non-deadly force weapons will make decisions under pressure regarding their use, and not training police officers to make judgment calls under such stress conditions reflects a deliberate indifference.

Similarly, although not finding liability for failing to require in-service training, the court in *McQurter v. City of Atlanta*,[100] stressed the essential nature of in-service training on techniques and weapons. *McQurter* involved the allegation that a police department failed to provide in-service training in the use of the chokehold. The court, which decided this case several years before the United States Supreme Court decided *Tennessee v. Garner*, took great pains to note that no in-service training was being provided in a deadly force technique such as chokeholds, although such training was being provided in firearms. Nevertheless, the court concluded that the failure to provide in-service training in the chokehold did not rise to the level of recklessness or gross negligence required for the imposition of liability. The court, however, did hold that the failure to train supervisors to deal with such life threatening conduct constituted deliberate indifference. The police department had promoted supervisors without training them on the use of the chokehold, the regulations governing its use, or the risks a person may face when subject to the chokehold.[101]

The requirements of "live" training, annual proficiency certifications, and in-service training should be as formal and detailed as required for the use of firearms. Superficial requirements would not be sufficient to avoid inadequate training liability under section 1983, as noted in *McKenzie v. City of Milpitas*.[102] In *McKenzie*, the court denied the city's motion for summary judgment on the claim of inadequate training regarding the use of tasers.[103] The taser training consisted of giving police officers a copy of the city's policy on taser use, discussing the policy with the officers, and teaching officers to take subjects that have been tasered to the emergency room. Moreover, the city not only required that officers were not to use tasers without taking a training course and passing a written test, but also required a mandatory refresher course every year.[104] Even though these requirements surpass what most police departments require today, the court found that the city could be held liable for the inadequate training of its police officers. Indeed, the plaintiff's allegation that the requirements were simply superficial was supported by evidence that police officers were not told of the "constitutional, moral, legal and ethical standards" associated with using the taser.[105] Additionally, the police officers were never instructed on the dangers of prolonged continuation of electrical charges, thereby encouraging officers to use the taser continually until

the suspect complies. Finally, it was alleged that the written test on proper taser use was designed to be passed, as demonstrated by the fact that no officer had ever failed the test.[106] After the District Court denied the city's motion for summary judgment, the jury found that the City had inadequately trained its police officers in the use of the taser and awarded the victim $200,000.[107]

The inadequacy of superficial training requirements was further stressed in *Russo v. City of Cincinnati*,[108] where the Sixth Circuit addressed a claim that the city had failed to adequately train its officers to deal with mentally ill individuals, and this failure proximately caused the shooting death of a paranoid schizophrenic. In reversing the trial court's grant of summary judgment for the city, the Sixth Circuit explained that sufficient evidence was produced to generate a material dispute as to whether the city's training in deadly force amounted to deliberate indifference, and therefore, a failure to adequately train. The court noted that testimony showed that while there was some initial training on handling mentally ill individuals, in-service training for dealing with the mentally ill was non-existent.[109] Expert testimony revealed that "none of the involved police personnel understood the appropriate procedure for reacting to mentally ill individuals."[110] The court found that offering a seven-hour course on "Disturbed-Distress Persons" was insufficient in and of itself to shield the city from liability.[111]

Inadequate training liability, therefore, could be imposed based on the Baltimore City Police Department's failure to provide more sophisticated training in non-deadly weapons. Such a lack of training is known to cause a substantial risk of constitutional violations because police officers will be less capable of properly and safely utilizing the weapon. The most innocuous devices can become problematic when a municipality fails to offer the annual certification and in-service training for such weapons. Moreover, police officers without such training tend to become much more indiscriminate in the use of non-deadly weapons, which often leads to the over use of the weapon.[112] This lack of training can even turn otherwise non-deadly weapons into deadly ones.[113]

A prime example of the problems associated with a lack of training is reflected in the use of pepper spray. Pepper spray is an oily plant resin that is derived from dried spices such as chili.[114] Pepper spray is considered by law enforcement agencies to be a proper force after the police officer's verbal commands fail to control the suspect, but before hands-on type contact such as a baton is utilized.[115] When pepper spray is used on a person, that person's airways tend to restrict, his eyelids swell, and he feels a burning sensation on his skin and membranes of the mouth and nose for approximately twenty minutes.[116] The use of this spray, because of its seemingly non-injurious nature, is widespread among police departments, including Baltimore City's.[117]

The American Civil Liberties Union ("ACLU") has recently complained that police officers have become "increasingly indiscriminate [about the use of pepper spray] despite written expressions of 'grave scientific concern' by the Environmental Protection Agency regarding its safety."[118] The sometimes free use of the device can be problematic.[119] For example, in California, police officers used pepper spray 9,000 times over the last year, at a rate of twenty-four times a day.[120] The ACLU has recently petitioned the United States Consumer Product Safety Commission to regulate the use of pepper spray by noting that twenty-seven criminal suspects have died over the last two and one-half years in California, and an estimated sixty-one people have perished nationwide, after being subdued with pepper spray by police officers.[121] Although the exact cause of death of these victims was difficult to determine, a large proportion of the victims had underlying heart or respiratory problems suggesting that the use of the spray could have been a "serious complicating factor."[122]

Assessing the harm caused by pepper spray is complicated by the fact that law enforcement officials will not evaluate their pepper spray training programs unless definitive proof of the causal connection between pepper spray and these deaths is produced. Law enforcement agencies have been lulled into a false sense of security by relying on studies that have shown that no "long-term health risks" have been found as a result of using the spray.[123] Also, pepper spray manufacturers, with a great deal at stake, contend that there is little or no evidence that pepper spray caused any of the sixty-one deaths, pointing to the fact that medical examiners only cited pepper spray as a factor in two of the deaths.[124]

The ACLU has argued that police departments must begin to implement regulations and training programs to teach officers about the length of time a person can be sprayed, the danger that use of the spray can cause to some individuals, especially high risk groups

such as drug users and those with respiratory problems, and the need for providing medical attention after someone is sprayed.[125] Furthermore, instruction on the effects of combining non-deadly force techniques should be carefully analyzed, and appropriate policy formulated. Presently, this type of training is simply not taking place in most police departments around the country.

The debate over the effects of pepper spray is indicative of the problems associated with the use of non-deadly force. Police departments have been very reluctant to impose any restrictions or effective guidelines on the proper use of pepper spray by police officers. While the causal connection between the use of pepper spray and death has not been conclusively proven, there is evidence that the effects of pepper spray tend to be aggravated by police officers' use of other non-deadly techniques in conjunction with pepper spray, such as stun guns, handcuffs, and manual holds.[126] This is not to say that police officers should discontinue the use of pepper spray, but rather, they must recognize that the use of all non-deadly weapons and techniques run the risk of significant injury or death. Accordingly, civil liability for inadequate training may result if police departments fail to investigate the potential for harm in the non-deadly weapons they use and refuse to increase training through the use of "live" training, proficiency certification, and in-service training in these weapons. Additionally, the indiscriminate use of the non-deadly weapons that accompany the lack of such training is a cause of grave concern.

IV. CONCLUSION

Non-deadly weapons hold a great deal of promise for avoiding the risk of injury to police officers and suspects during confrontation, thereby substantially decreasing the threat of civil liability. Nevertheless, this promise has not been fully realized primarily because police departments have failed to appreciate that significant injury or death, can result from the use of these non-deadly weapons and techniques. Specifically, the systematic undervaluing of the degree of force posed by the use of these weapons, and the failure to recognize the need for "live" training, proficiency certification, and in-service training in the use of these weapons has increased the risk that the use of a non-deadly weapon or technique will be excessive, increasing the risk of civil liability to the officer, the department, and the municipality involved.

Much of the liability concerns could be eliminated if police departments, such as the Baltimore City Police Department, imposed the same training requirements for non-deadly weapons as these departments have done with firearms. The policy justifications for mandating extensive proficiency and in-service training requirements in regard to non-deadly weapons are just as strong, if not more so, than in the context of firearms. The use of "shoot-don't shoot" type training in non-deadly weapons would not only diminish the threat of liability faced by police departments, but such training would give police officers greater confidence and proficiency in using the weapons under stressful conditions. The need for such "live" training in the use of non-deadly weapons is best supported by the fact that most physical confrontations faced by police officers will not call for deadly force, but rather, will require the officers to make the difficult, split-second assessment of what level of non-deadly force is appropriate. By making the training in non-deadly weaponry more extensive, and by carefully evaluating the level of force a particular weapon or technique imposes, the police departments will not only better protect its officers and citizens from unnecessary physical injury, but protect the municipality from unnecessary civil liability.

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ENDNOTES:

[1]Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L & Criminology 481, 481-82 (1994) (quoting the United States Civil Rights Comm'n Report, *Who is Guarding the Guardians*, V (1981)).

[2]There are approximately 17,000 law enforcement agencies operating in the United States today. Mark Fischetti, *Less-Than-Lethal Weapons*, 98 Tech. Rev. 14 (1995). Among these law enforcement agencies, there are approximately 400,000 law enforcement officers employed. Michelle A. Travis, *Psychological Health Tests for Violence-Prone Police Officers: Objectives,*

Shortcomings, and Alternatives, 46 Stan. L. Rev. 1717, 1719 n.8 (1994).

[3] Of these crimes, there were 5,482.9 serious crimes per 100,000 people. Baltimore City's murder rate was 48.1 murders per 100,000 people, making it eighth on the "Murder Capitals" list. Wire Report, *Random Killings Increasing, According to FBI*, Balt. Sun, Dec. 5, 1994, at A11.

[4] Research has shown that police officers are most likely to be involved in a physical confrontation when they are engaged in traffic stops. Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. & Criminology 481, 495 (1994). Additionally, research has revealed that 20-30% of police activity involves some type of "confrontation" with offenders. Michelle A. Travis, *Psychological Health Tests For Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives*, 46 Stan. L. Rev. 1717, 1731 n.82 (1994) (citing Samuel Walker, *The Police In America: An Introduction*, 237-38 (2d ed. 1992)). In these "confrontations," police use some type of force 5.1% of the time. *Id.*

[5] Edwin J. Delattre, *Brutality on the Beat: Can the Violence in L.A. Teach Us Why Cops Lose Control?*, Wash. Post, Mar. 24, 1991, at C1.

[6] *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985).

[7] *See State v. Albrecht*, 336 Md. 475, 649 A.2d 336 (1994) (holding that there was sufficient evidence to sustain a criminal conviction against a police officer for being grossly negligent in using deadly force).

[8] Since the early 1960's, § 1983 claims have dramatically increased. Matthew C. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 Utah L. Rev. 149, 153 (1993). The number of § 1983 suits filed annually has risen to approximately 30,000. Benjamin I. Wipple, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 29 San Diego L. Rev. 177 (1991). Meanwhile, the costs of such civil suits to municipalities has grown exponentially. Michelle A. Travis, *Psychological Health Tests for Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives*, 46 Stan. L. Rev. 1717, 1724 (1994). For example, Los Angeles paid $7,000 in excessive force cases in 1965. *Id.* However, from 1986 to 1992, the Los Angeles Police Department paid more than $20 million as a result of excessive force claims. Ruth Marcus, *History of Mistrust May Have Contributed to Riots: Experts Say Los Angeles's Minorities Have Long Been Critical of "Hard-Nose" Police*, Wash. Post, May 2, 1992, at A18. More striking is the fact that these figures do not include the "staggering" litigation costs incurred by the city. Travis, *Psychological Health Tests for Violence-Prone Police Officers: Objectives, Shortcomings, and Alternatives*, 46 Stan. L. Rev. 1717, 1724 (1994).

[9] Gregory H. Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 Harv. Blackletter J. 79 (1993).

[10] Nicholas Riccardi, *Demand Up for Less Deadly Force*, L.A. Times, Feb. 5 1995, at B1; Heather Hepler, *Keeping Them Safe: Police Work Is More Dangerous Than Ever*, 109 Am. City & Country 55 (1994).

[11] Increasingly, weapons are being developed that are intended to temporarily stun or disable criminals, with the hope that death and serious injury to the criminal, the police officer, and the public can be avoided. Mark Fischetti, *Less-Than-Lethal Weapons*, 98 Tech. Rev. 14 (1995). Such weapons include an infrared laser that heats the skin enough to cause pain but not cause burns, a laser beam bright enough to cause temporary blinding of a suspect without causing eye damage, and a back seat air bag that can pin down violent passengers, thereby preventing them from kicking the windows or harming themselves. *Id.* Unfortunately, in addition to the difficulty in designing this new weapons, the cost can be prohibitive. For example, the laser beam that can be used to emit a blinding light presently costs about the same as a police cruiser. *Id.*

[12] For example, many law enforcement officials believe that the use of pepper spray has saved countless lives because it is used as an alternative to the firearm. Bill Miller, *Police Find a Whiff of Pepper Can Work Wonders in a Pinch*, Wash. Post, Aug. 10, 1992, at D1. Indeed, officer related shootings have declined since the introduction of the pepper spray into the police arsenal. Mark I. Pinsky, *Assault on Pepper*, L.A. Times, June 18, 1995, at A3.

[13] *See, e.g., Kelly v. City of San Jose*, C-86-205260-RPA, United States District Court, Santa Clara County, California, March 1988 ($212,500 awarded for excessive force with baton); *Janey v. District of Columbia*, CA-3894-86, Superior Court, District of Columbia, Oct. 1988 ($1,200,000 awarded for excessive force using chokehold); *Davis v. City of San Leandro*, United States District Court, San Fransisco County, Califor-

nia, Feb. 1990 ($25,000 awarded for excessive force with stun gun); *Macleod v. Willie*, 91-6710 AI, Circuit Court, Palm Beach County, Florida, Jan. 1993 ($235,000 and changes in city policies as settlement for excessive force of police dog); *King v. City of Los Angeles*, CV 91-1543 JGD, United States District Court, Southern District County, California, May, 1994 ($3,816,535 awarded for excessive force with baton and taser). *See also, Cooper v. City of Virginia Beach,* 817 F. Supp. 1310 (E.D. Va. 1983), *aff'd*, 21 F.3d 421 (4th Cir. 1994) (handcuffs); *Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993) (flashlight). Additionally, the use of pain compliance techniques has recently generated litigation and controversy. *See* Benjamin I. Wipple, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 29 San Diego L. Rev. 177 (1991) (discussing litigation and issues raised in pain compliance techniques).

[14]Gregory H. Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 Harv. Blackletter J. 79 (1993).

[15]Keith A. Harriston, *D.C. Police Ban Use of Blackjacks: Lack of Training Called Liability Risk*, Wash. Post, Dec. 11, 1993, at B2 (D.C. stopped the use of blackjacks by police officers because lack of training on proper use posed major liability concerns).

[16]The focus of this paper will be solely on the potential for municipal liability under 42 U.S.C. § 1983. This narrow focus has been undertaken for two primary reasons. First, while this paper utilizes the Baltimore City Police Department as a case example of the problems associated with the use of non-deadly weaponry, the problems with non-deadly training identified are equally applicable to many police departments around the country. Therefore, an extensive evaluation of the causes of actions provided by any one state is inappropriate. Second, and most importantly, satisfying the requirements for imposing municipal liability under § 1983 is far more difficult than satisfying the requirements of most state tort actions. Thus, the existence of a § 1983 claim against a municipality will generally mean that requirements of the state tort actions can be satisfied.

[17]42 U.S.C. § 1983 (1988) reads in part: 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.

[18]*Monell v. Department of Social Servs.*, 436 U.S. 658, 665 (1978) (provides extensive discussion on the history of § 1983).

[19]Carolyn L. Brown, Comment, *Liability of A Municipality for Acts Commited By Its Police Officers: Inadequate Training Demands Strict Custom of Policy Test*, 53 U. Cin. L. Rev. 525 (1984). Acting under the color of law is satisfied if the police officer utilizes excessive force while acting in his capacity as a police officer.

[20]471 U.S. 1 (1985).

[21]*Id.* at 7. The Fourth Amendment to the Constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized. U.S. Const. amend. IV.

[22]*Id.* at 8 (*quoting United States v. Place*, 462 U.S. 696, 703 (1983)).

[23]*Id.* at 9.

[24]*Id.* at 3.

[25]490 U.S. 386 (1989).

[26]*Id.* at 394.

[27]*Id.* at 396.

[28]*Id.* at 397.

[29]*Id.* at 396. An officer, while required to use objectively reasonable force based on the particular circumstances faced, is not obligated to use the minimum amount of force possible. *O'Neal v. DeKalb County*, 850 F.2d 653, 656 (11th Cir. 1988). Police are under no duty to use a less-than-deadly alternative when deadly force is appropriate. *Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2612 (1995). Indeed, "[a] police officer need not suffer brutalizing injury before he inflicts it; rather, the restraint on an officer's use of force is that it must be reasonable under the circumstances." *Cotton v. Busic*, 793 F. Supp. 191, 196 (S.D. Ind. 1992).

[30]This paper focuses on the liability of the municipality under an inadequate training theory. Nevertheless,

police officers who use excessive force can be found personally liable. The doctrine of qualified immunity shields such officers, however, from damage awards where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[31]A municipality may be liable for such violations, although a state, or its agencies, will not be accountable for a similar violation because the United States Supreme Court has held that Congress did not intend to waive state immunity to suits in federal court through enactment of 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332 (1979). In order for the state, or an employee of the state, to be liable in their official capacity, the state must specifically waive immunity under the Eleventh Amendment.

The prohibition against suing the state, or its agencies, under § 1983 has raised an interesting issue regarding the liability of the Baltimore City Police Department under such suits because the Baltimore City Police Department is considered under Maryland law to be an agency of the State of Maryland and not the Mayor and City Council of Baltimore. *See* Baltimore City Code § 16-2 (1980). *See also Clea v. Baltimore*, 312 Md. 662, 541 A.2d 1303 (1988)(holding that Baltimore City is not liable under the doctrine of respondeat superior for actions of Baltimore City Police Department or its police officers). Thus, the power to control and regulate the training of police officers is vested in the Police Commissioner and not the City of Baltimore. *See* Charter of Baltimore City art. II, § 27 (1964).

The City of Baltimore has sought to use this distinction to avoid liability under § 1983. Baltimore City has argued that they have no control over the Baltimore City Police Department according to state law, and that the Baltimore City Police Department is a "state agency" not subject to liability under § 1983. This argument, however, has been routinely rejected. *Wiley v. Mayor of Baltimore*, 48 F.3d 773, 776 (4th Cir. 1995), *cert. denied*, 115 S.Ct. 89 (1995)(noting that the argument has been twice rejected because of strong practical links between Baltimore City and the Baltimore City Police Department); *Hector v. Weglein*, 558 F. Supp. 194 (D.Md. 1982)(noting Baltimore City's "substantial control" over activities and policies such as setting of salary and benefits, Mayor's power to appoint and remove police commissioner, and City Solicitor's representation of the Police Commissioner); *Wilcher v. R. D. Curley*, 519 F. Supp. 1 (D.Md. 1980)(same). The Court of Appeals of Maryland has also recognized that Baltimore City Police Department would not be seen as a state agency under § 1983 actions. *Clea v. Baltimore*, 312 Md. 662, 670 n.5, 541 A.2d 1303 (1980).

[32] 436 U.S. 658 (1978).

[33]*Id.* at 690.

[34]*Id.* at 690-91.

[35]489 U.S. 378 (1989).

[36]*Id.* at 388.

[37]*Id.* at 390.

[38]*Id.* A person must demonstrate that they have suffered an underlying constitutional violation for there to be liability even if the government has an actual policy authorizing the use of excessive force. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). *See also Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992); *Belcher v. Oliver*, 898 F.2d 32, 46 (4th Cir. 1990). Nevertheless, showing that the police officer is liable for the constitutional violation is not necessarily a prerequisite to finding the municipality liable for failing to adequately train. *Hopkins v. Adaya*, 958 F.2d 881, 888 (9th Cir. 1992). Moreover, a jury could certainly refuse to hold a police officer responsible because he reasonably followed city procedures or his conduct did not violate clearly established constitutional or statutory requirements that a reasonable person would have known, thereby enjoying qualified immunity. Such a jury could still find the municipality liable because it does not enjoy qualified immunity. *Chew v. Gates*, 27 F.3d 1432, 1438-39 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995).

[39]Peter Hermann, *Baltimore Police Retire the Twirling Nightstick, Ending a Century of Use*, Balt. Sun, Mar. 27, 1995, at A1.

[40]Peter Hermann, *Better Training in Use of Force for Police*, Balt. Sun, Nov. 5, 1994, at B1.

[41]Peter Hermann, *Baltimore Police Retire the Twirling Nightstick, Ending A Century of Use*, Balt. Sun, Mar. 27, 1995, at A1.

[42]*Id.* Indeed, Officer Gary McLhinney, the president of the Fraternal Order of Police Lodge 3, stated that "[t]here is an unusual amount of criticism from people who have participated in the [training] program." Id.

[43]Robert K. Koga & William L. Pelkey, *Controlling*

Force: A Primer for Law Enforcement (1994).
[44]*Id.* at 23.
[45]*Id.* at 46.
[46]*Id.*
[47]*Id.*
[48]*Id.* at 182.
[49]*Id.* at 183.
[50]*Id.* at 188. Areas that are not "recommended" to strike are the head, neck, throat, groin, spine, kidneys, and heart. *Id.* at 188-89.
[51]*Id.* at 190.
[52]*Id.* at 182.
[53]*See, e.g., Robinette v. Barnes*, 854 F.2d 909 (1988) (using this definition in finding that the proper use of a trained police dog on a person was not deadly force).
[54]Model Penal Code, § 3.11(2) (Proposed Official Draft 1962).
[55]Eric Young, *Irvine Police Learning Zen of Suspect Control,* L.A. Times, May 30, 1983, at B4.
[56]Pat Dillon, *Can We Avert L.A.'s Horror?,* San Jose Mercury News, Mar. 19, 1991, at B1.
[57]*Attorney's Textbook of Medicine: Manual of Traumatic Injuries,* Vol. I, 9-1 (1989).
[58]*Id.* at 9-3 to 9-4.
[59]*Id.* at 9-4.
[60]*Id.* at 9-6.
[61]*Id.* at 9-12 to 9-13.
[62]*Id.* at 9-3.
[63]*See, e.g.*, Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Liability for the Use of Excessive Force*, 28 Creighton L. Rev. 733 n.4 (noting that Ohio & Arizona police departments classify baton strikes to the chest as deadly force); Associated Press, *Officer Can Be Sued Over Baton Strike, Court Rules,* Wash. Post, Jan. 10, 1995, at B2 (noting that the Minneapolis Police Department only allows baton strikes to the chest where deadly force is appropriate).
[64]Recently, the Baltimore City Police Deparatment appears to be changing its policy regarding the baton strike to the chest. The Department may begin teaching this technique as deadly force rather than non-deadly. If the Department actually changes the baton training program, they would be taking a large step toward a more sensible treatment of non-deadly weapons. Nevertheless, there does not appear to be any plan on the horizon to impose any in-service training requirements or conduct "live" training with the non-deadly weapons given to the police officers in Baltimore City.
[65]Nicholas Riccardi, *Demand Up for Less Deadly Force*, L.A. Times, Feb. 5, 1995, at B1.
[66]*Id.*
[67]KOGA also teaches the application of the carotid chokehold, which is contained in the manual provided to Baltimore City Police officers, as non-deadly force. This only serves to raise more questions about the ability of KOGA to properly assess the nature of the force it teaches police officers. Fortunately, it appears that the Baltimore City Police Department has no plans to implement the use of the chokehold.
[68]*People v. Sanders*, 74 Cal.Rptr. 350 (Cal. App. 1 Dist. 1969).
[69]*See City of Los Angeles v. Lyons*, 461 U.S. 95, 99 (1983) (describing in detail the mechanics of these holds). *See also* Phil McCombs, *Stacey Koon's Arresting Explanations: The Sergeant and Now Author Reflects,* Wash. Post, Dec. 7, 1992, at B1.

In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a victim of a police chokehold that was used during a traffic violation stop brought suit for being rendered unconcious and for the damage to his larynx. Lyons also sought injunctive relief against the city, which would bar them from using the chokehold technique in similar situations where deadly force would not be appropriate. The District Court found that the city had in effect unconstitutionally authorized the use of deadly force where death or serious harm to the officer or others was not threatened, and thus, found the practice unconstitutional, and entered a preliminary injunction. In a 5-4 decision, the Supreme Court avoided the issue of the constitutionality of the chokehold practice by finding that Lyons failed to demonstrate a "real and immediate threat" and he was likely to be a victim of the attack again, and thus, there was no case or controversy. Moreover, the Court noted that Lyons had an adequate remedy at law to gain compensation for the injuries already suffered, and thereby, reversed the lower court's granting of the preliminary injunction.
[70]*See City of Los Angeles v. Lyons*, 461 U.S. 95, 117 (1983)(Marshall, dissenting).
[71]*Id.* at 117 n. 7 (1983) (Medical testimony at the trial court revealed that "immediate heart stoppage" can occur when the technique is used).
[72]*See Id.*
[73]*See Id.* at 116.
[74]*See Id.*

[75]*See Id.*

[76]Lou Cannon, *Summations in L.A. Trial Describe Officers as Hoodlums or Heroes*, Wash. Post, April 9, 1993, at A14; Lou Cannon, *Trial Told of "Swarm" Technique: Witness Says Not All Police Got Training*, Wash. Post, Mar. 5, 1993, at A3.

[77]The ending of the use of the carotid hold by many jurisdictions has been labeled as a reason why excessive force has been used with the baton. Lou Cannon, *Officer Says He Sought to 'Cripple' King with Beating to Avoid Shooting*, Wash. Post, Mar. 25, 1993, at A6; Phil McCombs, *Stacey Koon's Arresting Explanations: The Sergeant and Now Author Reflects*, Wash. Post, Dec. 7, 1992, at B1. An LAPD lieutenant has noted that removing the chokehold as an option to the baton has created a gap in the use-of-force continuum, which has resulted in more people being subjected to blows with batons. Greg Meyer, *Finding a Safe Way to Subdue Violent Suspects*, L.A. Times, June 14, 1994, at B7. Indeed, a comparison of injuries to suspects and officers that occurred before and after the ban on the use of chokeholds by Los Angeles police officers reveals that there was a 661% rise in injuries to suspects and a 521% rise in injuries to officers once the use of the chokehold had been discontinued. *Id.*

[78]For example, the estate of a D.C. resident was awarded $950,000 after he died from the use of a chokehold by D.C. Police. Saundra Saperstein, *$950,000 Awarded in Arrest Death: Excessive Force by Police Alleged*, Wash. Post, June 5, 1985, at C5. *See also* Michael Specter, *5 N.Y. Police Accused of Murdering Suspect; Man, 21, Found Sleeping in Stolen Car*, Wash. Post, Mar. 21, 1991, at A3 (noting the prohibition against chokeholds in New York). Nevertheless, even though police departments have prohibited the use of such holds, occasionally officers instinctively resort to such tactics in less than deadly force situations. For example, $1.2 million was awarded to a victim of a D.C. police officer's use of a chokehold that resulted in his vocal cord being crushed. Editorial, ... *And Episodes Near Home*, Wash. Post, Mar. 20, 1991, at A18.

[79]*Bennett v. City of Dublin*, C993-1309 CW, Superior Court San Francisco, California (1994). There are courts that have been willing to allow the use of chokeholds in non-deadly situations. *See, e.g., Gassner v. City of Garland*, 864 F.2d 394 (5th Cir. 1989) (allowing police officer summary judgment on the issue of excessive force, because the application of the chokehold against a resisting suspect was reasonable). Moreover, there have been cases, based on due process grounds, dealing with the use of a chokehold in order to prevent an arrested person from swallowing drugs. These decisions have generally rested on the notion that use of the chokehold was permissible as long as the person's ability to breathe was not interrupted. *See State v. Harris*, 505 N.W. 2d 724, 732 (Neb. 1993) (noting that chokehold used was not "deadly force" because the breathing of the suspect had not been cut off).

[80]*See* Lou Cannon, *Trial Told of "Swarm" Technique: Witness Says Not All Police Got Training*, Wash. Post, Mar. 5, 1993, at A3 (noting that many departments continue to allow the use of chokeholds). The liability from the ill-fated policy permitting chokeholds is best demonstrated in a recent case where Miami officials agreed to pay a man $7.5 million plus all future medical expenses, estimated at approximately $34 million, to keep a 24-year-old man on life support, because police officers applied a chokehold to the man during a traffic stop when he became "unruly." Associated Press, *Chokehold Case May Cost Miami $34 Million*, L.A. Times, June 30, 1993, at A2. More recently, the city counsel in Inglewood, California paid $750,000 to the family of a teenager who died as a result of the police use of a carotid artery chokehold. Eric Malnic, *Inglewood to Pay $750,000 in Death of Man Restrained by Police*, L.A. Times, Feb. 3, 1994, at B2.

[81]For example, in an inadequate training claim in *Berry v. Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995), the court reversed a $6,000,000 award for the estate of a man shot by police officers because there was insufficient evidence to show deliberate indifference. The court noted that at the Detroit Police Academy, officers "were given 60 hours of firearms training and were required to take both a certification examination and an additional written examination," which required a score of 100% to pass. *Id.* at 1347. Officers were also given a deadly force policy manual upon graduation, which was updated regularly. *Id.* Furthermore, Detroit police officers continued to receive firearms training after graduating and 40 hours of in-service training were required annually. During this training, police officers were required to attend annual refresher courses concerning the use of deadly force. *Id.* at 1347. Officers were required to qualify annually in firearms usage. *Id.*

Smaller police departments, which do not always have such in-depth firearms training, are still susceptible to claims for inadequate training of its officers in the use of firearms. See, e.g., *Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 275 (1991) (holding that county's failure to train officers on legal requirement in the use of deadly force amounted to deliberate indifference as a matter of law).

[82]Telephone Interview with Carl Bart, Chief of Law Enforcement Training, Maryland Police Training Commission (July 7, 1995). Forty-nine out of fifty states have a similar state commission, with Hawaii being the exception. *Id.*

[83]*Id.*

[84]*Id.*

[85]*Id.* Maryland's requirements tend to exceed that of most other states. For example, Virginia only requires that an officer "qualify" with their weapon every other year. *Id.*

[86]*Id.* "Slapjacks," which are hand-held pouches filled with lead, have long been used by Baltimore City police officers, even though the weapon has not been authorized to be carried or used by the Department. Peter Hermann, *Better Training in Use of Force for Police*, Balt. Sun, Nov. 5, 1994, at B1. Indeed, officers have been permitted to carry "slapjacks" without any training in the proper use of the weapon. *Id.* As a result of a recent incident, where an internal review indicated that an officer may have hit a suspect in the back of the head with a "slapjack," and in light of KOGA's recommendation, Baltimore City police officers will likely be prohibited from carrying these weapons in the future.

[87]Gregory H. Williams, *Controlling The Use of Non-Deadly Force: Policy and Practice Procedures*, 10 Harv. Blackletter J. 79 (1993). Telephone Interview with Carl Bart, Chief of Law Enforcement Training, Maryland Police Training Commission (July 7, 1995) (also pointing out that he is not aware of any state that has established any minimum requirement regarding non-deadly weapons).

[88] Several courts have found that the failure to adequately train police officers in the use of non-deadly force constituted a deliberate indifference to the safety of their citizens. *See Kerr v. West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989)(holding inadequate training was present where, among other things, the municipality failed to train the K-9 division in the constitutionally permissible use of police attack dogs); *Rymer v. Davis*, 775 F.2d 756 (6th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987)(holding that a municipality may be liable under §1983 for inadequately training its officers in the proper arrest procedures); *McLain v. Milligan*, 847 F. Supp. 970, 979 (D. Me. 1994)(limited instruction to police officers on the proper use of force could demonstrate deliberate indifference).

[89]*Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989)(citations omitted).

[90]Gregory H. Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice Procedures*, 10 Harv. Blackletter J. 79 (1993).

[91]997 F.2d 730 (10th Cir. 1993).

[92]*Id.* at 737-38.

[93]*Id.* at 738-39.

[94]*Id.* at 739.

[95]*Id.* at 740-41.

[96]*Id.* at 740.

[97]*Id.* at 741.

[98]Note, Criminal Law -- *The Right to Run: Deadly Force and the Fleeing Felon*, 11 S. Ill. U. L.J. 171, 183 (1986).

[99]Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. & Criminology 481, 487 (1994).

[100]572 F. Supp. 1401 (N.D. Ga. 1983)

[101]*Id.* at 1420-21.

[102]738 F. Supp. 1293 (N.D. Cal. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992).

[103] A taser is a hand-held device which propels two darts at a subject, and then the officer can send electric charges into the person's body by pressing a button, which then causes involuntary muscular contractions. *McKenzie v. Milpitas*, 738 F. Supp. 1293, 1296 (N.D. Cal. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992). The electrical charge that is transmitted is 50,000 volts. Lou Cannon, *L.A. Officer Says He Tried Not to Use Force On King*, Wash. Post, Mar. 24, 1993, at A3.

[104]*McKenzie v. Milpitas*, 738 F. Supp. 1293, 1297 (N.D. Cal. 1990), aff'd, 953 F.2d 1387 (9th Cir. 1992).

[105]*Id.*

[106]*Id.* at 1297 n.2.

[107] This verdict was later affirmed by the Ninth Circuit in an unpublished opinion. *McKenzie v. City of Milpitas*, 953 F.2d 1387 (9th Cir. 1992)(unpublished opinion).

[108]953 F.2d 1036 (6th Cir. 1992).

[109]*Id.* at 1046.

[110]*Id.* at 1047.

[111]*Id.*

[112]Batons were used by Los Angeles police officers 501 times during 1990, prior to the Rodney King incident, and only 41 times last year. News Service, *Around the Nation*, Wash. Post, Mar. 6, 1995, at A10.

[113]Many non-deadly weapons can take on a deadly nature as used. *McNeill v. Durham County ABC Board*, 359 S.E.2d 500, 503 (N.C. App. 1987), *rev'd on other grounds*, 368 S.E.2d 619 (N.C. 1988)(jury instruction that flashlight was deadly weapon as a matter of law would not have been prejudicial in this case given weight and size, club-like quality, and officer admitted on stand that flashlight similar to one used was deadly weapon). For example, the use of police attack dogs to arrest suspects has become controversial because of the "find and bite" policies, whereby the police release a dog trained to find and immediately bite a hiding suspect. Louis P. Dell, *Police Attack Dogs: A Dogmatic Approach to Crime Control*, 13 Whittier L. Rev. 515 (1992). This approach runs the serious risk of permanent scarring of tissue, and in some cases, death of the individual. *Id.*

In some situations, the degree of training will influence whether the court views a given technique as deadly or not. In *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), an unarmed burglary suspect, who had not threatened police officers but was hiding inside a car dealership even though ordered to come out by the police, died after police officers used a "find and bite" trained canine to apprehend the suspect. The dog, after finding the suspect, grabbed him by the throat and pulled him out from under a car, causing the loss of a substantial amount of blood. The court found that the use of the dog was not deadly force, and noted that the dog and trainer underwent continual training, and therefore, the police dog, when trained properly, did not present a substantial risk of deadly or serious bodily harm to the suspect.

[114]Mark I. Pinsky, *Assault on Pepper*, L.A. Times, June 18, 1995, at A3.

[115]Bill Miller, *Police Find a Whiff of Pepper Can Work Wonders in a Pinch*, Wash. Post, Aug. 10, 1992, at D1.

[116]L.A. Johnson, *New Spray Give Police Option Over Deadly Force*, Detroit Free Press, Aug. 10, 1992, at B3 (spray is being utilized by the Detroit Police Department).

[117]Bill Miller, *Police Find a Whiff of Pepper Can Work Wonders in a Pinch*, Wash. Post, Aug. 10, 1992, at D1 (Over 2,000 police departments were using pepper spray as of 1992).

[118]*Id.*

[119]*Id.* A spokesman for the Alexandria Police Department explained the reason that officers love pepper spray, "With the spray we can say, 'Hey, you're under arrest.' The guy says, 'Kiss off,' and we zap him."

[120]*Id.*

[121]William Claiborne, *ACLU Warns of Need to Restrict Police Reliance on Pepper Spray*, Wash. Post, June 19, 1995, at A16; Mark I. Pinsky, *Assault on Pepper*, L.A. Times, June 18, 1995, at A3.

[122]*Id.*

[123]Bill Miller, *Police Find a Whiff of Pepper Can Work Wonders in a Pinch*, Wash. Post, Aug. 10, 1992, at D1.

[124]Mark I. Pinsky, *Assault on Pepper*, L.A. Times, June 18, 1995, at A3.

[125]*Id.*

[126]William Claiborne, *ACLU Warns of Need to Restrict Police Reliance on Pepper Spray*, Wash. Post, June 19, 1995, at A6; Mark I. Pinsky, *Assault on Pepper*, L.A. Times, June 18, 1995, at A3.