

# Criminal Law Bulletin

A WARREN GORHAM LAMONT PUBLICATION

March-April 1993

THE HATE CRIME STATISTICS ACT OF 1990

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HOW TO STOP THE STALKER: STATE  
ANTISTALKING LAWS

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Volume 29, Number 2

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# Law Enforcement: Policing the Defective Centurion— Decertification and Beyond

By William C. Smith\* and Geoffrey P. Alpert\*\*

Policing is perceived as a public service career, but recently that perception has come under critical scrutiny. Virtually every adult in the United States is familiar with the infamous videotape of the Rodney King beating, where Los Angeles police officers engaged in a "feeding frenzy."<sup>1</sup> The societal backlash against acquittal of the officers involved in the beating touched off a riot of proportions that should never be repeated. At the core of the Rodney King incident festers a question that, owing to its complex roots, may never be adequately answered: "How, in a system predicated upon the maxim of 'equal justice under law' could such police misconduct occur?"

The nature, extent, and costs of police misconduct and corruption are difficult to determine and impossible to justify. One commentator has observed that "as long as there have been police, there has been corruption."<sup>2</sup> One police historian has ob-

served that police "corruption is one of the oldest and most persistent problems in American policing."<sup>3</sup> One of the most interesting and serious examples of police corruption is that of the so-called Miami River Cops, in which twelve Florida police officers were convicted of crimes ranging from drug dealing to murder.<sup>4</sup>

While there have been insightful studies of the extent and types of police corruption,<sup>5</sup> its direct and indirect costs have never been calculated. One hidden cost of police misconduct is its demoralizing effect on society in general and the police community.<sup>6</sup> This column will review the current concerns and discuss the decertifica-

<sup>3</sup> S. Walker, *The Police in America* 262 (1992).

<sup>4</sup> P. Eddy, H. Sabago, and S. Walden, *The Cocaine Wars* 194-198, 235-237 (1988).

<sup>5</sup> T. Barker and D. Carter (eds.), *Police Deviance* (1992); L. Sherman (ed.), Note 2 *supra*. H. Goldstein, *Police Corruption: A Perspective on its Nature and Control*, (1975); Knapp Commission, *Report of the New York City Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures* (1972). Murphy, "Corruptive Influences," in B. Garmire (ed.), *Local Government Police Management*, (1982); A. Simpson, *The Literature of Police Corruption: A Guide to Bibliography and Theory* (1977).

<sup>6</sup> P. Murphy and G. Kaplan, "Fostering Integrity," at 239-271, 255-257, in W. Geller (ed.) *Local Government Police Management* (1991).

\* Partner, Dennis & Smith, Columbia, S.C. Formerly Director, Legal Services, South Carolina Criminal Justice Academy, Columbia, S.C.

\*\* Professor, College of Criminal Justice, Research Professor, Institute of Public Affairs, University of South Carolina, Columbia, S.C.

<sup>1</sup> Alpert, Smith & Watters, "Law Enforcement: Implications of the Rodney King Beating," 28 *Criminal Law Bulletin* 469, 470 (1992).

<sup>2</sup> L. Sherman (ed.), *Police Corruption: A Sociological Perspective* 1. (1974).

tion process as an ultimate method of accountability. In addition to decertification, police professionalism as a means of control will be considered.

### *Control and Misconduct*

Every aspect of police behavior is subject to some type of control mechanism<sup>7</sup> since policing is perceived as a paramilitary function. This accounts for the belief that in a disciplined occupational group, the appropriate means of control is to allow very little discretion in the vast majority of tasks. From a clinical standpoint, the logic may be valid. However, reality dictates that officers must be prepared to make discretionary decisions in many of their activities and in these situations stringent control mechanisms are inappropriate.<sup>8</sup>

The behavioral repertoire of the average "street cop" includes a complex array of decisions, based on training and experience, that results in discretionary actions. Because members of society are so diverse, the police response to the multitude of social problems must be equally diverse.<sup>9</sup> Providing police training to address adequately all of these behaviors would be virtually impossible. The mediated response to this reality is a system in which training has come to address the critical "worst case scenario" and officers are forced to use limited, and frequently unguided, discretion in cases involving lesser evils. Were proper training available for handling the routine activities of police work, this approach would

generate little controversy. However, the lack of proper training, i.e., minimal emphasis on ethical decision making coupled with the frequent refusal by management to relinquish tight control over virtually every aspect of officer behavior, may be a significant cause of the current allegations of police misconduct.<sup>10</sup>

Police misconduct, however, can be organizational as well as individual. As an individual act, misconduct is the misuse of authority by an officer by which the officer or another benefits.<sup>11</sup> Such misconduct remains on an individual level until it is "condoned, supported or encouraged by the police organization."<sup>12</sup> If the misconduct is known or should have been known to the administrative staff and no disciplinary action is taken, the misconduct becomes organizational or institutional rather than individual. The key question in claims of organizational misconduct is whether the police agency took appropriate steps to control the actions of its individual officers once put on notice of their misconduct. Thus, the issue of control becomes critical in balancing officer and agency response to public need in an effort to maintain trust and confidence in the police.

Certainly, trust and confidence in the police is based on their interaction with citizens and the service and crimefighting functions that they perform.<sup>13</sup> When the police lose sight of their public service obligation, as they did during the beating of Rodney

<sup>10</sup> S. Walker, *The Police in America* 269-270 (1992).

<sup>11</sup> G. Alpert and R. Dunham, *Policing Urban America* at 103-119 (1992).

<sup>12</sup> *Id.* at 107.

<sup>13</sup> G. Alpert and R. Dunham, "Policing Multi-Ethnic Neighborhoods: The Miami Study and Findings for Law Enforcement in the United States 119-127 (1988).

<sup>7</sup> Smith and Alpert, "Police Policy: Is the Control Principle Out of Control?," *Police and Security News*, Sept./Oct. 1992, at 3, 5.

<sup>8</sup> *Id.* at 32.

<sup>9</sup> M. Brown, *Working the Street: Police Discretion and the Dilemmas of Reform*, 244-245 (1981).

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King, and in the incidents involving the Miami River Cops, there must be an accounting for the aberrance from their social contract to serve and protect.<sup>14</sup> Judicially, the accounting can range from findings of financial liability to criminal imprisonment. At the departmental level, firing or a lesser disciplinary sanction such as suspension may occur for individual officers. From a licensure perspective, however, decertification may be the only appropriate remedy where the individual officer's ability to police has become terminally compromised.<sup>15</sup>

The regulation of police misconduct has traditionally relied on the localities.<sup>16</sup> That is, once the individual officer becomes certified by the state regulatory agency, local agencies are free to hire, fire, or discipline an officer without oversight or state intervention. Because initial attempts to manage misconduct were limited to such internal control mechanisms, discipline frequently was subjectively imposed, with widely disparate punishments.<sup>17</sup> In many cases, this resulted in inconsequential disciplinary action taken against officers who had engaged in serious misconduct.<sup>18</sup>

Similarly, officers who committed serious offenses might be fired but find work subsequently in an agency that was unaware of the misconduct or simply indifferent to it.<sup>19</sup> Because

of such discrepancies in treatment, many states have enacted statutory or regulatory prerequisites for police service. In every state and the federal government, police officers must be licensed or certified.<sup>20</sup> Once an individual has earned the license and maintains it, he may continue in a career of law enforcement moving from one department to another. It is the license or certification that permits the individual to practice law enforcement in a particular jurisdiction. Unless the police officer's certification or license is withdrawn, the authority to exercise law enforcement powers continues. Other professions also regulate their members by granting and revoking licenses.<sup>21</sup> For example, an attorney or a medical doctor found guilty of immoral or illegal

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Process in Florida", 10 J. of Police Science and Admin. 473, 474 (1982).

<sup>20</sup> For example, in the state of South Carolina, Section 23-23-40 of the Code of Laws reads, in pertinent part:

No law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this state is authorized to enforce the laws or ordinances of this state or any political subdivision thereof unless he has been certified as qualified by the [Law Enforcement Training Council], except that any public law enforcement agency in this State may appoint or employ as a law enforcement officer, a person who is not certified if, within one year after the date of employment or appointment, the person secures certification from the council.

<sup>21</sup> For example, members of the legal and medical professions are closely regulated by professional licensure and are subject to censure and discipline for infractions of their regulatory guidelines. As an example, see ABA, Model Rules of Professional Conduct, American Bar Association (1992), governing the legal profession.

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<sup>14</sup> See notes 1 and 4 *supra*.

<sup>15</sup> Alpert, Smith and Watters, note 1 *supra*, at 475-478.

<sup>16</sup> Goldman and Puro, "Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct," 15 Hastings Const. L. Q. 60 (1987).

<sup>17</sup> United States Civil Rights Commission, Who's Guarding the Guardians 128-149 (1981).

<sup>18</sup> R. Goldman and S. Puro, note 16 *supra*, at 60-65.

<sup>19</sup> Greenberg and Kaluhiokalani, "Policing Ourselves: The Decertification

behavior may be professionally sanctioned.<sup>22</sup> As the practice of law enforcement entails the exercise of a significant number of critical functions, it is surprising that all states do not currently have mechanisms for decertifying officers who engage in serious police misconduct.<sup>23</sup>

Many states have a statutory or regulatory mandate that police officers cannot continue employment after being convicted of a felony or other such serious offense as one involving moral turpitude.<sup>24</sup> Additionally, some states have civil service systems with established continuing eligibility criteria for police.<sup>25</sup> However, these regulations affect only the most serious offenders and do not require that any action be taken against those who have violated the public trust in a less than criminal fashion. Thus, serious police misconduct within the penumbra of specific statutory or regulatory prohibitions may go unchecked unless accountability can be established for all police misconduct.

The need is clear: The state agency that certifies police officers must have the authority to remove the license to police where the licensee has proven unworthy. Like other professional groups, the police must keep

their own house in order.<sup>26</sup> Central to the implementation of any decertification procedure, however, is the need to define misconduct that would warrant what has been referred to as occupational capital punishment.<sup>27</sup>

### *Defining the Problem*

Criminal acts committed by police officers are the most repugnant type of misconduct. Violations of the law committed by those sworn to uphold it shock the conscience of the community. Federal civil rights violations are often criminal as well as civil in nature.<sup>28</sup> In these instances of misconduct, police executives have little difficulty deciding to discipline police officers for errant behavior. But what of allegations of impropriety that fail to rise to the level of criminality? In these areas, administrators are without concrete guidance and are forced to walk a thin line, balancing between the obligation to serve the public with integrity and the need to maintain fair but firm treatment of officers without destroying morale. Even the most conscientious efforts at discipline at this level will vary significantly from department to department due to the lack of standardized guidance as to the seriousness of specific misconduct. A difficult first question then becomes, "What constitutes police

<sup>22</sup> For example, an attorney can be disbarred for acts that tend to bring the legal profession into disrepute or that involve dishonesty or moral turpitude. See the Model Code of Professional Conduct, n.21 *supra*, Rule 8.4: Misconduct.

<sup>23</sup> Puro and Goldman, "Police Decertification: A Remedy for Police Misconduct?" in 5 R. Homant and D. Kennedy (eds.), *Police and Law Enforcement* 118 (1988), who report that nineteen states had no authority to decertify police officers. Since the time of their report, at least Michigan and South Carolina have implemented decertification procedures.

<sup>24</sup> *Id.* at 116.

<sup>25</sup> *Id.* at 122.

<sup>26</sup> Savino and Brunung, "Decertification Strategies and Tactics: Management and Union Perspectives," 43 *Lab. L. J.* 210-210 (1992).

<sup>27</sup> Johnson and Smith, "Blue Suits in Glass Houses: Can We Regulate Police Misconduct?" 2 *S.C. Forum* 6-11, (Summer 1992) at 8.

<sup>28</sup> Title 18 of the United States Code, Sections 241 and 242, specifically provide criminal sanctions for those persons who, under color of state law, conspire to violate federally secured rights of any citizen or actually violate federally secured rights of any inhabitant of the United States.

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misconduct for which officers should be decertified?"

Unlike many other "regulated" occupational fields, the police are not subject to uniform ethical principles or national standards. This results in regionalized and disparate judicial determinations of what precisely constitutes unacceptable conduct for the guardians of law and order. Such a balkanized approach explains the varying degrees of protection given to officers by different courts in ostensibly similar factual settings.<sup>29</sup> The lack of nationally binding ethical standards imposes an immense burden on the identification of behavior for which decertification is necessary or appropriate. Officers must be put on notice of expected behavior and given some degree of concrete guidance in its particulars or the process of insuring citizen rights will become mired in speculation.

While fundamental constitutional principles may preclude creation of an enforceable code of conduct at the federal level, altruistic principles of public service and economic concerns of risk and liability management should force every state to admit that deficient police officers must be subject to disciplinary action and delicensure if public trust is to be maintained. This conceptual aspect of decertification, however, is more easily explained than are its contours and limits defined.

As a practical matter, decertifiable misconduct is difficult to define. Frequently, the underlying behavior is linked by definition to the punishment or discipline meted out for it. It has been noted that the remedies for police misconduct take many forms,

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<sup>29</sup> For a useful discussion of the wide disparity in assessment of punitive damages against individual officers for their acts of misconduct see cases cited in I. Silver, *Police Civil Liability* 10-17-10-20 (2d ed. 1992).

most notably, from a criminal law standpoint, the application of the exclusionary rule.<sup>30</sup> An alternative remedy, the removal of the repeatedly deficient officer from the practice of law enforcement, has also been proposed.<sup>31</sup> Similarly, in an analysis of police misconduct in the Detroit Police Department, one author noted that:

The police have developed an amazing resiliency against pressures to control their own abusive behavior. It seems that police will not alter conduct without outside compulsion; nor is altered conduct guaranteed even when outside compulsion is present.<sup>32</sup>

These authors have recognized a principle critical to definition: misconduct is that which warrants some sanction as a remedy for its occurrence. The seriousness of the sanction, or outside compulsion, is the proper domain of inquiry for discussions involving decertification. Certainly, inquiry must be made into the relationship of an officer's offensive conduct to the ability to provide police service. Where the behavior involves critical aspects of police duty and seriously compromises the officer's ability to provide protection to the public, decertification must be the appropriate sanction. To define the parameters of decertifiable conduct, however, requires analysis of those police functions that must be deemed critical and core to the providing of public service.

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<sup>30</sup> Goldman and Puro, note 16 *supra*, at 47-49.

<sup>31</sup> *Id* at 63-65.

<sup>32</sup> Littlejohn, "Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct", 58 U. Det., Journ. of Urban Law, 365, 366 (1981) (citations omitted).

*Core and Critical Functions*

Certain behaviors may be said to be core functions of police work, i.e., fundamental to the performance of the police mission. On the one hand, core behaviors involve those activities, such as executing legal process, conducting traffic stops, and a host of others, that are the daily tasks of police work. On the other hand, critical functions are a small subset of core behaviors that have as their likely consequence great bodily injury or death if performed improperly. These would include such behaviors as discharge of a weapon or emergency response driving, including vehicular pursuit. One may conclude, from an analysis of the police mandate to serve the public, that decertification may be an appropriate remedy where willful or wanton misfeasance<sup>33</sup> in a critical function area is found after a full investigation is conducted. Where such misfeasance has occurred in a core function, the remedy should typically be less drastic, unless repeated or multiple occurrences are involved. This proposal is premised upon officers having been provided proper training in the delivery of police services in core and critical function areas. Typically, decertification would be inappropriate for misfeasance premised upon inadvertent or negligent behaviors that fall

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<sup>33</sup> *Black's Law Dictionary* (5th ed. 1979) defines "misfeasance" as "[t]he improper performance of some act which a man may lawfully do" at 902. A "willful" act is "one done intentionally, knowingly and purposely, without justifiable excuse" and "done with evil intent, or with a bad motive or purpose, with indifference to the natural consequences" at 1434. "Wanton" conduct, according to the same source, is that "characterized by extreme recklessness or foolhardiness [and] disregardful of the rights or safety of others or consequences, at 1418-1419."

short of wanton or intentional conduct.

The importance of core behaviors can best be understood by evaluating a police department's frequency of critical public contacts. Exhibit I has been designed for risk management of police activities<sup>34</sup> and its author noted that the high-frequency, low-exposure functions can be discharged with minimal guidance and a strong system of shared values. The high-exposure activities, including the use of both lethal and nonlethal force and many other serious actions, including searches, seizures, and other activities significantly affecting the liberty interests of citizens, require explicit policies, training, and overall guidance. In this last respect, this classification would include all critical functions and many core functions. Of course, there exists a policy continuum along which the need for control increases proportionately with respect to the criticality of the police function.<sup>35</sup> While this continuum is addressed specifically to policy issues, it serves to identify those activities that are closely tied to the potential for serious injury or death, i.e., critical functions. Of necessity, the class of core behaviors must be broader than the class of critical functions. While the policy continuum identifies critical functions that *must* be tightly controlled because of the potential for serious injury or death, there also exists a body, or core, of police functions that are essential to

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<sup>34</sup> D. LaBrec, "Risk Management: Preventive Law Practice and Practical Risk Management Methods for the 1980s," paper presented to the Annual Meeting of the National Institute of Municipal Law Officers, Miami, Fla. (1982).

<sup>35</sup> G. Alpert and W. Smith, "Developing Police Policy: Evaluating the Control Principle," 12 *American Journal of Police* (1993) (forthcoming).

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public safety but that will not likely result in serious injury or death if improperly performed. These core and critical functions, once identified, should be the focus of a definition of decertifiable misconduct.

Therefore, to define decertifiable police misconduct one must isolate core and critical behaviors that have an impact upon significant rights of citizens, i.e., those guaranteed by the Bill of Rights and the Fourteenth Amendment and those created by state statutory and constitutional guarantees. An identification of actionable police conduct under such federal civil rights statutes as the 1871 Civil Rights Act would be the first step in this process.<sup>36</sup> Once this identification process has been completed, the second step is to establish qualitative guidelines for officers so that notice of permissible behavioral parameters is provided. Finally, notice must be given of possible punishment for transgressions. Linked to this last step is provision for due process protection for officers who are targets of misconduct allegations. Clarification of the impact of criminal indictment or information based upon core or critical functions must also be made.

Ultimately, the ability to decertify will serve both police and citizen interests by providing service with integrity. Additionally, elimination of officers who are no longer worthy of the public trust will reduce agency liability exposure. This threat of civil judgment may provide the final com-

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<sup>36</sup> Codified at Title 42, U.S.C. § 1983. Such conduct would include wrongful arrests and detentions, malicious or retaliatory prosecutions, incidents involving use of excessive force and illegal searches and seizures to list a few. For a comprehensive review of actionable police misconduct, see *Police Misconduct, Law and Litigation*, M. Avery and D. Rudovsky, 2d ed. (1992).

pulsion to alter or prevent abusive police behavior or prevent it.<sup>37</sup>

### *Police Civil Liability for Misconduct*

The 1989 U.S. Supreme Court decision in *City of Canton v. Harris*<sup>38</sup> marked the beginning of an era of increased scrutiny of police training and operations. The case should be viewed as a harbinger of increased accountability for police conduct. A number of courts, both federal and state, have taken the *City of Canton* benchmark of "deliberate indifference" and applied it to a variety of incidents of police misconduct.<sup>39</sup> In *Davis v. Mason County*,<sup>40</sup> for exam-

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<sup>37</sup> Littlejohn, note 32 *supra*, at 365.

<sup>38</sup> 109 S. Ct. 1197 (1989). *City of Canton* is frequently cited as holding that inadequacy of police training may serve as the basis for municipal liability under Title 42, U.S.C. § 1983 where the failure to train amounts to "deliberate indifference" to the rights of citizens with whom the police will likely have contact. The significance of the "deliberate indifference" standard is highlighted in footnote 10 of the case which posits that some police activities are so critical in terms of their potential for injury, if improperly discharged, that failure to provide training in their particulars is classifiable as deliberately indifferent. 109 S. Ct. at 1205 n.10.

<sup>39</sup> G. Alpert, "Law Enforcement: *City of Canton v. Harris* and the Deliberate Indifference Standard," 25 *Crim. L. B.* 466-472 (1989).

<sup>40</sup> 927 F.2d 1473 (9th Cir. 1991). *Davis* involved four "incidents" in which Mason County, Washington, deputies engaged in a variety of arrest and detention tactics clearly disproportionate to the circumstances in which they were used. In holding Mason County and its sheriff liable under 42 U.S.C. § 1983, the Court of Appeals for the Ninth Circuit held that the county's failure to train its deputies on the constitutional limits of the use of force constituted "deliberate indifference" under *City of Canton v. Harris*, *supra* note 38 and that the sheriff

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ple, the Ninth Circuit Court of Appeals recognized that the training afforded sheriff's deputies in the constitutional limits of the use of non-lethal force was so deficient as to amount to "deliberate indifference" to citizens' rights. The facts in the four *Davis* "incidents" provide sad commentary on the impact of deficient police training on the citizens the officers purportedly were required to "protect and serve."

*City of Canton* is of critical importance to police administrators and municipal risk managers, but it has brought no surprises to an occupational group already accustomed to repeated allegations of improper conduct. That case represents only part of the current concern over police misconduct, but it makes abundantly clear that where officer behavior can be seen as evidencing the policy, custom, or practice of the employing municipality and has resulted in constitutional injury to a plaintiff, municipal liability is virtually certain to follow.<sup>41</sup> Stated another way, failure to correct individual misconduct may result in a finding of organizational misconduct or corruption.

Twenty years ago, the National Advisory Commission on Criminal Justice Standards and Goals reported that when the most visible government agents, the police, flaunt the laws they are sworn to uphold, this has a significant demoralizing effect on members of the community. The Commission explained

As long as official corruption exists, the war against crime will be perceived by many as a war of the powerful against the powerless; 'law and order' will be just a hypocritical rallying cry and 'equal jus-

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was a "policymaker" for purposes of municipal liability.

<sup>41</sup> R. Del Carmen, *Civil Liabilities in American Policing* 45 (1991).

tice under law' will be an empty phrase.<sup>42</sup>

Today, in 1993, the Commission's observations have a frighteningly contemporary ring in the realm of police misconduct studies and the problem is no closer to resolution than when the words were first written.

If, after *City of Canton v. Harris*,<sup>43</sup> departments have been placed on notice to identify so-called critical function areas for their officers and to provide appropriate training, why is there such a proliferation of "inadequate training" claims? If agencies have been put on notice that unchecked patterns of unconstitutional practices by their officers will likely result in a finding of deliberate indifference, why are claims of unconstitutional "custom" or "practice" rampant in civil rights litigation? An initial explanation might be that departments fail to understand the ramifications of deliberately indifferent training or discipline. A more considered response would probably reveal a lack of awareness of what steps may be taken to remove the bad actors who perpetuate patterns of defective policing. Many departments are without the means to rid the system of the renegade centurions who migrate from one department to another. There is also a tendency to protect fellow officers, even though such a practice undermines the police mission of public service and runs afoul of the *City of Canton* mandate.

It may at first appear that the relationship of *City of Canton* to police misconduct and decertification issues is tangential. However, it should become clear, under the now "famous"

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<sup>42</sup> The National Advisory Commission on Criminal Justice Standards and Goals, Report on Police at 207 (1973).

<sup>43</sup> *City of Canton v. Harris*, 109 S. Ct. 1197 (1988).

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footnote 10,<sup>44</sup> that departments that continue to employ officers who, as a practice, violate the constitutional rights of citizens are at tremendous risk of liability. By raising the issue of "foreseeability" of police behavior, *City of Canton* has invited departments to look at core and critical police functions that policymakers ought to know will impact citizens' rights. Certainly, the case sends out a strong message to manage officer behavior effectively by executive level guidance on the issue of departmental and societal expectations, and the imposition of a comprehensive system of discipline.

To eliminate the many regionalized approaches to police discipline, there must be a consistent approach to problems of decertifiable misconduct. Because of the need for such a standardized approach to retain public trust and confidence, solutions to the misconduct must come from a centralized state regulatory body, independent of regional or local variation. The process itself must provide a balance among the rights of officers, agencies, and citizens.

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<sup>44</sup> Footnote 10 states:

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

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers who, nevertheless, are 'deliberately indifferent' to the need. 109 S. Ct. at 1205 n.10.

### *Mechanics of Decertification: A Generic Model*

The first step in a decertification process is the identification of decertifiable misconduct. In an effort to address this definitional issue from a regulatory standpoint in South Carolina, two authors proposed that any definition of misconduct "must be constructed keeping in mind effectiveness, enforceability, and legal defensibility," taking into consideration the broad range of behaviors involved in law enforcement operations.<sup>45</sup>

Once these definitional concerns have been resolved, fundamental fairness and due process issues must be addressed.<sup>46</sup> Since accountability for misconduct is a part of law enforcement's "social contract"<sup>47</sup> with the public, citizen complaints must be solicited and investigated as efficiently as those internally generated. In our system of justice, officers accused of misconduct are entitled to a presumption of innocence. In order to comply with Administrative Procedures Acts<sup>48</sup> in most jurisdictions, it

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<sup>45</sup> Johnson and Smith, *supra* note 27, at 10.

<sup>46</sup> A number of state and federal protections may be available to officers under statute for their ostensibly job-related behaviors. Among these are state "whistleblower" statutes (i.e., S.C. Code of Laws as amended 58-27-20 (1976), Act H.354 effective March 19, 1988), the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990), the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, (Nov. 21, 1991), and others.

<sup>47</sup> H. Cohen and M. Feldberg, *Power and Restraint: The Moral Dimension of Police Work* 112 (1991).

<sup>48</sup> These acts typically prescribe the administrative recourse available to an individual affected by governmental action. Under the vast majority of such statutes, exhaustion of the administrative

is suggested that officers be guaranteed a hearing before an administrative law judge or hearing officer in cases of contested allegations made in support of decertification. The outcome of the hearing must, additionally, be appealable to a court of competent jurisdiction if the findings at the initial hearing are contested.<sup>49</sup>

Once findings of misconduct are entered and finalized, appropriate sanctions must be considered. While some statutory and regulatory schemes allow for no sanctions other than decertification where a finding of misconduct is substantiated,<sup>50</sup> another approach is preferable. Sanctions must be commensurate with the seriousness of the behavior. While it may be a foregone conclusion that willful misfeasance in performance of a critical function, such as discharge of a firearm at a fleeing misdemeanant, may warrant decertification, it does not logically follow that there should be no lesser punishment where the misconduct is considerably less severe. Finally, departmental discipline may be sufficient under a scheme allowing for lesser sanctions.

This much is clear: Every instance of misbehavior by an officer should not be considered "misconduct." Similarly, this proposal does not suggest that every instance of substantiated misconduct should warrant decertification. Every instance of substantiated misconduct, under any definition, however, should be reported for recordkeeping purposes,

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process is required before the filing of a lawsuit is permitted.

<sup>49</sup> For example, South Carolina's provisions are found generally at Code Sections 1-23-310-1-23-400, which allow judicial review of an administrative determination only after exhaustion of administrative remedies.

<sup>50</sup> See South Carolina's Regulations of the Law Enforcement Training Council at R. 38-300 et. seq. (effective 1991).

so that the state regulatory body is able to monitor patterns of individual officer misconduct. It is suggested that the issue of such appropriate lesser sanctions as temporary suspension of certification should be addressed under every state statutory or regulatory scheme.

#### *Relationship to Departmental Discipline*

The concept of decertification is analogous to occupational capital punishment. Once decertified, the officer loses the license to engage in a career in law enforcement. In many states, there is no procedure for reinstatement, even where a pardon may be granted for criminal conduct underlying the decision to decertify or where the officer has been rehabilitated with regard to underlying misconduct.<sup>51</sup> In situations involving wrongdoing that does not meet the definition of "misconduct" appropriate for decertification or lesser sanction, departmental discipline may be the sole means of accountability for officer misfeasance. Initiation of proceedings to decertify a deficient officer must not bar departmental disciplinary action. Departmental sanctions will in most cases be imposed long before the outcome of the decertification proceeding is finalized. Likewise, a department's decision to terminate an officer's employment cannot render moot the ultimate decision to decertify. Officers terminated

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<sup>51</sup> The issue of "irreversible" decertification is one over which police administrators are frequently at odds. Much of the debate is contingent upon the particular state statute or regulation involved. In some states, for example, decertification is terminal in that no reinstatement provision exists. See South Carolina's Regulations of the Law Enforcement Training Council at 38. South Carolina Regulations serve as an example of this approach.

## POLICING THE DEFECTIVE CENTURION

for misconduct from one agency have frequently been accepted by sister agencies, with and without knowledge of the prior termination for misconduct. However, a decertified officer is not so marketable. Effectively, the decertification issue is one of moral and ethical fitness. While ineptitude may warrant sanction according to the terms of a department's disciplinary plan, it is unlikely that inept conduct would rise to the level of wanton or willful misfeasance warranting decertification.

### *Beyond Decertification*

Certainly, the entire process of defining misconduct would be facilitated were all officers to operate under a uniform set of ethical principles. Thus, a logical first step is an enhanced effort to educate officers in ethical and moral decisionmaking.<sup>52</sup>

<sup>52</sup> Green, Alpert and Styles, "Values of Culture in Two American Police Departments: Lessons From King Arthur," 8 J. Contem. Crim. Just. 184-186 (1992).

There is a dire need for national consensus on the ethical and moral parameters of police conduct. This concern is magnified when one considers that even where police misconduct is regulated by the state, sanctions may differ drastically for identical behaviors and there is no nationalized database for tracking decertified officers. Creation of a nationally accepted Code of Police Professional Responsibility would be a major step in guaranteeing equal treatment under law and in professionalizing the police. There must be a process of believing and accepting departmental policy, which itself must be premised upon service to the public with integrity.<sup>53</sup>

The hallmark of a profession is its ability to regulate itself internally by sanctioning members and tracking their continuing eligibility to practice professionally. Until the police keep their own house in an accountable fashion, true professionalism will remain an elusive goal.

<sup>53</sup> Alpert and Smith, note 35 *supra*, at 8.

**Exhibit 1**  
**Categories of Risk**

		Frequency	
		High	Low
Exposure	High	High Frequency High Exposure	Low Frequency High Exposure
	Low	High Frequency Low Exposure	Low Frequency Low Exposure