CAMPUS POLICE ISSUES:
POLICING IN AN AGE OF LIABILITY

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17th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1996
Policing has always occurred in an arena ripe with opportunities for liability. College campuses, with a concentration of young adults engaging in many activities that potentially require attention from the police, present even more opportunities for police-based liability. As a result, both police and administrators have expressed concerns about the possibilities of suits challenging traditional police actions, i.e., arrests, detention, pursuits, as well as suits seeking compensation based on negligence of the institution for criminal conduct of third parties on campus premises.

This outline presents: 1. the legal context in which campus policing occurs; 2. the legal theories underlying the most serious liabilities for campus policing; and 3. recommended campus management tips that will help reduce the likelihood of liability for police actions.

This outline will not address in any detail liability issues that arise from off-campus or off-duty police activities; or non-liability police legal issues, such as the Buckley Amendment or campus crime reporting.

I. Peace Officers and Security Officers: There is a Legal Difference

A. Peace Officer: A peace officer refers to an individual who is given the same law enforcement authority, power and responsibility by the state as is given to other law enforcement officers of the state.

1. Authority for existence/powers of campus peace officers derives from state law regarding the police powers and authority.

   a. Commonly campus peace officers have the same powers as other peace officers in the state including:
      (1) Powers of arrest for the commission of a crime;
      (2) Investigative authority, including the ability to secure a warrant for a lawful search under certain circumstances;
      (3) Ability to detain a suspect;
      (4) Access to use the criminal justice process;
      (5) Ability to carry and use weapons; and
      (6) All of the privileges and immunities of the state.
b. Typically, the authorizing statutes limit the authority of campus peace officers in a manner that match their role to preserve and protect the peace of the educational campus.

(1) The authority of campus peace officers is often limited to the physical boundaries of the campus; when so imposed, such jurisdictional authorities are usually strictly construed by courts as limiting the law enforcement authority of peace officers, and prohibiting them from making an arrest off-campus (unless in hot pursuit of a suspect). See Commonwealth of Pennsylvania v. Mitchell, 554 A.2d 542 (Pa. Super. Ct. 1989); People v. Doherty, 487 N.E.2d 1222 (Ill.App.Ct. 1986); State v. Harris, 609 A.2d 945 (RI, 1992); Baris v. State, 846 S.W.2d 764 (Mo.Ct.App. 1993).

(2) It is not uncommon for peace officers commissioned to serve on private college campuses to have more limitations placed on their authority than is placed on the authority of their counterparts employed at public institutions. See, e.g., Texas Education Code Section 51.202.

c. In virtually every state examined, peace officers are subject to oversight by specific state agencies, such as:

(1) The state police commission (typically responsible to award and remove licenses, oversee the issuance of bonds, establish and operate training requirements for continuation or renewal of licensure).

(2) Often, the campus or institutional police department must meet state requirements to be enabled to hire police.

(3) The state/county attorney who is charged to bring to the courts indictments and charges of criminal violations may have the right to exercise some authority over police.

d. Of greatest significance to both public and private institutions of higher education, peace officers on campus may be protected by the same sovereign immunity in tort actions as are all other peace officers in the state. See Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992); People v. Wesley, 365 N.Y.S.2d 593 (City Ct. Buffalo, 1975); Hall v. Virginia, 389 S.E.2d 921 (Va.Ct.App. 1980).

B. Security Officers

1. The term security officer is used to refer to individuals who are hired to provide protection to a campus or group of campuses, but do not have the law enforcement powers, responsibility or authority of peace officers.
a. Increasingly, state penal codes provide for the licensure of security officers.  
(1) Commonly, such licensure requirements permit employees who serve in a security function to carry and use a weapon the use of which that would otherwise be prohibited. (i.e., handguns, club, mace).  
(2) Some codes, but not many, give a limited detention authority to security officers.  
(3) Security officers are not typically granted the immunity of the state.  

b. The education codes of some states may provide for the hiring and services of security officers by public educational institutions.  
(1) Some codes specifically authorize the hiring of security officers for schools and colleges and vest in them a limited authority (carrying of weapons other than firearms after the appropriate training, traffic authority on the roads immediately surrounding the educational institution), that is not available to other security officers in the state.  
(2) Commonly, the education code is not specific about the hiring of security officers and therefore, their hiring falls under the general authority of the board of trustees to provide for the safety of the campuses and to protect the buildings and personal property.  
(a) The authority and power of such employees cannot exceed the general authority and power of the board and is uniquely dependent upon the presence of clear board policy and internal procedures.

II. **Common Legal Bases for Liability Claims Based on Police Activities**

A. Violation of Constitutional Rights (42 U.S.C. Section 1983): "Section 1983" is the most important source of serious liability claims made against police, their employers and the people with administrative responsibility for police actions.  

1. Section 1983 prohibits persons from depriving any persons of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States ... under color of state law".
2. The law is extremely broad and potentially covers many of the serious challenges that can be brought because of campus policing decisions and actions, including:
   (1) arrest or detention of a person by the police. See 83 ALR2d 353, 452.
   (2) Car chases by police. See 83 ALR2d 353, 452.
   (3) Excessive force;
   (4) Deaths or suicides while in police custody. See 1 ALR Fed. 519.

3. Large awards possible under section 1983
   (1) Actual damages (financial losses suffered)
   (2) Punitive damages
   (3) Consequential damages
   (4) Damages are not subject to the caps imposed by the Civil Rights Act of 1990.

4. The "under color of state law" requirement raises an important legal issue: whether section 1983 may be applied to nonstate institutions, such as private colleges or universities or local community college districts.

   a. Security officers who do not have police authority (usually defined in terms of their arrest and search powers) may fall outside the large net of Section 1983 as not being "under color of state law".

   b. The few cases that have examined whether officers hired by nongovernmental entities "act under color of state law" have found that they do, including in some circumstances where they did not have the full statutory powers of peace officers of the state. See, Temple v. Albert, 719 F.Supp. 265 (S.D.N.Y. 1989); Rojas v. Alexander's Department Store, Inc., 654 F.Supp. 856 (E.D.N.Y. 1986)

   c. Cases finding "state action" and the applicability of Fourth Amendment strictures which security officers given arrest or search powers may suggest a judicial attitude of imposing more stringent responsibilities upon even noncommissioned officers and administrators. See People v. Boettner, 362 N.Y.S.2d 365 (S.D.N.Y. 1974) (Search by private university administrators not state action even though its fruits were given to police; left open that chance of finding state action if the administrators were serving as agents of police or if there was a close and continuing relationship between the police and the University administrators.). See also, People v. Zelinski, 594 P.2d 1000 (Cal. 1979).

5. A Section 1983 action may be brought against officers, college administrators and Board members who participated in challenged decisions or who set the challenged policy.
a. The officer is potentially liable for negligence which results in injury or death (See 60 ALR2d 873) or negligent damage to property (See 53 ALR 41).

b. The institution, through its trustees, may be sued under section 1983 if the trustees were directly involved in the deprivation of liberty.

(1) When the official policy is the moving force behind the constitutional violation, Rojas v. Alexander's Department Store (supra)

(2) Involves a plan of close and consistent cooperation with the police. Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975)

(3) "A persistent, widespread practice of city officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that failure represents policy". Webster v. City of Houston

(4) "Failure to train police personnel can support section 1983 liability 'only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contact'". Evans v. City of Marin, 986 F.2d 104 (1993).

(5) But, a government cannot be found vicariously liable for the constitutional torts of its employees. See, e.g., Monell v. Department of Social Services, 436 U.S. 658, 694 (1956); Temple v. Albert (supra).

c. Less clear on when civilian administrators and supervisors of police can be found to be "acting under color of state law".

6. A final legal issue is whether the institution or the officer is protected from Section 1983 actions by the immunity protections of the 11th Amendment of the Constitution. This issue will not be addressed in this outline, except to note:

a. The circuits continue to disagree about the reach of the 11th Amendment immunities to particular public institutions, making it impossible to assert with assurance what institutions and activities of the institutions are protected from Section 1983 actions.

b. The law appears to be clarifying, however, that the 11th Amendment immunities provide protection in federal, rather than state court.
c. Regardless of whether Section 1983 may be used to
counter police actions that deny constitutional rights,
federal and state civil rights statutes are typically
available as an alternative route.

(1) See, e.g., The Americans with Disabilities Act, 42
U.S.C. Section 1211 et seq.; Title VI of the Civil
Rights Act of 1964, 42 U.S.C. 2000d et seq., Title
IX of the Education Amendments of 1972, 20
U.S.C. Section 1681.

(2) Particularly vulnerable under these sections are
institutional or police practices that result in the
questioning and/or detention of minorities or the
mistreatment of a person with a disability.

B. Negligence

1. Negligence refers to a specific type of tort action in which the
claim is made that the defendant owed a legal duty to the
plaintiff, that the defendant did not meet this legal duty, and
this failure caused injury to the plaintiff.

a. See Sheila Trice Bell's outline for the 1994 Stetson
Conference "Legal Issues Affecting Event Management
at Colleges and Universities"; see also "Annot.
"Liability of University, College or Other School for
Failure to Protect Students from Crimes", 1 ALR4th
1099 (1980 and Supp.); Kaplin & Lee, The Law of
a more complete discussion of negligence.

b. Negligence claims are typically made against the
institution, its trustees and even senior administrators
alleging failure to the institution to train, direct, equip, or
arm campus police; occasionally the claim is made
against the individual police officer.

c. Although negligence theories are notoriously creative
and as broad as a lawyer's imagination, negligence
actions arising from crime committed on the campus is
clearly the most significant area of growth in recent
years.

(1) Campuses are particularly subject to such actions
since the enactment of the Campus Security Act
(20 U.S.C. 1092) as amended by the Sexual
Assault Victims' Bill of Rights. See M.C.
Gribbaton, Note, "Forewarned is Forearmed: The
Crime Awareness and Campus Security Act of
1990 and the Future of Institutional Liability for
Student Victimization", 43 Case Western Reserve

(a) The Act requires colleges/universities to
prepare and distribute annual crime
statistics reports.
(b) The law also requires the college/university to take steps to warn of crime on campus in certain circumstances.

(2) Plaintiffs have been permitted to bring actions alleging the failure of the institution to provide adequate security. See Miller v. State, 478 N.Y.S.2d 829 (N.Y.App. 1984); Nieswand v. Cornell University, 692 F.Supp. 1464 (N.D.N.Y. 1988).

(3) The failure to take reasonable steps when harm was foreseeable has recently been a basis for negligence liability. See Delaney v. University of Houston, 835 S.W.2d 56 (S.Ct. Tex. 1992); Green v. Dormitory Authority of the State of New York, 173 A.2d 1,577 N.Y.S.2d 675 (1991); Vangelli v. Schneider, 598 N.Y.S.2d 8347 (1993); Nero v. Kansas State U., 861 P.2d 768 (Kan. 1993).

(4) However, in numerous cases in which the criminal conduct was not considered to be foreseeable, institutions have not been found liable. See e.g., Rabel v. Illinois Wesleyan University, 514 N.E.2d 552 (Ill.App. Ct. 1987); Tanja H. V. Regents of the University of California, 278 Ca. Repr. 918 (Cal.Ct.App.; Eiseman v. State of New York, 518 N.Y.S.2d 608 (NY 1987); Nola v. University of Southern California, 20 Cal. Rptr.2d 97 (1993 Cal.App.)

(5) Recently, campus police are experiencing demands to protect individuals from threats made by specific individuals. See e.g., Jesik v. Maricopa County Community College District, 611 P.2d 547 (Ariz. 1980) for a discussion about the possibilities of liability against the individual officer and the institution in such a situation.

(a) In general, the duty to preserve the peace and arrest lawbreakers is one which is owed to the public in general rather than any one particular individual. See Police -- Personal Liability, 41 ALR3d 700, 703 section 3; see also Am. Jur. Sheriffs, Police, and Constables (1st Ed. Sec. 132).

(b) However, some courts have found liability when police failed to provide protection to one who was specifically threatened and was later harmed. See 46 ALR4th 948.

2. Personal Torts - Liability Against Individual Police or Security Officers

a. A peace officer may be held liable in damages to any person injured in consequence of a breach of any of the duties of the office. See, "Police -- Personal Liability" 41 ALR3d 700, 703 Sec. 3.
b. Commonly plaintiffs charge police with such personal torts as assault, defamation/libel or oppressive use of process. See 70 Am.Jur.2d 68.

c. Liability has been imposed against an individual peace officer whose arrest of a student on a drug charge was found to constitute entrapment by the criminal court. Wright v. Schreffler, 618 A.2d 412 (Pa. Super. Ct. 1992).

d. See also, Hickey v. Zezulka, 443 N.W.2d 180 (Mich.Ct.App. 1989)(liability found against an officer who failed to follow institutional procedures in searching a student arrested and detained who hung himself in the holding cell).(Cf 487 N.W.2d 106 in which the institution was found to be protected by sovereign immunity in the same cause of action.)

e. See, Jones v. Wittenberg University, 534 F.2d 1203 (6th Cir. 1976)(imposing liability on both institution and officer who’s warning shot to a fleeing student suspect resulted in his death).

3. Legal Challenges to Constitutionality of Campus Disciplinary Proceedings When Criminal Charges or Trial Pending

a. This issue is not usually one of liability, as this term has been used thus far, because the intended result is commonly to enjoin the proceeding rather than obtain money damages. However, there are important and practical legal issues involved.

b. The Fifth Amendment of the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself".


(2) Also inapplicable if confession heard by private citizens, as opposed to police. See State v. Graves, 291 A.2d 2 (N.J. 1972)(key was whether the person hearing the confession had arrest powers or not).

c. The Fourteenth Amendment prevents the government from depriving any person of any rights or privileges without the due process of law.
Right to representation by an attorney not required in an administrative hearing. (see Osteen v. Henley, 13 F.3d 221 (7th 1993)) although if campus action is preceding criminal action, may be required to permit the accused to have his/her attorney present. Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978).

Is not double jeopardy for a public institution to conduct a hearing to consider inflicting punishment for same act that is punished under criminal code. Paine v. Board of Regents of the University of Texas System, 355 F.Sup. 199 (W.D. Tex. 1972)(5th Cir. 1973).

The Fourth Amendment protections the Fourth Amendment of the U.S. Constitution protects "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures".

(1) The "exclusionary rule" is a shorthand for court decisions that bar the use of evidence in a criminal proceeding that was obtained from police searches that were not supported by probable cause and a proper warrant.

(2) This constitutional protection usually does not prevent the following:
   (a) the ability of private persons to conduct searches. See People v. Boettner, 362 N.Y.S.2d 365 (Sup. Ct. 1974) A private university had initiated a dormitory search, which uncovered evidence used to prosecute a student. This was admissible because the police had not initiated the search.
   (b) The use of evidence in an administrative, as opposed to criminal proceeding. See, e.g., Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

III. MANAGEMENT STEPS THAT MAY REDUCE LIABILITY FOR POLICING ACTIVITIES

A. The top levels of the institution needs to determine what responsibilities and/or authority will be given to campus police?

1. This decision must be made understanding the legal basis underlying the police on the campus.

   a. If the legal authorities of campus police are unclear, clarify with the appropriate authorities in the state (e.g.,
attorney general) the responsibilities/authorities of the campus police.

b. Educate the police, the administration and the Board about the legal responsibilities and limitations on authority of the police force.

c. Create and adopt policies to clarify how the institution is applying the laws to its own force. (It is not usual mandated that officers hired by campuses be invested with the maximum authority granted; it might be that some lesser amount of authority will better serve the institution.

2. Determine what responsibilities outside of those assigned or dictated by law, will be carried by the campus officers.

a. For example, many institutions establish extra-legal safety responsibilities for campus police, including:
   (1) maintain hours for buildings (including access privileges, hours etc.);
   (2) enforcing certain student conduct rules, i.e., anti-hazing policies; use of alcohol at parties on campus.
   (3) lighting and patrol of campus at night.
   (4) enforcing and administering institution's own internal parking rules;
   (5) control of campus demonstrations and oversight over campus social or athletic events.

b. However, it is imperative that a thorough legal review be conducted of issues must be considered in making this decision:
   (1) Whether such a role invests those activities with constitutional obligations that are not carried by non-police administrators (this may not nix the decision, but certainly needs to be anticipated).

c. Communicate widely to key administrators and students when police have such a function, especially:
   (1) Student affairs professionals;
   (2) Residence hall advisors/supervisors;
   (3) President’s office!

B. Establish comprehensive and up-to-date polices

1. Stay up to date with the increasing number of federal laws that, while not imposing liability, may be argued to set standards or create duties by the institution.
a. The *Campus Security Act* (20 U.S.C. 1092) conditions the receipt of federal funds upon the compliance with specific reporting and publication of campus crime statistics and reports concerning serious crime incidents.

b. The *Drug Free Schools and Communities Act* (20 U.S.C. 1145g) conditions the receipt of federal money upon the publication of the campus' policies concerning use of alcohol or illegal drugs, the penalties that will be imposed for use of either on the job and resources that can assist employees or students with drug or alcohol abuse problems.

c. *Family Educational Rights and Privacy Act (FERPA)* 20 U.S.C. 1232g; 34 C.F.R. 99.31 (also known as the Buckley Amendment). FERPA protects the educational records from disclosure to anyone except the student (or if below the age of 18, the student's parents). Educational records are broadly defined but exclude a small category of information, called "directory information". FERPA contains specific rules regarding records collected and retained by campus police and kept for law enforcement purposes.

d. *Drug Free Schools and Communities Act*, 20 U.S.C. 1145g; 34 CFR 86 (Aug. 16, 1990) requires institutions receiving federal funds to certify:
   (1) that they have adopted and implemented a drug and alcohol prevention program.
   (2) that they will impose disciplinary sanctions, up to and including expulsion, termination of employment and referral to prosecution.
   (3) The institution is not mandated to refer persons who violate the institutions rules for prosecution, but may do so if it chooses.

2. Review the institution's policies and procedures for compliance with laws which are helpful in defending police action.

a. Deadly Force

b. Guns and other weapons on/near campus
   (1) *Gun Free Zone Act*, 20 US Sec. 922(g)(1)(A), made it a federal crime to possess a firearm in a school zone. It was struck down as unconstitutional by the U.S. Supreme in *U.S. v. Lopez*, 115 S.Ct. 1624 (1995).

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1This is not an issue of a liability because FERPA does not create a private right of action against the institution for violations of FERPA (although some states may permit a tort claim of the violation of the rights of privacy). See, e.g., *Smith v. Duquesne University*, 612 F.Supp. 72, 79-80 (D.C. Pa. 1985, aff'd w/o opin., 787 F.2d 583 (3d Cir. 1985).
(2) This decision, which concluded that the law exceeded the legitimate reaches of the Commerce Clause of the Constitution, does not affect state “Gun Free School Zone Laws”.

(3) Attend to the special issues raised by “Concealed Weapons Laws” being passed in a number of states, particularly in their incorporation of Gun-Free-School-Zone laws.

3. Establish good business practices to oversee police
   a. Clearly identify police responsibilities and take steps to review carefully the legal liability implications of peace officers in administrative roles.
   b. Be clear about the reporting responsibilities/accountability of campus police.
      (1) Establish Board policy on this matter, if the law is vague.
      (2) Stay in good contact with outside agencies that are involved in giving police direction.
      (3) Investigate complaints against police, promptly and even consider bringing in outsiders to examine practices that result in police attention to a disproportionate number of minorities students or citizens.

4. Police training is a crucial budget matter that cannot be allowed to slip.
   a. Give special attention to each of the following issues:
      (1) ADA
      (2) Civil Rights Laws
      (3) Deadly force and use of weapons
      (4) Arrest and detention procedures.
      (5) Weapons on campus
      (6) Organized demonstrations
   b. Do not fall into the trap of believing that training need be done only once,
      or that state-mandated training is sufficient.

5. Review and have in place up to date and effective interlocal agreements with other local police departments that address the following:
   a. Under whose authority are campus police when they respond to a request for backup by an outside police department.
b. What is the role of the campus police when the local police department seeks to arrest a student or employee/faculty member on the campus.

c. What will be the procedures for questioning, detaining, arresting, transporting, charging individuals arrested on campus.

6. Review with counsel the conduct of campus disciplinary hearings in circumstances when criminal charge or trial is pending.

a. Establish good and clear communications between student judicial affairs and the police.

b. Regularly review policy on this matter after it is used to ensure that it operates as intended.

7. Purchase liability insurance that will be adequate to cover liabilities not clearly protected by sovereign immunity:

a. Policy and administrative decisions regarding police practices.

b. Coverage for Board members and other administrators who guide or oversee the police department.