

# Areas of Liability for the Criminal Justice Information System Administrator

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**NCIC**  
**National Crime**  
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An area of concern to law enforcement officials and criminal justice information system administrators is the liability that is imposed on them for the overall operation and maintenance of a criminal justice information system. The management of the system initiates a very large administrative responsibility that is continuously reviewed and defined by the courts. To assist the administrator, the following document presents the types of legal liability that may result from the maintenance and dissemination of criminal justice data.

In discussing actions that might be maintained against a criminal justice agency employee for "record malpractice," it is necessary to first review immunity and one's status. Under the principle of sovereign immunity, the United States or any state therein cannot be sued by reason of its sovereignty. However, suits may be entertained against the United States if specific permission has been granted by an act of Congress. An example of this is the Federal Tort Claims Act (FTCA), 28 United States Code (U.S.C.) §2671, *et. sec.*, which makes the United States liable for the negligent acts or omissions of federal employees who are acting within the scope of their employment. Most states possess some kind of system that permits them to assume liability for the actions of their

employees by allowing civil suits against the states. This is normally provided via constitutional or statutory authority.

The move away from immunity and toward responsibility has taken different forms. Even though a state may have immunity and its agencies are protected from suit, its officials and employees are not protected in their capacities under the doctrine of sovereign immunity. However, there are two types of official immunity: (1) absolute immunity and (2) qualified immunity. In an action for a common law tort against federal officers, the FTCA, 28 U.S.C. §2679(b)(1), provides federal government employees acting within the scope of their employment with absolute immunity. (Similar statutes have been enacted by many states.) Instead, an FTCA action against the government is the "exclusive remedy for [common law] torts committed by government employees in the scope of their employment." (See *United States v. Smith*, 499 U.S. 160, 163 [1991].) However, absolute immunity is not generally available to government officials as a defense in suits alleging constitutional violations, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business or for the actions of presidents, judges, and prosecutors when performing the traditional functions of the



office. (See *Kalina v. Fletcher*, 522 U.S. 118 [1997].) (See Note 1.)

### QUALIFIED IMMUNITY IN THE AREA OF CONSTITUTIONAL TORTS

In the area of constitutional torts, the U.S. Supreme Court has advanced a change relating to qualified immunity. In a series of opinions, the Court has ruled that government officials involved in a wide range of executive decision making and police functions have qualified immunity in actions for damages charging them with violations of civil rights. Under the earlier opinions, these officials could avoid liability for a constitutional violation if they proved (1) that they held a good faith belief that their actions were lawful and (2) that this belief was objectively reasonable given the state of the law at that time. (See *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental hospital officials); *Butz v. Economou*, 438 U.S. 478 (1978) (federal government cabinet level officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officials); *Pierson v. Ray*, 386 U.S. 547 (1967) [police officers].)

These cases had provided a framework for litigating the qualified immunity defense. The defendant was generally believed to bear the burden of pleading and proving at trial that the constitutional right at issue was not clearly established at the time of the incident and that the defendant did not knowingly or maliciously intend to cause a deprivation of constitutional rights or other injury to the plaintiff. (See *Wood v. Strickland*, *supra*, at 321-22; *Procunier v. Navarette*, *supra*.) These standards, of course, were not always easy to apply and resolution of the immunity issue has proven to be quite complex in some situations.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court reconsidered the doctrine of qualified immunity and announced a fundamental change in its scope and application. In an attempt to allow for pretrial adjudication of the qualified immunity issue, the Court appeared to discard the subjective element

of good faith, focusing instead on the state of the law at the time of the alleged constitutional violation. The Court ruled:

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (See *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, *supra*, 420 U.S. at 321.)

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could the official fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his or her conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that the official neither knew nor should have known of the relevant legal standard, the defense

#### ☞ Seminal Case

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court appeared to discard the subjective element of good faith in establishing qualified immunity for government officials.

☞ Qualified immunity is based upon the standard of objective reasonableness of officials' conduct in light of established law.

should be sustained. But again, the defense would turn primarily on objective factors (footnotes omitted).

The primary reason for granting qualified (“good faith”) immunity to government officials is that such immunity allows them to exercise their duties in good faith without fear of having to pay damage awards. As reflected in the *Harlow* reasoning, perfection is not required of government employees; instead, the Court-created standard gives ample room for mistaken judgments. (See *Malley v. Briggs*, 475 U.S. 335, 343 [1986].)

Pursuant to the holding in *Harlow*, a proper analysis of a qualified immunity defense requires a two- or three-prong inquiry. (See *Siegert v. Gilley*, 500 U.S. 226 [1991].) First, it must be determined whether the plaintiff has asserted a violation of a constitutional right at all. Second, the court must determine whether the law allegedly violated was clearly established at the time of the official’s action. Third, the court must evaluate the “objective reasonableness of the official’s conduct as measured by reference to clearly established law.”

The principle announced in *Wood v. Strickland*, *supra*, that defendants could not, as a matter of law, avoid liability where the rights were clearly established, is not diluted by *Harlow*. As the Court stated in *Wood*, at 321-22:

The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student’s constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students’ lives than by the presence of actual malice. . . .

Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . .

This holding was affirmed in *Smith v. Wade*, 461 U.S. 30, 56 (1983), when the Supreme Court found that a jury could assess punitive damages in an action under §1983 if the defendant’s conduct is shown to be instigated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others.

Subsequent to *Harlow*, Supreme Court rulings have established that qualified immunity shields a law enforcement employee from suit for damages if “a reasonable officer would have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.” (See *Anderson v. Creighton*, 483 U.S. 635, 641 [1987].) This entitlement is an immunity from suit rather than a mere defense to liability and should be resolved at the earliest possible stage in litigation. (See *Mitchell v. Forsyth*, 472 U.S. 511, 526 [1985]; *Harlow v. Fitzgerald*, 457 U.S. 800, 818 [1982].)

As an example, in *Hunter v. Bryant*, 502 U.S. 224 (1991), two Secret Service agents were sued for their actions relating to their arrest of a respondent. The circumstances surrounding that arrest were initiated when James Bryant delivered two photocopies of a handwritten letter to two administrative offices at the University of Southern California. The rambling letter referred to a plot to assassinate President Reagan by “Mr. Image,” who was described as “Communist white men within the ‘National Council of Churches.’” Campus police notified the Secret Service, and Agents Hunter and Jordan were assigned to the case. The agents found a university employee who identified Bryant as the man who had delivered the letter to the university, and Agents Hunter and Jordan visited Bryant’s home. Bryant gave Agent Hunter permission to search the apartment where Agent Hunter found the original letter. While the search was underway, Agent Jordan questioned Bryant, who refused to answer questions about his feelings toward President Reagan or to state whether he intended to harm the President. The agents arrested Bryant for making threats against the President, and he was arraigned and held without bond for about two weeks. The criminal complaint was dismissed on the government’s motion.



 *The Court, not the jury, is responsible for the initial inquiry regarding qualified immunity.*

 *The entitlement is immunity from suit, which is to be resolved at the earliest possible stage of litigation.*



☰ The Court presumes that government officials are aware of the law in effect at the time of the alleged violations.

Bryant sued Agents Hunter and Jordan, alleging *inter alia* that the agents had violated his rights under the Fourth Amendment by making an arrest without probable cause and without a warrant. The District Court denied the agents' motion for summary judgment on qualified immunity grounds, but the Ninth Circuit panel held that the agents were entitled to qualified immunity for arresting Bryant without a warrant because the warrant requirement was not clearly established for situations in which the arrestee had consented to the agents' entry into a residence. However, the majority of the Ninth Circuit panel concluded that the agents had failed to sustain the burden of establishing qualified immunity because their interpretation of Bryant's letter—their reason for arresting him—was not the most reasonable reading of the letter. The Supreme Court overruled the "most reasonable" requirement of the Ninth Circuit's decision by holding that qualified immunity would be available if "a reasonable officer would have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed," rather than requiring the most reasonable reading of the letter.

The above holding does not involve criminal history repositories; however, it does reflect the legal reasoning leading to a determination of qualified immunity. The courts look to the law in effect at the time of the alleged constitutional violation, presuming government officials are aware of that law.

## CRIMINAL HISTORY RECORDS

Agencies that maintain criminal history record information are required to have procedures that ensure the maintenance of current information, and government officials maintaining such records are presumed to know of this requirement. (See 42 U.S.C. §3789[g].) Title 28, Code of Federal Regulations, Section 20.21 provides, in pertinent part:

1. Complete records should be maintained at a central State repository. To be complete, records maintained at a central State repository which

contains information that an individual has been arrested, and which is available for dissemination, must contain information of any dispositions occurring within the State within 90 days after the disposition has occurred. The above shall apply to all arrests occurring subsequent to the effective date of these regulations. Procedures shall be established for criminal justice agencies to query the central repository prior to dissemination of any criminal history record information unless it can be assured that the most up-to-date disposition data is being used. Inquiries of a central State repository shall be made prior to any dissemination except in those cases where time is of the essence and the repository is technically incapable of responding within the necessary time period.

2. To be accurate means that no record containing criminal history record information shall contain erroneous information. To accomplish this end, criminal justice agencies shall institute a process of data collection, entry, storage, and systematic audit that will minimize the possibility of recording and storing inaccurate information and upon finding inaccurate information of a material nature, shall notify all criminal justice agencies known to have received such information.

The case of *Maney v. Ratcliff*, 399 F. Supp. 760 (1975), discusses the issue of incomplete records. The plaintiff in *Maney* brought the instant action against certain Louisiana law enforcement officials based on a cause of action arising under the Federal Civil Rights Law (42 U.S.C. §1983) challenging the manner in which the defendants had used the National Crime Information Center (NCIC) System to locate the plaintiff. The plaintiff was arrested on three separate occasions on the basis of an NCIC entry indicating that he was wanted by authorities on a felony narcotics charge. The plaintiff was not extradited after the first arrest, and the NCIC entry was never cleared. The Court stated, "Although the decision of whether

to extradite is within the 'quasi-judicial' function of a state prosecutor, conduct of the Louisiana District Attorney's Office in leaving the outstanding arrest warrant entry on the FBI NCIC computer system, after having decided not to extradite the plaintiff, was not within the prosecutorial function and was outside the scope of prosecutorial immunity in a civil rights suit." Thus, the immunity which a prosecutor would normally have as a government official did not extend to an act beyond the prosecutor's scope of authority, i.e., allowing the entry to remain on file. Additionally, an issue in the *Maney* case was alleged violation of the plaintiff's Fourth Amendment rights. As indicated previously, the suit was being maintained under the civil rights statute, and in order to maintain this type of litigation, a case must allege a deprivation of a right, privilege, or immunity which is secured by the Constitution. This alleged deprivation must be caused by a person acting under color of state law. The *Maney* Court found the complaint sufficient to state a cause of action for violation of the plaintiff's Fourth Amendment rights. The Court held that (under the facts as presented) although the failure to take the entry out of the NCIC computer after the first arrest did not constitute an unreasonable search and seizure, the failure to delete after the second arrest "evinced a reckless and careless disregard for the plaintiff's constitutional rights."

A similar (and current) standard was announced by the Supreme Court relating to an Eighth Amendment issue. In *Farmer v. Brennan*, 511 U.S. 825 (1994), a transsexual inmate sued prison officials, claiming that the officials showed "deliberate indifference" by placing him in the general prison population, thereby failing to keep him from harm allegedly inflicted by other inmates.

Rather than using an objective test to determine culpability, the Court held that "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Consequently, if the prison officials either knew (or must have known) of a substantial risk to the prisoner, and acted with "deliberate indifference," liability could attach when the prisoner was exposed to a sufficiently

substantial risk of serious damage to his future health.

Similarly, a custodian of criminal history record information failing to remove information from the Wanted Person files after being notified that the person would not be extradited may be found to be acting with "deliberate indifference" and, therefore, be liable for damages.

### **POLICE OFFICERS AND THE "GOOD FAITH" DEFENSE**

There are a number of situations under which a police officer who has allegedly violated someone's constitutional rights will assert a good faith defense. Easiest to analyze is the one in which an officer acts pursuant to statute reasonably believed to be valid but later declared to be unconstitutional. Given the Supreme Court's ruling in *Harlow v. Fitzgerald*, the officer's strongest case is alleging reliance upon the statute as the law in effect at the time of the action.

Similarly, where the officer has in good faith secured or executed a search warrant, or has followed other court orders, the officer will normally be protected even if the warrant or order is invalid. (See *Smith v. Martin*, 542 F.2d 688 (6th Cir. 1976); *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577 [1st Cir. 1976].) However, in *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982), the court ruled that a prosecutor can be held liable for a search conducted pursuant to the issuance of a warrant if there was fraud in the procurement of the warrant or if the prosecutor should have known that the warrant was illegal or should not have been issued. (See *Kalina v. Fletcher*, 522 U.S. 118 [1997].)

Additionally, in *Malley v. Briggs*, 475 U.S. 335 (1986), the U.S. Supreme Court concluded that a law enforcement officer is entitled only to qualified, not absolute, immunity from liability in a civil rights action based on a claim that the officer caused an unconstitutional arrest by obtaining a warrant on the basis of a complaint and affidavit that were insufficient to establish probable cause; qualified immunity is not established simply by virtue of the fact that the officer believed the allegations in the affidavit and that a judicial officer found the affidavit suffi-



 *Immunity does not extend to an act by an official that is beyond the official's scope of authority.*

 *Failure to remove a record from the NCIC Wanted Person File may be an act of "deliberate indifference."*



cient. The Court stated, "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on the issue, immunity should be recognized." The Court further declared that, as a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law.

As to constitutional issues that are raised with reference to maintenance of inaccurate or incomplete records, one needs to review the case of *United States v. Mackey*, 387 Fed. Supp. 1121 (1975). In this case, the plaintiff was hitchhiking when he was approached and stopped by two police officers who made a routine NCIC check. The officers were advised that there was an outstanding fugitive warrant on the subject, and they arrested him, which they would not have done otherwise. While processing the plaintiff, an unregistered shotgun was found in a dufflebag, resulting in an indictment on a federal firearms charge. Subsequently, it was determined that the fugitive warrant actually had been satisfied five months earlier, but had not been removed from the NCIC System. The plaintiff made a motion to suppress the shotgun as evidence on the basis that his arrest, which was made pursuant to an incorrect NCIC arrest warrant entry, was illegal and constituted a denial of due process under the Federal Constitution. The Court held the evidence inadmissible and that the plaintiff's arrest was equivalent to an arbitrary arrest and a denial of due process. The Court stated, "A computer inaccuracy of this nature and duration, even if unintended, amounted to a capricious disregard for the rights of the defendant as a citizen of the United States. The evidence compels a finding that the government's action was equivalent to an arbitrary arrest and that an arrest on this basis deprived the defendant of his liberty without due process of law. Once the warrant was satisfied, five months before the defendant's arrest, there no longer existed any basis for his detention and the government may not now profit by its own lack of responsibility." It might be pointed

out that in the *Mackey* case, the decision was made by the Court without attempting to determine the actual responsibility for the NCIC error but that this stale information did constitute an infringement of the plaintiff's rights and that this infringement was "perpetrated primarily with the assistance of a mindless automation controlled by the government." It should be noted that in the *Mackey* case, the judge mistakenly referred to an NCIC inquiry, when in fact, the inquiry and record were in the California system. However, this does not alter the basic ruling of the Court as it applies to possible liability because of state records in a computerized system.

It should also be noted that criminal history records are often incomplete, and that the available information may be stale. The NCIC 2000 System generally provides a caveat with its responses, stating that the NCIC information should not be the sole basis for searching, detention, or the initiation of an arrest. Moreover, to protect against stale information, some files require periodic validation. As an example, the Wanted Person file requires that each person file record that has not been validated within the past 90 days, accompanied with a Date of Validate Request older than 30 days, will be automatically retired.

Having examined areas of liability with respect to immunity, followed by constitutional torts that have been the subject of challenges involving computerized information, we now move to a third area, a criminal justice agency's obligation to maintain accurate information.

## IMPLICATIONS OF INACCURATE INFORMATION

Of significant interest in this area is the case of *Tarleton v. Saxbe*, 507 F.2d 1116 (1974). In this case, the plaintiff's FBI criminal record contained a number of arrests without dispositions and the plaintiff wanted these records expunged from his file. His action was dismissed in the lower court and he appealed that dismissal. On appeal, the Court considered the issue of "what type of duty does the FBI have in safeguarding the accuracy of information which it has in its criminal files which can subsequently be dissemi-

As a matter of policy, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

### Seminal Case

In *Tarleton v. Sanbe*, 507 F.2d 1116 (1974), the Court considered the degree of responsibility of the FBI in safeguarding criminal history information. The Court said the FBI has "some duty" in this regard.

nated.” The Court said that the FBI has “some duty” to ensure that the records which it maintains and disseminates are reasonably accurate.

It also stated that the “primary duty” for accuracy of a record is placed on the local agency making the arrest or conviction rather than the FBI. The Court did reject the argument offered by the government of the “passive recipient” theory in that the FBI is a mere repository for information collected and recorded by local and state agencies and, therefore, is not responsible for any inaccuracies in that information. It should be pointed out that the *Tarlton* case specifically reviewed the duty of the FBI and not specifically the type of duty which would be imposed on a criminal justice agency for ensuring the accuracy of its records. The Court also noted that individuals may take affirmative action to obtain and review their Criminal History Record Information for correction. (See 28 C.F.R. §16.30-34).

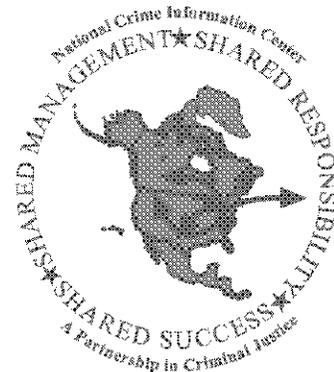
Subsequent to *Tarlton*, the case of *Testa v. Winquist*, 451 F.Supp. 388 (1978) tends to shed some light on negligent record keeping as forming a basis for personal liability of local officials. (Although the decision is somewhat complex, it is especially relevant because it involves damage claims based on alleged deprivations of constitutional rights as well as on common law tort theories. It also involves issues of primary as well as contributory negligence resulting from record keeping practices.) In *Testa*, the plaintiffs were detained overnight by East Providence, Rhode Island, police officers and charged with possession of a stolen car. The police officers based their action on information supplied by an NCIC check, as confirmed by telephone by a Warwick, Rhode Island, police officer, which reflected that the car the plaintiffs were driving was stolen. In fact, the car had previously been stolen in Warwick but had been recovered and subsequently sold to the plaintiffs.

The plaintiffs brought a civil damage action against the East Providence police officers for deprivation of constitutional rights (false imprisonment), pursuant to 42 U.S.C. §1983, and for state tort claims, including false imprisonment, libel and slander, trespass, and malicious destruction of property. The police officers joined the

regional administrator of NCIC and the Warwick police officer as third party defendants on the grounds that these individuals had negligently failed to keep current and accurate records and had supplied erroneous information on which the police officers had relied to their detriment. Therefore, if the police officers were found liable to the plaintiffs, the third party defendants should bear or share this liability under state theories of contribution and indemnity.

The third party defendants moved to dismiss the claim against them, and the court denied the motion. It concluded that under the facts alleged, the defendant police officers could be found to be liable to the plaintiffs and the third party defendants because of their negligent record keeping practices. In discussing the liability of the defendant police officers, the court said that although the officers were performing discretionary duties and were entitled to a defense of qualified immunity, this immunity could be overcome by showing that they had unreasonably relied on the NCIC computer check and the Warwick police officer’s confirmation as the sole basis for probable cause to detain the plaintiffs.

Citing *Bryan v. Jones*, 530 F.2d 1210 (1976), the court said that, in §1983 suits for false arrest and imprisonment, the defense of qualified immunity has a reasonableness component. The police officers must show not only that their acts were nonmalicious, but also that they acted reasonably under the circumstances. If they negligently relied solely on the computer check and telephone confirmation without making further pertinent inquiries, they could be held liable. The court also ruled that the NCIC administrator and the Warwick police officer could be held jointly or severally liable for breach of a duty owed to the plaintiffs to maintain accurate and current record systems. Since it is commonplace for arresting officers to rely heavily on computer checks and police department record systems, the persons who maintain these systems have a duty to establish reasonable administrative mechanisms designed to minimize the risk of inaccuracy by requiring that the records be constantly updated. Where breach of this duty results in an illegal arrest, the



 *The local agency making the arrest has the “primary duty” to ensure the accuracy of the record.*

 *The qualified immunity defense could be overcome by showing that officers had “unreasonably relied on” the NCIC computer check and the originating agency’s confirmation.*



arrestee may have a cause of action for false arrest actionable under both state and federal law. (The current standard, per *Harlow*, is whether a reasonable police officer could have relied upon the above-referenced information to arrest and detain the defendants.)

The court, in discussing the various duties that should have been imposed on the administrator of the information system, indicated that a duty with respect to the maintenance of individual criminal history record information has been established by statute, 42 U.S.C. §3771(b). This subsection, amended in 1984, now located at 42 U.S.C. §3789g(b), deals with criminal history information disposition and arrest data and states, in pertinent part:

All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this chapter, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

This section, at subsection (d), also imposes a sanction which provides that “any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed \$10,000, in addition to any other penalty imposed by law.”

It appears from the cases that have been cited, the courts have now specifically addressed the issue as to whether a criminal justice information system administrator can be held liable for the negligent mishandling of a criminal justice record. We can see that, in relation to 42 U.S.C. §3789g, there is a standard which is prescribed for record management and perhaps the establishment of maintenance standards for these records. It can be said that criminal justice agencies specifically have a duty to maintain records that are accurate, complete, and up-to-date. To ensure that legally sufficient record management is present, each administrator should make certain that there are security standards, audit standards, and personnel training standards which would allow accurate and up-to-date records.

In addition to the liability that may be imposed on an NCIC Control Terminal Officer for maintaining inaccurate or stale information in the System, the question of the liability of an agency which totally fails to utilize the System, and this failure thereby results in harm to a third party, has been posed. This type of “failure to act” could be termed as nonfeasance, which is defined as the “failure to act when a duty to act existed.” (*Black’s Law Dictionary* [7th ed. 1999])

#### IMPLICATIONS OF FAILURE TO USE CRIMINAL RECORD SYSTEMS

In *Bryan County v. Brown*, 520 U.S. 397 (1997), the plaintiff brought both a 42 U.S.C. §1983 and a state action against the county and reserve deputy, in which she sought to recover for injuries allegedly sustained when she was forcibly removed from her automobile. She alleged the county was liable for her injuries based on the sheriff’s hiring and training decisions. The sheriff admitted that he had not closely examined either the driving record or NCIC report prior to hiring the deputy. (The deputy had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness.) The Supreme Court stated, “Where a claim of municipal liability rests on a single decision, not itself representing a violation

 To ensure that legally sufficient record management is present, administrators should make sure that security standards, audit standards, and personnel training standards are in place.

of federal law and not directing such a violation, the danger the municipality will be held liable without fault is high.” The Court went on to find that “unless [the sheriff] would necessarily have reached [the conclusion that the deputy’s] use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore’s inadequate scrutiny of Burns’ record cannot constitute ‘deliberate indifference’ to the respondent’s federally protected right to be free from the use of excessive force.” Accordingly, the facts reflected that “Sheriff Moore’s isolated decision to hire [the deputy] without adequate screening [did not constitute ‘deliberate indifference’], because the respondent has not demonstrated that his decision reflected a conscious disregard for a high risk the [deputy] would use excessive force in violation of the respondent’s federally protected right.” (See Note 2.)

When looking at the liability of law enforcement officers with respect to their specific failure to act, one must consider the “neglect of duty” issue. The general rule is that police officers owe protection to the public and not specifically to any particular individual. In most law enforcement agencies, there are specific guidelines that establish and outline the nature and responsibilities of the offices or officers. To be considered in violation of these duties or willfully neglecting one’s duty, officers must be aware of the nature and responsibilities of their offices. Once the officers are placed on notice of their duties, they can possibly be held liable for intentionally omitting, neglecting, or refusing to carry out these duties. For example, if there are agency rules which require that fugitive information must be entered into a state or national information system and the officers fail to enter the subject data, and, thereafter, harm occurs to a third party, the officers may be held liable for their negligent conduct.

As to specific cases involving the failure to enter data into a computer information system and nonfeasance on the part of a police agency, no specific cases were noted. However, in dealing with the “neglect of duty” issue, a widely recognized duty of law enforcement officers is the requirement to avoid negligence in their work. Society has repeatedly imposed a duty upon individuals to conduct their

affairs in a manner that would avoid subjecting others to unreasonable risk of harm. This standard, of course, applies to law enforcement officers. If the officers’ unreasonable conduct creates a danger, they will be held accountable to others injured as a proximate result of their conduct when the injured parties have not contributed to their own harm. These general principles are well known concepts in the law of negligence. The tort of negligence is defined as “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights.” (See *Black’s Law Dictionary* 1056 [7th ed. 1999].) Consequently, these principles could be interpreted that the actions taken by a police officer in investigations and/or the apprehension of criminals must not create an unreasonable risk of injury or death to innocent persons. This creation of risk is not in and of itself negligence; however, the law does require reasonable assessments of the likelihood of harm and will regard as negligent any act that creates a risk of such magnitude as to outweigh the utility of the act itself. (See Restatement [Second] of Torts §291.)

### IMPLICATIONS OF NEGLIGENT BREACH OF DUTY

Under the civil courts system, if the police officers owe no specific duty to the complainant, they will not be penalized even if the plaintiff in fact suffers some form of injury. However, officers may be liable when it is shown that (1) they were obliged to do or refrain from doing something and (2) the plaintiff was damaged because of the officers’ failure to comply with the particular obligation or duty. Additionally, supervisors have a duty to train officers they employ. Administrators have been held liable where there has been a negligent breach of this duty which approximately caused an injury to the plaintiff. The negligent failure to train involves a breach of executive duty and imposes the same liability as if the administrators had participated in the wrongful



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☞ *The law will regard as negligent any act of a law enforcement officer that creates a risk of harm to innocent persons that outweighs the utility of the act itself.*



action. An example of this would be when training officers fail to properly and diligently train personnel in the proper use of the NCIC System, a skill necessary to allow personnel to carry out their required duties. Generally, police administrators are not vicariously liable for the acts of subordinate officers unless they participate in, direct, authorize, or ratify the misconduct of the officers. Such liability generally involves some affirmative act (or failure to act) by a supervisor.

A parallel could be drawn by looking at the case of *Roberts v. Williams*, 302 F.Supp. 972 (1969), where a county farm superintendent was held liable for the grossly negligent shooting of a county prisoner by an armed trustee. The trustee was furnished a loaded shotgun without receiving training. The court held that “since the shooting in this case occurred under the most needless and avoidable circumstances, it is patent that Williams [the trustee] was thoroughly ignorant—indeed incompetent—in the handling of a firearm.” The court went on to say that it was the superintendent’s “duty to exercise care that Williams knew how to use the gun and could handle it safely before giving him possession of it.” The negligence of the superintendent in this case “combined with the negligence of Williams in mishandling the gun, produced a classic case of causation which proximately resulted in the shooting of and personal injuries to the plaintiff. It is no answer to say . . . that Williams alone is responsible for the consequences of this negligence, but that responsibility must be shared by the superintendent because of his concurrent, tortious conduct.”

Additionally, liability against a municipality may be found where the city’s failure to train reflects a policy of deliberate indifference to the constitutional rights of its inhabitants. (See *Canton v. Ohio*, 489 U.S. 378, 392 [1989].) However, a single incidence of “inadequate training” was found to be insufficient to establish a ‘policy’ in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

As reflected in the case of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that local governing bodies are “persons” subject to damages

and liability under 42 U.S.C. §1983, for violations of that act caused by its officers. The Court noted, however, that municipal liability could not be premised on the mere fact that the municipality employed the offending official. Instead, the Court held that municipal liability could only be imposed for injuries inflicted pursuant to government “policy or custom.” In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme Court clarified *Monell* and indicated that where municipal liability is alleged and based on a policy of inadequate training, there must be a causal connection between the policy and the constitutional deprivation; that is, there must at least be an affirmative link between the training inadequacies alleged and the particular constitutional violation at issue. These two cases, as augmented by *Canton v. Ohio*, are illustrative of the point that liability for inadequate training resulting in mishandling criminal and other records is a possibility.

The case of *Terry Dean Rogan v. City of Los Angeles*, 668 F. Supp. 1384 (1987), provides specific notice to those individuals responsible for maintaining criminal records. During 1981, using false identification in the name of Terry Dean Rogan, Bernard McKandes, an Alabama state prison escapee, was arrested and later released by the Los Angeles Police Department (LAPD) on suspicion of murder. In April 1982, LAPD Officer Richard Crotsley obtained a warrant in Rogan’s name, charging him with two robbery-murders. The warrant contained an alias, but none of McKandes’ known physical characteristics. In May of 1982, LAPD Officer Lester Slack entered the warrant information into the NCIC System without McKandes’ known physical characteristics. In July of 1982, Slack reentered the record without modification.

Sometime around November 1982, Rogan was arrested in Michigan for resisting arrest during a trespassing dispute and an NCIC check revealed the outstanding California arrest warrant. After comparing physical characteristics, officers determined that Rogan was not the same individual named in the warrant, and the record was automatically removed from the NCIC System. However, later that month, Crotsley reentered the record without modification.

18 A municipality may be found liable for failure to train if the court finds a policy of deliberate indifference to the constitutional rights of its inhabitants.

19 Local governing bodies are “persons” subject to damages and liabilities.

During 1983 and 1984, Rogan was arrested four times based on the warrant information contained in the NCIC System. Also, in July of 1983, Crotsley again reactivated the record in Rogan's name without modification. Finally, in January of 1984, after McKandes was returned to an Alabama prison, Crotsley removed the NCIC record in Rogan's name.

Rogan, in U.S. District Court, sued the City of Los Angeles and both LAPD officers under 42 U.S.C. §1983 for damages and other relief, alleging a deprivation of his constitutional rights because of the mistaken arrests. On cross motions for summary judgment, the Court found the City of Los Angeles to be liable, but did not find liability on the part of the officers. The Court held, *inter alia*, that:

- 1) Inasmuch as descriptive data were available but not entered, the arrest warrant violated the particular description requirement of the Fourth Amendment, and this requirement was extended to NCIC records.
- 2) The maintenance and multiple reentry of the NCIC record without amendment caused Rogan to be arrested and detained without due process of law.
- 3) The officers had qualified immunity because their conduct and omissions did not violate Rogan's "clearly established constitutional rights of which a reasonable person would have known." However, "the City's failure to (i) adopt any policy, (ii) train, and (iii) supervise its police officers regarding: (a) the Fourth Amendment requirement that the arrest warrant and the NCIC record created pursuant thereto describe the suspect with particularity; and (b) the procedures for and the necessity of amending the NCIC record when additional or more accurate descriptive information became available were both grossly negligent and systemic in nature."

This decision represents a warning that the courts will not tolerate incomplete NCIC records or the failure to train or

provide adequate training in the proper use of the NCIC System. If that occurs, liability will be assessed at the appropriate and responsible levels of government.

## SUMMARY

In summation, with reference to the total nonuse of criminal justice information systems, there is no case law authority which specifically states that a system of this nature must be used by law enforcement agencies. However, this topic did not encompass all state statutory authority that might require utilization. Regardless, it can be inferred that (1) negligent nonuse by a law enforcement officer when required by policy to use the system or (2) inadequate training by an administrator of an officer who must use the system pursuant to policy, may result in a finding by a court that breach of a specific duty has occurred and the persons (and/or agencies) involved are liable for damages when a constitutional tort is committed.

It should be pointed out that although the risk of personal liability may be small, the potential for liability does exist. Therefore, it is important for criminal justice officials to understand the theories and boundaries of liability for record mishandling and to monitor court decisions that affect the scope of personal exposure of criminal record personnel. Additionally, although personal liability may not be present due to qualified immunity, the "agency" may be liable for constitutional violations. If so, employees may be administratively disciplined for, among other things, failure to train and inadequate hiring practices.

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Note 1: Suits alleging constitutional violations are often referred to as "Bivens" actions when taken against federal officials and 42 U.S.C. §1983 actions when filed against state officials.

Note 2: The jury found that the deputy did not have probable cause for arrest; accordingly, qualified immunity was not available and he was held personally liable for the plaintiff's injuries. The Supreme Court did not overturn this portion of the finding. Additionally, the Court did not rule out the possibility that one egregious fact could result in a finding of liability. For example, officials responsible for hiring workers with child-care duties should be especially careful in ensuring that a pedophile (historically known for a high recidivism rate) is not summarily placed in situations where children may be in harm's way.



*The courts will not tolerate incomplete NCIC records or failure to train in the proper use of the NCIC System.*