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January 2011

When Individuals Seek Death at the Hands of the Police: Analyzing the Legal and Policy Implications of Suicide-by-Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects. Golden Gate University Law Review (forthcoming 2011).

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**When Individuals Seek Death at the Hands of the Police: Analyzing the Legal and Policy
Implications of Suicide-by-Cop and Why Police Officers Should Use Nonlethal Force in
Dealing with Suicidal Suspects**

Rahi Azizi*

I. INTRODUCTION

Occasionally, Joel Schumacher's 1993 film *Falling Down*, starring Michael Douglas and Robert Duvall, serves as a topic of discussion in academic papers.¹ In *Falling Down*, Douglas plays Bill Foster, a psychotic engineer fired from his position at a missile defense company. The event triggering the storyline is a traffic jam on a scorching day in Los Angeles. Ostracized and delirious from heat, Foster leaves his car in the middle of the freeway and journeys by foot to Venice Beach, where he hopes to reunite with his estranged wife and daughter. En route, he engages in violent confrontations with several individuals, including a Korean storeowner, three Mexican gang members, and a militant skinhead.

Duvall's character, a homicide detective, tracks him down and corners him at a pier in Venice. Even though he discarded his gun earlier that day, Foster suggests that they have a shoot out. He reaches into his pocket and pretends to retrieve a weapon. The detective instinctively shoots him. Before he falls over the pier, Foster pulls out a squirt gun he had obtained earlier from his daughter's room. The audience realizes that Foster wished to die. By goading the officer

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¹ See Rebecca Johnson and Ruth Buchanan, *Getting the Insider's Story out: What Popular Film Can Tell Us about Legal Method's Dirty Secrets*, 20 WINDSOR Y.B. ACCESS TO JUST. 87, 101-102 (2001) (discussing the film *Falling Down* as an example of the perceptual powers of cinema); see also Christine Alice Corcos, "Who Ya Gonna C(s)ite?" *Ghostbusters and the Environmental Regulation Debate*, 13 J. LAND USE & ENVTL. L. 231, n.180 (1997) (discussing *Falling Down* as an example of a movie with a frustrated protagonist who takes the law into his own hands).

into killing him, his wife can now redeem his life insurance policy and raise their daughter securely.

Foster's death constitutes a recognized category of police killings: suicide-by-cop.² The term suicide-by-cop (or police-assisted suicide³) is controversial and ill-defined. The psychological and narratological implications of police-assisted suicide have been explored to some extent. Suicidal individuals sometimes enlist the help of others in killing themselves as a way to overcome the moral prohibition against committing suicide.⁴ Moreover, a psychodynamic relationship exists between suicidal and homicidal tendencies.⁵ Also, as exemplified in *Falling Down*, directors and writers sometimes use suicide-by-cop as a narrative device in portraying the demise of a protagonist who is either a sympathetic vigilante or an antihero.⁶ By contrast, our legal literature has not thoroughly examined how classifying a police killing as suicide-by-cop might shape legal complaints against law enforcement agencies.⁷

The U.S. Supreme Court has held that police officers can only use deadly force against a suspect who employs deadly force against an officer or a bystander.⁸ The standard for determining whether an officer's use of force is excessive is one of "objective reasonableness": was it objectively reasonable under the circumstances for the officer to believe that the suspect meant to kill or seriously harm others?⁹ Helpful in making this determination is evidence that

² Alan Feuer, *Drawing a Bead on a Baffling Endgame: Suicide by Cop*, N.Y. TIMES, June 21, 1998, at § 4.

³ See Timothy P. Flynn and Robert J. Homant, *Suicide by Police in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555 (2000) (stating that the term suicide-by-cop is interchangeable with police assisted suicide).

⁴ Mark Lindsay & David Lester, SUICIDE BY COP: COMMITTING SUICIDE BY PROVOKING POLICE TO SHOOT YOU 9 (John D. Morgan ed., Baywood Publishing Company, Inc.) (2004).

⁵ James Garbarino, *Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence*, 8 VA. J. SOC. POL'Y & L. 129, 137 (2000).

⁶ For example, in S.E. Hinton's coming-of-age novel about 1960s greasers, *The Outsiders*, one of the main characters of the book commits suicide-by-cop. S.E. Hinton, *The Outsiders* (Viking Press, Dell Publishing) (1967).

⁷ The exception being Flynn and Homant's work. See *supra* note 3.

⁸ *Tennessee v. Garner*, 471 U.S. 1, 8-12 (1985).

⁹ *Graham v. Connor*, 490 U.S. 386, 395-398 (1989).

that the suspect threatened to harm the officer or civilians¹⁰ Sometimes the police realize after the shooting that despite his actions the suspect did not intend to harm anyone. The suspect may have threatened to shoot a bystander to facilitate the commission of a robbery, or to escape the scene of a nonviolent crime. Yet the suspect's intent does not factor into a determination of whether the officer's use of lethal force was lawful.¹¹ As long as it was objectively reasonable for the officer to conclude—precisely at the moment he or she fired the shot—that the suspect was about to use lethal force, the officer's use of deadly force is excusable.¹²

This article has two purposes: to determine 1) whether suicide-by-cop can form the basis for a lawsuit under Section 1983 of the 1871 Civil Rights Act¹³ (the main federal statute through which private litigants can bring civil rights suits against police departments), and 2) the policy implications of recognizing suicide-by-cop as a unique category of police killings. The article will also determine whether a suicide-by-cop killing inclines courts to apply something other than the “objectively reasonable” standard in adjudicating a Section 1983 claim.¹⁴ Furthermore, it will try to determine whether evidence of the suspect's suicidal intentions can either improve or mitigate the plaintiff's chances of prevailing in court.¹⁵

Additionally, the article makes two principal arguments. First, while many courts bar the admission of “pre-seizure” evidence in Section 1983 suits (evidence that came into being before

¹⁰ However, an officer's intent does not necessarily negate the reasonableness of her actions. *See id.* at 397.

¹¹ *See Graham*, 490 U.S. at 396 (holding that the “reasonableness” of an officer's actions must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight).

¹² *See Garner*, 471 U.S. at 21 (holding that an officer must reasonably believe that a suspect poses a deadly threat before he can deploy lethal force against the suspect).

¹³ 42 U.S.C. § 1983 (1994).

¹⁴ *See Graham*, 490 U.S. at 386-88 (holding that the appropriate standard for deciding Section 1983 suits is whether an objectively reasonable officer would have used that degree of force under the circumstances).

¹⁵ In *Garner*, the Supreme Court held that the trier of fact must determine whether an officer's use of force was objectively reasonable according to the totality of circumstances at the time of the shooting. 471 U.S. at 8-11. The question this article confronts is whether a suspect's suicidal motives or actions constitute a circumstance that the trier of fact may consider.

the suspect's interaction with officers, like a suicide note¹⁶), some courts have shown a willingness to admit evidence that the suspect was attempting suicide.¹⁷ Therefore, police departments face a tangible threat of litigation stemming from suicide-by-cop incidents.¹⁸ At least one federal appellate case, *Palmquist v. Selvik*, suggests that evidence of suicide-by-cop may be pertinent in determining whether police tactics are appropriate under Section 1983.¹⁹ Consequently, because of the risk of litigation, police departments should train officers to better ascertain when a suspect may be attempting suicide-by-cop.²⁰ Law enforcement agencies must also undertake studies in order to develop the proper criteria for identifying and gauging the frequency of suicide-by-cop.²¹

Second, suicide-by-cop poses a significant sociological problem.²² Victims of suicide-by-cop share certain traits: they are usually poor, mentally ill, and addicted to alcohol or narcotics.²³ Law enforcement agencies must educate officers on the underlying circumstances that exacerbate suicide-by-cop.²⁴ Moreover, suicide-by-cop incidents may worsen police-community relations because residents will think that the police shooting was unnecessary, unjustified, or even racially motivated.²⁵ Therefore, we should also encourage police officers to employ non-

¹⁶ See, e.g., *Carter v. Buscher*, 973 F.2d 1328, 1332 (holding that “pre-seizure conduct is not subject to Fourth Amendment Scrutiny”).

¹⁷ See e.g., *Palmquist v. Selvik*, 111 F.3d 1332, 1342 (7th Cir. 1997) (holding that evidence that a suspect intends to commit suicide-by-police is “directly relevant to his life expectancy” and therefore likely admissible). This article will closely examine the *Palmquist* opinion in later sections.

¹⁸ Flynn and Homant, *supra* note 3, at 558.

¹⁹ *Palmquist*, 111 F.3d at 1340-42.

²⁰ Many police departments provide some general training on suicide intervention. See Flynn and Homant, *supra* note 3, at 574.

²¹ Anthony J. Pinizzotto, *Suicide by Cop: Defining a Devastating Dilemma*, 74 THE FBI LAW ENFORCEMENT BULLETIN 2, 8 (2005).

²² See *id.* (characterizing suicide-by-cop incidents as “painful and damaging experiences for surviving families, the communities, and all law enforcement professionals”).

²³ Lindsay and Lester, *supra* note 4, at 87.

²⁴ Flynn and Homant have pointed out that until fairly recently, very few police departments dealt specifically with “suicide-by-police” scenarios. *Supra* note 3, at 574.

²⁵ Lindsay and Lester, *supra* note 4, at 99.

lethal force in defusing an obvious attempt at suicide-by-cop, where the risk of harm to others is minimal.²⁶

II. THE HISTORY AND PREVELANCE OF SUICIDE-BY-COP

A. *The Origins of the Term Suicide-by-Cop*

Forensic medical journals coined the term “suicide-by-cop” (alternately, “police-assisted suicide” or “suicide-by-police”).²⁷ Prior to the 1990s, the term was not widely known. Today, law enforcement agencies and media commentators frequently use the term.²⁸ However, there is no commonly accepted definition of suicide-by-cop, which complicates its consideration in Section 1983 lawsuits: after all, how can courts assess the legal consequences of police-assisted suicide if there is no uniform way of classifying incidents as such?²⁹

Some consider the classification a misnomer.³⁰ One article claims that suicide-by-cop is “far more often a post hoc justification of sloppy police work than a valid explanation of why and how someone died.”³¹ Another article characterizes it as a “catchy descriptor for a large number of cases in which officers put themselves unnecessarily into harm’s way” and must “shoot their way out.”³² From this perspective, the classification tends to insulate police officers from blame even where their actions were unreasonable.³³ The word “suicide” suggests that the

²⁶ *Id.* at 111.

²⁷ Flynn and Homant, *supra* note 4, at 556.

²⁸ Pinizzotto, *supra* note 21, at 9.

²⁹ *See id.* (stating that a “clear and accepted definition” of suicide-by-cop “has yet to surface”).

³⁰ *See* James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. AM. ACAD. PSYCHIATRY L. 345, 346 (2000) (arguing that suicide-by-cop is an inadequate explanation of why and how someone dies).

³¹ *Id.*

³² Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force*, 34 COLUM. HUM. RTS. L. REV. 261, 297 (2003).

³³ *See id.* at 298 (suggesting that because plaintiffs in police misconduct cases often challenge the way in which officers were trained, police training on suicidal suspects may be relevant to a plaintiff’s claim).

suspect was to blame for his own death; the officer was merely a reticent instrument in effectuating the suspect's suicidal desires.³⁴ One writer identifies it as an attempt to shift agency "from the police to the victim."³⁵

Robert J. Homant and Timothy Flynn offer a clearer definition of police-assisted suicide: a situation in which "a suicidal, distraught and often unbalanced individual comes into contact with law enforcement officers," and through life-threatening actions "causes the police to retaliate in self-defense or defense of others by killing the person."³⁶ The best example emerges when a suspect deliberately points an unloaded gun on a police officer in order to provoke a violent response.³⁷ The suspect's intent becomes probative: if the offender means to kill the officer or threatens him with deadly force in order to escape, labeling the incident as suicide-by-cop proves misleading.³⁸ It portrays a potential murderer as a victim of police brutality. In order to classify incidents as suicide-by-cop, law enforcement agencies must decipher the suspect's intent based on known circumstances.

B. *The Prevalence of Suicide-by-Cop*

Studies exploring the frequency of suicide-by-cop emerged in the early 1990s, after one California newspaper acknowledged that suicide-by cop was a growing problem among lower-income males in San Diego.³⁹ In compiling statistics, law enforcement and social service agencies also usually consider incidents where the suspect genuinely attempts to harm or kill a police officer.⁴⁰ Neglecting to consider these situations might be unfair to police officers, as the

³⁴ Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, n. 134 (2001).

³⁵ *Id.*

³⁶ Flynn and Homant, *supra* note 3, at 555.

³⁷ Some might characterize such a situation as suicide-by-cop even if the gun was loaded. *See e.g.*, Garbarino, *supra* note 5, at 137. What ultimately matters with regard to the classification is the suspect's intent.

³⁸ *Id.*

³⁹ Flynn and Homant, *supra* note 4, at 555.

⁴⁰ *Id.* at 556.

use of lethal force against a suspect attempting suicide is justified where the suspect poses a concomitant danger to either to the officer or public safety.⁴¹

Unfortunately, complete, nationwide statistics on suicide-by-cop are unavailable.⁴² The Uniform Crime Reporting program (UCR) indicates that between 1991 and 2000, 62 offenders who feloniously killed a law enforcement officer committed suicide during the same incident.⁴³ But the study fails to identify the number of suspects who intentionally goaded officers into shooting them during that time period.⁴⁴

One study conducted by the Los Angeles Sheriff's Department indicates that roughly 10% of officer-involved shootings end in suicide-by-cop.⁴⁵ According to this study, 65% of offenders who commit suicide-by-cop convey their suicidal intent to others.⁴⁶ 43% exhibit signs of suicidal behavior and 22% leave suicide notes.⁴⁷ 59% ask the police to kill them and 15% continue to point a gun at the police after being warned they would be shot.⁴⁸ 16% try to harm an officer with a knife.⁴⁹

For the most part, studies on suicide-by-cop are scarce and inadequate.⁵⁰ Without more precise data on the prevalence of suicide-by-cop, law enforcement agencies may not be able to assess the ways in which suicide-by-cop incidents strain relations between police departments and members of the communities they serve.⁵¹

⁴¹ *Id.* at n.116.

⁴² Pinizzotto, *supra* note 21, at 8.

⁴³ *Id.*; *see also* Feuer, *supra* note 2, at § 4.

⁴⁴ Pinizzotto, *supra* note 21, at 8.

⁴⁵ *Id.* The study was based on suicide-by-cop incidents that occurred during a ten-year period, from 1987 to 1997.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Flynn and Homant, *supra* note 4, at 557. The total number of suicide-by-cop incidents during this period was 46.

⁵⁰ Pinizzotto, *supra* note 21, at 8.

⁵¹ *Id.*

III. THE RELATIONSHIP BETWEEN HOMICIDE AND SUICIDE: ASSESSING THE SOCIOECONOMIC AND PSYCHOLOGICAL IMPLICATIONS OF SUICIDE-BY-COP

A. *The Link between Homicide and Suicide*

A relationship exists between self-destructive and homicidal impulses.⁵² For instance, Eric Harris and Dylan Klebold, the teenage perpetrators of the Columbine Massacre, killed themselves shortly after murdering 18 classmates in their high school cafeteria on April 20, 1999.⁵³ Kip Kinkel, a 15-year-old who went on a shooting spree in Springfield, Oregon, screamed “Kill me! Kill me!” after being wrestled to the ground by onlookers.⁵⁴ Often, acts of self-destruction and the destruction of others share similar psychological roots: the sense that life is intolerable, and that death is the only true escape.⁵⁵ Consequently, homicide sometimes functions as a masked suicide attempt, especially where the suspect is certain his actions will trigger a lethal police response.⁵⁶ The suicidal suspect threatening others with violence would rather die than face incarceration.⁵⁷ Thus, he will devise a situation where officers have little choice but to shoot him.⁵⁸

B. *The Factors that Trigger Suicide-by-Cop*

The factors behind suicide-by-cop are the same as the factors behind other forms of suicide: poverty, unemployment, drug addiction, and a history of familial dissension.⁵⁹ For example, in one case a suicidal drug addict assailed a police officer because he was dissatisfied

⁵² Lindsay and Lester, *supra* note 4, at 13.

⁵³ Garbarino, *supra* note 3, at 131.

⁵⁴ *Id.* at 137.

⁵⁵ *Id.*

⁵⁶ *See id.* (stating that “in some cases, the act of killing others is intended as a suicide attempt”).

⁵⁷ *Id.*

⁵⁸ *See id.* (suggesting that the suspect may devise such a situation by “taking hostages or pointing a loaded gun at a police officer”).

⁵⁹ *Id.* at 137-38.

with his job as a mechanic.⁶⁰ In another case, a suspect who threatened police officers with physical violence kept exclaiming that his life “isn’t worth anything” and insisted that the officers shoot him.⁶¹ Multiple factors like economic hardship and substance abuse can drive an individual to commit violent crimes.⁶² A single factor by itself is less likely to trigger a pattern of violence.⁶³ For instance, one study reveals that the odds of a male teenager acting violently double if he abuses alcohol or drugs and belongs to a gang.⁶⁴ The odds triple if the teenager also has a prior record of arrest.⁶⁵

Like homicide, the majority of individuals committing suicide are men.⁶⁶ Men are more likely to commit suicide with a gun; women are more likely to use pills.⁶⁷ Men are seven times more likely than women to commit any form of suicide.⁶⁸ White men commit suicide at a higher rate than every other group except Native American men.⁶⁹

Mental instability can also trigger confrontations with officers.⁷⁰ In *Wallace v. Davies*, a suspect became suicidal after unsuccessfully trying to contact his mental health counselor.⁷¹ The police promptly arrived at the suspect’s apartment.⁷² The suspect possessed a gun and planned to shoot himself.⁷³ An officer, seeing the gun, fired once at the suspect, fatally wounding him.⁷⁴

⁶⁰ Palmquist, 111 F.3d at 135-36.

⁶¹ Plakas v. Drinski, 19 F.3d 1143, 1146 (7th Cir. 1994).

⁶² Garbarino, *supra* note 3, at 138.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 137.

⁶⁷ *Id.* at 138.

⁶⁸ Marina Angel, *The School Shooters: Surprise! Boys are far more Violent than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485, 499 (2001) (indicating that the ratio of boys committing suicide to girls is seven to one).

⁶⁹ John H. Blume, *Killing the Willing: “Volunteers,” Suicide, and Competency*, 103 MICH. L. REV. 939, 956 (2005).

⁷⁰ See Avery, *supra* note 32, at 262-63 (stating that nationwide, police departments “estimate that an average of approximately seven percent of police calls involve mentally ill people”).

⁷¹ *Wallace v. Estate of Davies by Davies*, 676 N.E.2d 422, 424 (Ind.App. 1997).

⁷² *Id.* at 424-25.

⁷³ *Id.*

⁷⁴ *Id.* at 424.

Ultimately, *Wallace* illustrates a policy question underlying police-assisted suicide: do we want officers killing mentally sick individuals who pose only a threat of harm to themselves?

Another case, *Hainze v. Richards*, demonstrates the difficulty police officers face in subduing suicidal suspects who exhibit signs of mental illness (including delusions and auditory hallucinations).⁷⁵ In *Hainze*, the police responded to the call of a family to transport a patient to a hospital for mental health treatment.⁷⁶ The patient had a mental illness and was under the influence of alcohol and antidepressants.⁷⁷ The police had been notified that the individual was contemplating suicide-by-cop.⁷⁸ When police arrived on the scene, the suspect walked toward the officers with a knife.⁷⁹ After refusing an order to stop, an officer shot him. The suspect survived, but the issue before the court was whether anything short of lethal force might have disabled the suspect—given that he only carried a knife—without compounding the risk of harm to the officers.⁸⁰ The Fifth Circuit exonerated the officers, citing the danger posed to public safety by the knife-wielding, intoxicated suspect.⁸¹ But the court held that the officers would have been under a duty to “reasonably accommodate” the suspect’s disability by transporting him to a mental health facility had there been no public danger.⁸²

C. *A Profile of the Typical Suicide-by-Cop Victim*

Mark Lindsay and David Lester’s study on 23 individuals who committed suicide-by-cop showed that 61% of these individuals suffered from some chronic mental or physical illness.⁸³

⁷⁵ *Hainze v. Richards*, 207 F.3d 795, 797-98 (5th Cir. 2000).

⁷⁶ *Id.* at 798.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 800-802.

⁸² *Id.*

⁸³ Lindsay and Lester, *supra* note 2, at 87.

78% abused alcohol or drugs, and 39% exhibited a prior history of suicide attempts.⁸⁴ Other statistics underscore the difficulty police officers face in confronting suspects with mental health issues.⁸⁵ 100% of suspects attempting suicide-by-cop instigate the precipitating event that leads to a confrontation with police.⁸⁶ 96% of suspects instigate a potentially violent confrontation, 83% threaten the officer with a deadly weapon, and 100% of these latter suspects refuse to drop their weapon on command.⁸⁷ The officer's difficult task is to distinguish suspects who intend to harm others from those possessing only suicidal intent.

The cases and statistics reflect a trend: the victims of suicide-by-cop are young and economically disadvantaged males, sometimes wrestling with psychosis or substance abuse. They usually feel that life is hopeless. Some may have endured ridicule in school and alienation. However, unlike other suicidal individuals (e.g., the Columbine shooters), they require assistance from others in accomplishing their own deaths. Someone else has to pull the trigger.

Some may argue that homicidal individuals are likewise predominantly disadvantaged and have a propensity toward substance abuse.⁸⁸ The systemic problems triggering both suicide and homicide among urban youth are identical in nature.⁸⁹ Thus, distinguishing the homicidal from the suicidal may not advance a particular law enforcement aim.⁹⁰ Moreover, from this perspective suicide-by-cop is not really a "police problem," in that it does not substantially differ from other forms of suicide. Accordingly, the term "suicide-by-cop" is inconsequential. It should not have any bearing on police work.⁹¹ Instead, the responsibility should fall on social service

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Lindsay and Lester, *supra* note 2, at 49-50.

⁸⁹ *Id.* at 50.

⁹⁰ *Id.*

⁹¹ For example, at least one court has held that failing "merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to deliberate indifference." *Pena v. Leombruni*, 200 F.3d 1031, 1033 (7th

workers and mental health professionals to facilitate early intervention before children are old enough to commit violent crimes.

The advocates of this argument raise significant points.⁹² A suspect who genuinely desires to hurt civilians or police officers is not entitled to preferential treatment from law enforcement agents simply because he or she is suicidal.⁹³ However, victims of suicide-by-cop often do not pose a threat of violence to others. They merely wish to end their lives. No community can completely eradicate the factors that lead to suicide, like depression, poverty, and substance abuse.⁹⁴ Therefore, the burden falls on law enforcement agencies to train officers in exercising greater restraint when dealing with individuals who appear to be attempting suicide-by-cop. Otherwise, police officers will continue to serve as instruments through which desperate individuals can effectuate their suicidal desires.

IV. SUICIDE-BY-COP IN SECTION 1983 LAWSUITS

A suspect's recourse against a police officer who uses excessive force is a Section 1983 lawsuit.⁹⁵ Through a Section 1983 lawsuit, the plaintiff (either the suspect or where the suspect has killed his estate) can allege that the officer's use of force constituted an unreasonable "seizure" or arrest that violated his or her Fourth Amendment rights.⁹⁶ The standard for determining whether the officer's use of force was excessive is the "objective reasonableness" test, articulated by the U.S. Supreme Court in *Graham v. Connor*.⁹⁷ In order to prevail under that

Cir. 1999). *Pena's* holding suggests that even if a suspect is suicidal or deranged, the police cannot be deemed negligent in their handling of the suspect where he or she poses a danger to others.

⁹² Flynn and Homant, *supra* note 3, at 577.

⁹³ *Id.*

⁹⁴ See Garbarino, *supra* note 5, at 142 (discussing the socioeconomic issues plaguing urban youth)

⁹⁵ 42 U.S.C. § 1983.

⁹⁶ See Garner, 471 U.S. at 2 (holding that apprehension "by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement").

⁹⁷ *Graham*, 490 U.S. at 395-398.

test, the plaintiff must show that the use of deadly force was not reasonably necessary from the perspective of the objective police officer under the apparent circumstances.⁹⁸

Tennessee v. Garner governs the propriety of a police officer's use of deadly force.⁹⁹ The use of deadly force is only justified if the suspect poses an immediate threat of serious bodily harm to the officer or civilians.¹⁰⁰ In determining whether the officer's belief that the suspect posed an immediate threat of serious harm was objectively reasonable, courts will consider "the totality of the circumstances" at the time of the shooting.¹⁰¹ As this article will show, the legal standard remains the same where suicide-by-cop is at play.¹⁰² But the question becomes whether suicide-by-cop is an admissible circumstance that factors into a Section 1983 analysis. In answering that question, it might help first to examine the legislative rationale behind Section 1983.

A. *The Legislative History of Section 1983: An Attempt At Remediating Racial Discrimination*

The enactment of Section 1983 is tied to the Civil War and Reconstruction—the period following the assassination of President Lincoln, when Congress passed a series of laws designed to secure the rights of citizenship for emancipated African-Americans.¹⁰³ Congress borrowed much of the language in Section 1983 from the Enforcement Act of 1871.¹⁰⁴ This statute, passed during the Reconstruction Period following the Civil War, was designed to provide African-

⁹⁸ See *id.* at 397 (holding that the inquiry "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation").

⁹⁹ *Garner*, 471 U.S. at 1.

¹⁰⁰ *Id.* at 10-22.

¹⁰¹ *Id.* at 10-20.

¹⁰² *Palmquist*, 111 F.3d at 1337.

¹⁰³ For an overview of civil rights legislation enacted during Reconstruction, see Douglass L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 510-12 (1993).

¹⁰⁴ See *id.* at 506 (stating that the Enforcement Act of 1871 "contained in its first section the language now found" in Section 1983).

Americans with a federal civil rights remedy against white supremacist organizations (like the Ku Klux Klan and the White Brotherhood).¹⁰⁵ Federal civil rights legislation was necessary because local and state governments refused to protect African-Americans from violent racists.¹⁰⁶ Moreover, local governments often collaborated with racist groups in depriving African-Americans of their constitutional rights.¹⁰⁷ The ratification of the Fourteenth Amendment in 1866 had fomented a wave of violence against freed blacks throughout the former Confederacy.¹⁰⁸

The Enforcement Act was based in part on the earlier 1866 Civil Rights Act.¹⁰⁹ That law (together with the Fifteenth Amendment) guaranteed African-Americans the status of citizenship and empowered the federal government to criminally prosecute any local official who deprived a citizen of his or her civil rights while acting “under color of law.”¹¹⁰ Another law passed around the same time, the Ku Klux Klan Act of 1871, granted the president the power to suspend habeas corpus in prosecuting Klan members.¹¹¹ By 1872, hundreds of Klansmen were arrested.¹¹² Ultimately, the federal government broke the organizational apparatus of the Klan.¹¹³ However, during the Reconstruction period, the civil provisions of the Enforcement Act (codified as

¹⁰⁵ *Id.* at 513-14.

¹⁰⁶ *Id.* at 510-12.

¹⁰⁷ *Id.* at 514.

¹⁰⁸ *Id.* at 514-18.

¹⁰⁹ *See id.* at 514 (stating that the drafters of the Enforcement Act modeled its language after the 1866 Civil Rights Act’s criminal provision).

¹¹⁰ *See* Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (1988) (prohibiting the deprivation of a person’s civil rights under color of law); *see also* Colbert, *supra* note 103, at 511-12 (noting that the Civil Rights Act of 1866 guaranteed African-Americans the status of citizenship and reinforced the ability of the federal government to protect the rights of citizenship).

¹¹¹ *See* Ku Klux Klan Act of 1871, ch. 22, §§ 3- 4, 17 Stat. 13, 14-15 (1871) (vesting the president with discretion to suspend habeas corpus in order to overthrow a rebellion); *see also* Mark D. Pezold, *When to be a Court of Last Resort: The Search for a Standard of Review for the Suspension Clause*, 51 B.C. L. REV. 243, 250 (pointing out that after the Civil War, Congress authorized President Ulysses S. Grant “to suspend the writ of habeas corpus in 1871 as part of the federal government’s efforts to combat the Ku Klux Klan during the Reconstruction era”).

¹¹² Richard Wormser, *The Enforcement Acts (1871-1872), The Rise and Fall of Jim Crow*, http://www.pbs.org/wnet/jimcrow/stories_events_enforce.html (last visited September 18, 2010).

¹¹³ *Id.*

Section 1885), which enabled any plaintiff to file suit against two or more private individuals who conspired to violate that person's Fourteenth Amendment rights, were not utilized by litigants in redressing civil rights violations.¹¹⁴

The Civil Rights Act of 1871, later codified as Section 1983, empowered citizens to sue local or state officials for civil rights violations.¹¹⁵ Unlike the Enforcement Act, its purpose was to protect African-Americans from racist government actors.¹¹⁶ While citizens could sue state or municipal governments under the Act for violating federal statutory or constitutional law, it did not vest citizens with a separate cause of action.¹¹⁷ But other laws existed that protected the civil rights of African-Americans, including the right to vote (protected by the Fifteenth Amendment),¹¹⁸ secure property (protected by the Fourteenth Amendment),¹¹⁹ and live as free individuals (protected by the Thirteenth Amendment).¹²⁰ Together with the post-Civil War Amendments, Section 1983 deterred local officials from infringing on these rights.¹²¹

B. The Modern Use of Section 1983 as a Means to Bring Excessive Force Claims against Police Departments

¹¹⁴ Colbert, *supra* note 103, at 514-516

¹¹⁵ 42 U.S.C. § 1983 (1988). This statute, which Congress originally enacted as section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹¹⁶ Colbert, *supra* note 103, at 515-16

¹¹⁷ *Id.*

¹¹⁸ U.S. Const. amend. XV.

¹¹⁹ U.S. Const. amend. XIV.

¹²⁰ U.S. Const. amend. XIII.

¹²¹ See Colbert, *supra* note 103, at 515 (stating that the purpose of the Reconstruction-era constitutional amendments was to “counter the officially condoned and perpetrated white ‘reign of terror’ that sought to reverse the legal gains of American-Americans from post-War federal policy”).

Since the Civil Rights Movement of 1960s, the nature of Section 1983 litigation has changed.¹²² Private individuals still rely on Section 1983 as a powerful tool against police departments employing racially discriminatory tactics against suspects.¹²³ However, today parties can also use Section 1983 to sue the police based on allegations of excessive force, even in the absence of racial discrimination or racial profiling.¹²⁴

The legal basis for a complaint alleging excessive force is the Fourth Amendment.¹²⁵ Courts have held that a police officer's use of excessive force in detaining or subduing a suspect constitutes an unlawful "seizure" under the Fourth Amendment.¹²⁶ Whenever a police officer "restrains the freedom of a person to walk away, he has seized that person."¹²⁷ The Supreme

¹²² After Reconstruction, courts construed federal civil rights statutes quite narrowly in order to prevent African-Americans from challenging Jim Crow practices. For example, from 1871 until 1941, Supreme Court decisions on Section 1983 limited the meaning of "under color of law" in cases involving state agents other than law enforcement officials. Colbert, *supra* note 103, at n.93. In *Barney v. City of New York*, the Court held that unauthorized acts of state construction do not constitute state action within the meaning of the Fourteenth Amendment. *Barney v. City of New York*, 193 U.S. 430 (1904). Moreover, prior to *Monroe*, the Court's "under color of law" had required litigants to establish that the state had *authorized* an official's unlawful act under state law. Colbert, *supra* note 103, at 519. As Justice Frankfurter pointed out in *Monroe*, during the "seventy years which followed [section 1983's passage,]...the 'under color' provisions...uniformly involved state action either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state law." 365 U.S. at 212-13 (Frankfurter, J., dissenting). This limited interpretation of the "under color" language meant that police officers and other officials were not subject to federal jurisdiction for actions that deprived citizens of their constitutional rights. Colbert, *supra* note 103, at n.92. However, *Monroe v. Pape*, decided in 1961, revitalized Section 1983's role "as a federal civil remedy against individual police officers that deprive citizens of their constitutional rights." *Id.* In *Monroe*, the Supreme Court rejected the narrow definition of the term "under color of law" that had stymied Section 1983 litigation for the preceding ninety years. *Id.* *Monroe* held that plaintiffs could use section 1983 to remedy a constitutional injury inflicted by a police officer whose misuse of power by "virtue of state law [was] only made possible because the wrongdoer [was] clothed with the authority of state law." *Monroe*, 365 U.S. at 184 (quoting *U.S. v. Classic v.* 313 U.S. 299, 326 (1941)).

¹²³ Racial profiling claims are usually based on the Equal Protection Clause of the Constitution. Cf. Const. amend. XIV § 1 ("No State shall make or enforce any law which shall...deny to any person within its jurisdiction."). But Section 1983 serves as a vehicle for bringing these and other constitutional claims. See generally Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy for Racial Profiling After the School Desegregation Cases*, 22 LAW & INEQ. 73, 82 (2004) (discussing the role of the Equal Protection Clause in racial profiling cases).

¹²⁴ See Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. §1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS LAW JOURNAL 753, 753-757 (1993) (discussing the ways in which Section 1983 has been used to litigate against police departments).

¹²⁵ See *Garner*, 471 U.S. at 2 (holding that "apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement").

¹²⁶ See *id.* at 7-8 (holding that a seizure is unlawful when it is unreasonable in light of the amount of force used in the course of the intrusion and the interest at stake).

¹²⁷ *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

Court defined the term “excessive force” in *Graham v. Connor*.¹²⁸ In *Graham*, the Court held that an officer’s use of force must be “objectively reasonable”¹²⁹ “Reasonableness” is judged from the perspective of the reasonable officer and how he or she would have responded to the suspect under the circumstances.¹³⁰ This standard takes into account the fact that police officers must sometimes make split-second decisions when confronting a deadly assailant.¹³¹

Consequently, the “reasonableness” of the seizure depends not only on when the seizure is made, but also on how it is carried out.¹³²

In *Tennessee v. Garner*, the Supreme Court advanced a more specific standard for determining when an officer’s use of *deadly force* is objectively reasonable.¹³³ While an officer is allowed to arrest a person if “he has probable cause to believe that person committed a crime,” the use of deadly force is only permissible when the suspect poses a threat of deadly force to others or the officer herself.¹³⁴ An officer’s belief that a suspect tried to use deadly force must be reasonable.¹³⁵ In making that determination, courts will balance the “totality of circumstances” that existed at the time of the seizure.¹³⁶ For instance, one Fourth Circuit case, *Gray-Hopkins v. Prince George’s County, Maryland*, held that the fatal shooting of an unarmed suspect who was

¹²⁸ 490. U.S. at 396-398.

¹²⁹ 490 U.S. at 397.

¹³⁰ *Id.*

¹³¹ *See id.* at 396-97 (holding that “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation”).

¹³² *Tennessee v. Garner*, 471 U.S. at 8.

¹³³ *Id.* at 17-22.

¹³⁴ *See id.* at 2 (holding that apprehension by the use of deadly force is not permissible unless the officer “has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others”).

¹³⁵ *See id.* (holding that “apprehension by the use of deadly force is a seizure subject to the Fourth Amendment’s reasonableness requirement”).

¹³⁶ *Id.* at 9-10.

standing still with his hands over his head was excessive and unconstitutional, because the man did not pose any threat to public safety.¹³⁷

The test is an objective one; neither the suspect's nor the officer's motives factor into a Section 1983 analysis concerning the lawfulness of a police seizure.¹³⁸ Instead, courts only consider circumstances of which the officer had knowledge at the time of the shooting, not after the fact.¹³⁹ *Graham* proscribes the use of hindsight in determining whether a police shooting was reasonable.¹⁴⁰

C. Suicide-by-Cop in Section 1983 Litigation

The seminal case on suicide-by-cop is *Palmquist v. Selvik*.¹⁴¹ *Palmquist* addressed the question of whether evidence that the suspect was attempting suicide-by-cop is admissible in a Section 1983 suit.¹⁴² While Seventh Circuit declined to admit evidence of the suspect's suicidal motives on the facts of that case, in dicta it stressed that evidence of suicide-by-cop can be admissible at trial by either party under certain circumstances.¹⁴³ While the court applied the *Graham* standard in determining the lawfulness of a police shooting in a suicide-by-cop scenario, the decision demonstrates that evidence of a suspect's suicidal intentions can both strengthen and undermine the merits of a Section 1983 claim.¹⁴⁴

In *Palmquist*, Paul Palmquist, a resident of Bensenville, Illinois, began screaming obscenities and incoherent statements in his apartment and broke his neighbor's window.¹⁴⁵ The

¹³⁷ *Gray-Hopkins v. Prince George's County, Maryland*, 309 F.3d 224, 231 (2002).

¹³⁸ *Graham*, 490 U.S. at 395-398.

¹³⁹ *See id.* at 396 (holding that the reasonableness "of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight").

¹⁴⁰ *Id.*

¹⁴¹ 111F.3d 1332; *see also* Flynn and Homant, *supra* note 3, at 562 (characterizing *Palmquist* as the first case on suicide-by-cop).

¹⁴² *Palmquist*, 111 F.3d at 1340-42.

¹⁴³ *Id.* at 1338-1342.

¹⁴⁴ *Id.* at 1337.

¹⁴⁵ *Id.* at 1336.

police were notified of his erratic behavior, and when officers arrived at his apartment they found him wielding a muffler pipe.¹⁴⁶ He yelled to the officers that they had to kill him.¹⁴⁷ When they attempted to arrest him for breaking the windows, he swung the pipe at one of the officers and landed a blow.¹⁴⁸ After Palmquist swung the pipe again, another officer fired numerous shots, killing him.¹⁴⁹ Palmquist's last words were, "You finally gave me what I wanted," and "I hope this worked, I hope you shot me enough."¹⁵⁰

Palmquist was a Vietnam War veteran who had told friends that he wished to be shot by the police, because he was depressed with his job as a mechanic and over the fact that he did not have a girlfriend.¹⁵¹ He had been heavily under the influence of alcohol and marijuana.¹⁵² After his death, Palmquist's estate filed suit against the city, alleging a Section 1983 violation for use of excessive force.¹⁵³ The estate argued that Selvik, the sheriff who fatally shot Palmquist 11 times, had received inadequate training and should have wrestled the pipe away from Palmquist before drawing a gun against him, because Palmquist himself did not possess a gun.¹⁵⁴ While the estate did not rely on Palmquist's suicidal motives to support its legal argument, several references were made during trial regarding Palmquist's desire to commit suicide.¹⁵⁵ However, the magistrate judge crafted a jury instruction stating that any evidence of the suspect's "death wish" was irrelevant to the excessive force claim, since it fell outside the time-frame of the

¹⁴⁶ *Id.* at 1335.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1336.

¹⁵¹ *Id.* at 1338.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1346.

¹⁵⁵ *Id.* at 1341.

shooting (evidence that Palmquist wished to kill himself only emerged after Palmquist was shot).¹⁵⁶ The jury found the city guilty and awarded Palmquist \$165,000 in damages.¹⁵⁷

Selvik and the city appealed the verdict, arguing that the judge had improperly excluded evidence concerning Palmquist's death wish because this evidence was directly relevant to determining both liability and damages.¹⁵⁸ The city argued that evidence of Palmquist's intent to commit suicide-by-cop was relevant to determining liability, because it tended to show that Palmquist was the initial aggressor during his entanglement with police officers, and that the officers' lethal response was therefore appropriate.¹⁵⁹ It also argued that evidence of suicide-by-cop was admissible under Rule 404(a)(2) of the Federal Rules of Evidence as an exception to the general prohibition against character evidence in criminal cases, for the purpose of showing that Palmquist was the "first aggressor."¹⁶⁰ The defense sought to show that the officer who shot Palmquist acted in self-defense, and that Palmquist was the proximate cause of his own death.¹⁶¹ As to the question of damages, the city argued that if Palmquist was suicidal, any computation of damages based on his life expectancy prior to the shooting should have taken his suicidal motives into account.¹⁶²

On appeal, the Seventh Circuit upheld the award with regards to the excessive force claim.¹⁶³ It also affirmed the inadmissibility of evidence pertaining to Palmquist's suicidal

¹⁵⁶ *Id.* at 1342.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1337.

¹⁵⁹ *Id.* at 1338.

¹⁶⁰ *Id.*; *see also* Fed.R.Evid.404(a)(2) (prohibiting the admission of evidence of a person's character or a trait of character for the purpose of proving action in conformity therewith on a particular occasion, except "where in a criminal case the prosecution offers evidence of a character trait of peacefulness of the alleged victim in order to rebut evidence that the alleged victim was the first aggressor").

¹⁶¹ *Id.* at 1339.

¹⁶² *Id.* at 1342.

¹⁶³ *Id.* at 1347.

motives.¹⁶⁴ The court held that evidence of Palmquist’s death wish was inadmissible under the character evidence rule.¹⁶⁵ Moreover, it did not tend to make the existence of any fact material to “the objective reasonableness” test more or less probable, as this evidence only came to light after the shooting.¹⁶⁶ For these reasons, the court declined to upset the jury’s verdict.¹⁶⁷ However, the panel specified that the trial court had admitted much evidence bearing on Palmquist’s suicidal desires.¹⁶⁸ Experts on both sides characterized the case as a suicide-by-cop situation, and the jury heard them characterize it as such.¹⁶⁹ The appellate court held that the admission of additional evidence on suicide-by-cop would have been “cumulative and prejudicial,” but even assuming that the evidence was improperly excluded, the error was harmless and therefore not a basis for overturning the verdict.¹⁷⁰

However, the court also declared that the suspect’s death wish proved relevant to determining the validity of the damages award.¹⁷¹ The court held that completely excluding evidence bearing on Palmquist’s suicidal motives “could have had a highly prejudicial impact on the jury’s ultimate award to the plaintiff.”¹⁷² Palmquist’s suicidal statements to friends before the shooting reflected his life expectancy and were therefore relevant to calculating damages.¹⁷³ However, because Selvik’s counsel did not make this argument at trial, evidentiary rules barred the appellate court from ruling on this matter.¹⁷⁴ While the court strongly admonished Selvik’s

¹⁶⁴ *Id.* at 1340-41.

¹⁶⁵ *Id.* at 1341.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1347.

¹⁶⁸ *Id.* at 1341.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1342.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

attorneys for not exercising due diligence and raising this point at trial, it affirmed the trial court's award of damages.¹⁷⁵

Ultimately, the Seventh Circuit's opinion suggests that either side may introduce testimony about suicide-by-cop, if 1) it proves relevant to the question of damages,¹⁷⁶ 2) the police were aware that the suspect was attempting suicide by goading officers into killing him,¹⁷⁷ and 3) there is a dispute regarding the facts and the perpetrator's suicidal motives have probative value in resolving that dispute.¹⁷⁸ An earlier case the Seventh Circuit cites, *Sherrod v Berry*, held that "knowledge of facts and circumstances gained after the fact...has no place in the jury's post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise...the jury would possess more information than the officer possessed when he made the crucial decision."¹⁷⁹ The *Palmquist* court reiterated this rule by concluding that information not possessed by Sergeant Selvik at the time of the shooting, such as "Palmquist's mental state and his physical behavior before the encounter," was inadmissible.¹⁸⁰ Such information would divert the jury's focus from Palmquist's actions to facts not immediately accessible to Selvik during his confrontation with the suspect—like Palmquist's mental condition.

However, the court qualified its general restriction on testimony concerning suicide-by-cop: such testimony is only inadmissible if it "occurred outside the presence of the police" and they "had no personal knowledge of it."¹⁸¹ This qualification suggests that if police officers are aware of the suspect's suicidal motives prior to the shooting, their awareness may be probative to determining whether the officers used excessive force. The court stated that Officer Selvik

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1341.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1339 (quoting *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988)).

¹⁸⁰ *Id.* at 1340.

¹⁸¹ *Id.*

“knew nothing of [Palmquist’s] preexisting condition and behavior” when he first encountered him.¹⁸² Consequently, these facts “could not have entered into Selvik’s determination on whether or not to shoot or how many times.”¹⁸³ The court’s reasoning indicates that an officer’s personal knowledge can be probative when it goes to the issue of objective reasonableness. In light of the officer’s knowledge at the time of the shooting, was his or her use of lethal force against a suspect who merely intended to commit suicide objectively reasonable? The officer’s personal knowledge is something a jury may take into account when assessing the reasonableness of a police response. For instance, the jury heard Palmquist’s statement to Selvik that the police would have to kill him, and also Palmquist’s last words that “this is what [he] wanted [the police] to do.”¹⁸⁴ Thus, the jury’s determination that Selvik’s 11 gunshots amounted to excessive force may have been based in part on the jury’s consideration of these statements, despite the judge’s limiting instructions.¹⁸⁵

Other decisions also suggest that evidence of a suspect’s desire to commit suicide is admissible, as long as this evidence was known to the officer at the time of the shooting. In *Rascon v. Hardimen*, another Seventh Circuit decision, officers fatally shot a mentally impaired suspect.¹⁸⁶ The trial judge refused to admit evidence of the suspect’s mental history, and on appeal the Seventh Circuit affirmed the ruling.¹⁸⁷ It held that the admission of such evidence might lead a jury to conclude that the suspect invited mistreatment at the hands of police officers.¹⁸⁸ The jury could only draw such a conclusion based on facts available at the time of the

¹⁸² *Id.* at 1341.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1341.

¹⁸⁵ *See id.* at 1341 (suggesting that the jury possibly considered the suspect’s suicidal intentions).

¹⁸⁶ *Rascon v. Hardiman*, 803 F.2d 269 (7th Cir. 1986).

¹⁸⁷ *Id.* at 278.

¹⁸⁸ *Id.* at 279.

altercation.¹⁸⁹ However, had the officer known of the suspect's mental state before the shooting, under *Palmquist* such knowledge might have been admissible as evidence in proving that the officer's use of force was reasonable.

Ironically, evidence that the suspect was attempting suicide may undermine a Section 1983 claim if it appears that the suspect was inciting a lethal response through provocative or dangerous actions. In one Ninth Circuit case, *Boyd v. City and County of San Francisco*, a kidnapping suspect repeatedly screamed at police officers to kill him.¹⁹⁰ The officers asked him to lie on the ground, and when he reached into his vehicle instead they shot and killed him.¹⁹¹ The suspect's estate filed a Section 1983 lawsuit against the county, and the county sought to introduce expert testimony that the suspect was attempting suicide-by-cop.¹⁹² The court held that such testimony was relevant to determining whether the suspect engaged in provocative actions against the police, and that "the suicide-by-cop theory" was "generally accepted in the relevant professional community" and therefore reliable.¹⁹³ Consequently, it upheld the district court's decision to allow the county to introduce expert testimony on suicide-by-cop.¹⁹⁴

Boyd demonstrates that evidence of suicide-by-cop can be a double-edged sword. In some cases, it may be detrimental to a plaintiff's excessive force claim. Often, a mentally ill suspect poses a threat to others even while attempting suicide. The use of lethal force against such a suspect may be justified. For instance, the suspect in *Palmquist* believed that the officers

¹⁸⁹ See *id.* at 278 (holding that the exclusion of testimony regarding the suspect's mental history was proper because such testimony might improperly suggest that "it would be reasonable to subdue him based on a supposed status rather than his conduct at the time [of the shooting]").

¹⁹⁰ *Boyd v. City and County of San Francisco*, 576 F.3d 938, 942 (9th Cir. 2009).

¹⁹¹ *Id.*

¹⁹² *Id.* at 945-46.

¹⁹³ Under the federal rules of evidence, in order for an expert's testimony to be admissible at trial it must meet be based on reliable principles and methods that are applicable to the facts of the case. *Id.* at 945 (citing *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 597 (1993)).

¹⁹⁴ *Id.* at 946.

trying to apprehend him were Vietcong colonels.¹⁹⁵ One could argue that his hallucinations made him dangerous to the police. But the takeaway from *Palmquist* is that evidence pertaining to a suspect’s suicidal motives may be relevant and admissible in a Section 1983 lawsuit, and the jury may consider such evidence in deciding whether to impose liability on a police department. And if the evidence shows that the suspect only posed a threat of harm to himself, his death is likely to elicit sympathy from the jury, thereby allowing the plaintiff to prevail at trial

D. How Other Circuits Have Ruled

Other federal circuits have also prohibited the admission of pre-seizure evidence—evidence that is not available to the officer at the time of the shooting—in Section 1983 suits. For instance, in *Dickerson v. McClellan*, a Sixth Circuit case, police entered Joel Dickerson’s home without first knocking and announcing their presence, in violation of the Fourth Amendment.¹⁹⁶ They heard Dickerson screaming the words, “I’ll get you motherfucker.”¹⁹⁷ One of the officers saw a gun in Dickerson’s hand and fired four shots.¹⁹⁸ Dickerson was killed, and his estate sued the police department for excessive force.¹⁹⁹ An investigation revealed that Dickerson’s revolver was not cocked, and that he had not shot at any of the police officers.²⁰⁰ In fact, he had been on the phone with his girlfriend, and his threatening statement was directed at her.²⁰¹

¹⁹⁵ *Id.* at 1336.

¹⁹⁶ *Dickerson v. McClellan*, 101 F.3d 1151, 1154-55 (6th Cir. 1996). The knock-and-announce rule is a common-law requirement that police officers seeking to enter a residential home must first knock on the door, announce their presence, and then wait a reasonable period before forcibly entering. *Wilson v. Arkansas*, 514 U.S. 927, 934-36 (1995). Only exigent circumstances can justify an officer’s forced entry into a private home without first knocking and announcing his presence. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1155.

¹⁹⁹ *Id.* at 1154.

²⁰⁰ *Id.* at 1155.

²⁰¹ *Id.*

The court limited its inquiry to circumstances of which the officer had knowledge at the time of the shooting.²⁰² It “segmented” or distinguished the violation of the knock and announce rule (requiring police officers to announce their presence before entering someone’s home) from the excessive force claim.²⁰³ Accordingly, in determining the validity of the plaintiff’s excessive force claim, the court declined to consider the reasonableness of the officer’s actions prior to his “seizure” of the suspect.²⁰⁴ In other words, an officer’s entry into a home, even if it is unlawful, should not factor into an assessment of whether he used excessive force against a suspect.²⁰⁵ Even if an officer is responsible for creating the circumstances that necessitated his use of lethal force, a court should not consider the officer’s actions prior to his use of force.²⁰⁶ Under this standard, evidence of a suspect’s death wish, like a suicide note, may not be admissible because it constitutes pre-seizure evidence (though a suicide note may be admissible if an officer read it prior to shooting the suspect, because he would then have knowledge of the suspect’s suicidal desire within the appropriate time-frame).

The Tenth Circuit has likewise held that courts should consider an officer’s conduct prior to the suspect’s threat of force only if the conduct is “immediately connected” to the threat.²⁰⁷ A suspect’s statement that he wishes to commit suicide may constitute such conduct, depending on when he makes it. The Fourth Circuit has “also adopted a narrow scope of the shooting time-frame” in ruling on the reasonableness of police actions in Section 1983 claims.²⁰⁸ Other circuits have similarly restricted the admissibility of evidence in excessive force cases. In *Wood v. City*

²⁰² *Id.* at 1160.

²⁰³ *Id.* at 1160-63.

²⁰⁴ *Id.* 1162-1164.

²⁰⁵ *Id.* at 1161-62.

²⁰⁶ *See id.* at 1161 (stating that in deciding Section 1983 cases, a court must examine “whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances”) (quoting *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992)).

²⁰⁷ *Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997).

²⁰⁸ *See Drewitt v. Pratt*, 999 F.2d 774, 781 (1993) (holding that an officer’s failure to show his badge after stopping a suspect does not mean that the officer’s subsequent use of force was unconstitutional).

of *Lakeland*, an Eleventh Circuit case, officers entered the room of an “emotionally disturbed” teenager threatening suicide.²⁰⁹ The teenager had committed no crime.²¹⁰ However, when officers entered the premises, they found him bleeding on his dresser and holding a knife.²¹¹ When the teenager slid off the dresser, the officers shot him.²¹² The defense argued that the suspect had come at the officers with a knife.²¹³ By contrast, the plaintiff argued that he was lying prone on the floor when he was shot.²¹⁴ Despite the factual dispute, the court sided with the defendants and concluded that knife-wielding suspect could have endangered the officers, due to his aggravated emotional state and possession of a dangerous weapon.²¹⁵ The court declined to consider the suspect’s suicidal impulses (of which the officers were aware), and whether in light of those impulses the police should have acted with greater restraint. Ultimately, *Wood* demonstrates that a court may reject a plaintiff’s Section 1983 claim even where the suspect is mentally ill, in possession of a knife (as opposed to a more dangerous weapon, like a gun), and clearly suicidal (as evident from self-inflicted cuts on his body).

Other cases have refused to hold the police liable for the death of a suicidal suspect. For instance, in *Quezada v. County of Bernalillo*, the Tenth Circuit ruled against a suspect suing under New Mexico state tort law and Section 1983.²¹⁶ The suspect, an elderly woman named Griego, held a gun to her head after she was pulled over by police officers and asked the officers to leave her alone so that she could kill herself.²¹⁷ She refused several commands to drop her

²⁰⁹ *Wood v. City of Lakeland*, 203 F.3d 1288, 1291-93 (2000).

²¹⁰ The suspect’s family called the police because he was trying to injure himself. *Id.* at 1290.

²¹¹ *Id.*

²¹² *Id.* at 1290-91.

²¹³ *Id.* at 1290.

²¹⁴ *Id.* at 1291.

²¹⁵ *Id.* at 1293.

²¹⁶ *Quezada v. County of Bernalillo*, 944 F.2d 710 (10th Cir. 1991).

²¹⁷ *Id.* at 712.

gun.²¹⁸ After being blockaded by police cars, Griego turned her gun on the officers, who immediately shot and killed her.²¹⁹ While the trial court ruled in Griego's favor on her Section 1983 claim, the Tenth Circuit reversed, holding that the trial court had applied the wrong standard of reasonableness.²²⁰ The police officers may have negligently placed themselves in harm's way when they approached the suspect after she asked to be left alone, but their actions did not give rise to a colorable excessive force claim under *Graham*.²²¹ *Quezada* illustrates two points: that a suspect's suicidal motives may not bear significant evidentiary support for a plaintiff's arguments, and that a finding of negligence under state tort law does not by itself satisfy a Section 1983 claim.

Another decision, *Plakas v. Drinksi*, reinforces the difficulty of raising suicide-by-cop as a theory for recovery under Section 1983.²²² In that case, the Fifth Circuit held that police officers have no constitutional duty to employ non-lethal means in subduing a dangerous suspect, even if the suspect is attempting suicide-by-cop.²²³ In *Plakas*, the court stressed the importance of evaluating objective signs that the suspect poses a danger to police officers, rather than evaluating the suspect's subjective intent.²²⁴ For example, if a suspect points a gun at a police

²¹⁸ *Id.* at 713.

²¹⁹ *Id.*

²²⁰ *Id.* at 716.

²²¹ *Id.* at 716-717. The Tenth Circuit stressed that the standard of reasonableness in negligence cases is broader than the reasonableness standard applied under Section 1983 and *Graham*. Under an ordinary negligence standard, the trier of fact may consider whether officers acted unreasonably before engaging the suspect. However, the reasonableness inquiry under Section 1983 is far more time-specific: only the circumstances immediately preceding the shooting can be assessed in determining whether officers violated a suspect's Fourth Amendment rights. In *Quezada*, while the court did not find that the police officer had violated Griego's constitutional rights, it found that he had breached the duty of care he owed to Griego. *Id.* at 722. He breached this duty because he "amplified the risk of harm to Ms. Griego" when he approached her vehicle. Accordingly, the court found that he had acted negligently (but not with excessive force).

²²² *Plakas v. Drinksi*, 19 F.3d 1143 (7th Cir. 1994).

²²³ *Id.* at 138.

²²⁴ The court declared that "[s]hooting a man who has told you, in effect, that he is going to use deadly force against you and then moves toward you as if to do so is unquestionably an exact of self-defense even if, as *Plakas*'s expert maintains, the man is attempting 'suicide-by-cop.'" *Id.* at 1146.

officer, a lethal response by the officer would be appropriate even if evidence later shows that the suspect did not intend to shoot the officer.²²⁵

Thus, while courts following *Palmquist* may accept evidence of a suspect's suicidal desires in determining whether a police response was unreasonable or excessive, courts outside the Seventh Circuit seem reticent in considering such evidence. The Tenth, Eleventh, and Fifth Circuits have indicated that even if the suspect is suicidal, as long as he possesses a weapon and makes provocative gestures, the police are entitled to use lethal force. Nevertheless, the *Palmquist* verdict and the appellate opinion that followed suggest that the jury took the victim's statements—that he wanted the police to shoot him—into consideration when deciding whether to hold the police liable. Because other circuits may decide to follow *Palmquist*, police departments should consider the liability they may face if they fail to train officers in properly identifying and engaging with suspects who may be attempting suicide-by-cop.

V. POLICY JUSTIFICATIONS FOR ADDRESSING SUICIDE-BY-COP AS A SERIOUS PROBLEM WITHIN THE LAW ENFORCEMENT COMMUNITY

A. Society Should Do All It Can To Protect The Suicidal

A blanket refusal to scrutinize police tactics in suicide-by-cop incidents may “invite reckless and irresponsible police behavior.”²²⁶ On the one hand, holding an officer liable for shooting a suspect with a gun may impair the ability of police departments to protect the public. On the other hand, police departments cannot ignore the possibility that some suspects commit provocative acts for the purpose of inviting a lethal response. Devising a way to reduce suicide-by-cop incidents without hindering police responsiveness proves difficult, especially when only

²²⁵ The court rejected the proposition that it should “return to the prior segments of the event and, in light of hindsight, reconsider whether the prior police decisions were correct.” *Id.* at 1150.

²²⁶ Flynn and Homant, *supra* note 3, at 577.

22% of suicide-by-cop attempts involve an empty gun or some other non-lethal prop.²²⁷ All other attempts usually involve lethal force directed at the officer.²²⁸

Moreover, requiring a police officer to assess the psychological condition of a suspect under life-threatening circumstances might not be fair to the officer, given the split-second judgments the police often have to make in these situations. Also, requiring officers to use more lenient tactics in subduing suicidal suspects might encourage non-suicidal suspects to feign suicide in order to accomplish their criminal ends. And in light of the relationship between homicidal and suicidal tendencies, a large number of suspects attempting suicide also intend to kill or harm others.²²⁹ The Columbine shooters exemplify this trend.²³⁰ Preserving the life of an individual who attempts suicide becomes less of a priority if he poses a threat to innocent civilians.

Nevertheless, police departments should do all they can to restrain officers in the use of lethal force. In *Washington v. Glucksberg*, the Supreme Court overturned a statute authorizing physician-assisted suicide.²³¹ The decision demonstrates that ours is a society that values life.²³² Few would criticize the police officer in *Plakas* for subduing a knife-wielding suspect by shooting him, because that suspect posed a danger to the officer.²³³ However, the suspect in *Wood* was more sympathetic.²³⁴ The officer in that case could have subdued the suspect with a

²²⁷ *Id.* at 578.

²²⁸ *Id.*

²²⁹ Lindsay and Lester, *supra* note 4, at 13.

²³⁰ Garbarino, *supra* note 3, at 131.

²³¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²³² In *Glucksberg*, the Court declared that “opposition to and condemnation of suicide—and therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.” 521 U.S. at 711. The Court added that “our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision making, we have not retreated from this prohibition.” *Id.* at 719.

²³³ In *Plakas*, suspect assailed the police officer with his knife. 19 F.3d at 1146.

²³⁴ In *Wood*, the suspect had cut himself repeatedly with a knife before the police arrived, indicating that he likely only meant to harm himself. 203 F.3d at 1290. The autopsy report also indicated that the suspect had not raised his

taser, as the suspect had not yet charged at the police officers.²³⁵ In fact, he fell to the floor before he was shot.²³⁶ Had the officers in that case understood the nature of the suspect's acts and that he only intended to harm himself, tragedy might have been averted. Consequently, police departments should take reasonable steps to prevent suicide-by-cop. Law enforcement agencies can do two things in order to improve their tactical response to suicide-by-cop: 1) They can implement a procedure for tracking the frequency of suicide-by-cop incidents; and, 2) they can educate officers on using non-lethal methods to resolve suicide-by-cop attempts.

B. Implementing a Uniform Method for Reporting Suicide-by-Cop

The absence of national statistics on police-assisted suicide impedes law enforcement agencies from fully addressing the problem. Without comprehensive studies, police departments cannot incorporate suicide-by-cop into their tactical training programs. One proposed solution is to collect several hundred incidents from around the country and determine the common characteristics that victims involved in these incidents share, so as to convey a "sense of the 'typical' suicide-by-cop incident."²³⁷

One study by the FBI, published in 2002, advocates the use of a two-tiered system in evaluating attempts at suicide-by-cop.²³⁸ First, the officer at the scene makes the initial determination that the suspect's use of deadly force was motivated by suicide.²³⁹ Second, an officer with expertise in handling deadly force incidents makes a final determination after a complete investigation as to whether the initial officer's determination was correct.²⁴⁰

Circumstances that will support these determinations include: statements made by the offender;

hand in a threatening gesture toward the cops. *Id.* at 1291. The officers shot him when he inadvertently slid off the dresser on which he was standing. *Id.* at 1293.

²³⁵ *Id.* at 1293.

²³⁶ *Id.*

²³⁷ Lindsay and Lester, *supra* note 4, at 109.

²³⁸ Pinizzotto, *supra* note 21, at 10.

²³⁹ *Id.*

²⁴⁰ *Id.*

the type of weapon used by the offender; conduct that the officer deemed bizarre or inappropriate on the part of the offender; and finally, circumstances indicating that the offender's motivation may have been suicide.²⁴¹ In some cases, the offender's motivation may not be apparent even after a full investigation. Nevertheless, this approach will enable law enforcement agencies to measure the frequency of suicide-by-cop more effectively.

C. How Officers Can Subdue Attempts at Suicide-by-Cop without Resorting to Deadly Force

There are a number of non-legal methods for restraining a suicidal suspect. One such method is "tactical withdrawal": once an officer determines that an individual is suicidal, he can create greater physical distance between himself and the individual.²⁴² Physical distance will mitigate the threat posed to police officers, and give officers more time to formulate a plan of action in calming and neutralizing the suicidal individual.²⁴³ Some commentators suggest that a suicidal individual "in an area...where no one else is at risk," can be left alone.²⁴⁴ Obviously, leaving a suicidal suspect by himself can pose a serious risk to bystanders, especially if the suspect holds a dangerous weapon. He or she can accost or harm a civilian once the police presence ends. However, if the suspect's intent is to harm others, he might attack others in lieu of threatening suicide before the police arrive at the scene. Through withdrawal, police officers can at least make it difficult for the suspect to commit suicide.

The police can also deal with suspects wielding weapons other than firearms or bombs by using non-lethal force.²⁴⁵ A knife-wielding suspect, for instance, like the plaintiff in *Wood*, can

²⁴¹ *Id.*

²⁴² Lindsay and Lester, *supra* note 4, at 110.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

sometimes be disarmed using shotgun projected bean bags or rubber bullets.²⁴⁶ Alternately, a sharpshooter can keep a target on the perpetrator, in case he or she runs at an officer with a dangerous object. Tasers can be employed against a suspect not holding a firearm.²⁴⁷

Police departments should instruct to officers employ these methods only when they can reasonably ascertain that the suspect poses no risk of deadly harm to others. Once they receive rigorous training on the characteristics that suicidal suspects share, police officers can more readily recognize a genuine attempt at suicide-by-cop and handle the situation accordingly. This sort of training will enhance the quality of police work and aid social workers and psychologists in treating suicidal and emotionally disturbed individuals before they meet a tragic end.

VI. CONCLUSION

The lack of comprehensive legal literature on suicide-by-cop perpetuates the belief that nothing can be done by law enforcement agencies in ameliorating this primarily sociological problem. Perhaps the scarcity of such literature reflects a belief that unless something poses a tangible threat of litigation, it need not be addressed as a serious concern. However, suicide-by-cop incidents often lead to lawsuits. Moreover, evidence of a suspect's suicidal desires may negate the reasonableness of a lethal police response under Section 1983, thereby empowering plaintiffs in Fourth Amendment suits.

Strong policy reasons also exist for distinguishing police-assisted suicide from assault or homicide incidents. Law enforcement agencies should recall the original impetus behind the enactment of the 1865 Civil Rights Act: protecting African-Americans from abuse and discrimination at the hands of the state. As discussed earlier, those who commit suicide by cop tend to be destitute and suffer from substance abuse or mental illness. Suicide-by-cop is a

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 111.

byproduct of cumulative factors prevalent in lower income communities. When the police kill individuals desperate enough to attempt suicide, they remain apathetic to discriminatory state policies that exacerbate such factors. Police tactics take on a discriminatory hue, thereby undermining the very spirit of Section 1983. Thus, police officers should do their best to defuse suicide-by-cop incidents through non-lethal force. If police departments can adopt this approach, they would set a powerful example for the rest of society to follow in redressing the ills that Section 1983 was designed to combat.