

ACJS Today

Academy of Criminal Justice Sciences

The 50-Year Journey: The U.S. Supreme Court and Prisoners' Rights

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Michigan State University

June 2014 marked the 50th anniversary of the U.S. Supreme Court's decision in *Cooper v. Pate* (1964), the case regarded as the highest court's endorsement of opening federal courthouse doors to constitutional rights lawsuits by incarcerated offenders. Prisoners were already filing legal actions seeking judicial protection of constitutional rights within correctional institutions, but the *Cooper* decision provided confirmation from the highest judicial authority that convicted offenders could file federal lawsuits against state corrections officials (Feeley & Rubin, 1998). In *Cooper*, a member of the Nation of Islam, described by the U.S. Court of Appeals opinion as part of the "Black Muslim Movement," sought access to the Quran as well as foreign language instructional materials to learn Arabic and Swahili. The Seventh Circuit upheld the district judge's dismissal of his religious rights claim (*Cooper v. Pate*, 1963). The Supreme Court's subsequent decision cited two

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SPECIAL ISSUE: EXCITING LEGAL ISSUES IN CRIMINAL JUSTICE

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President's Message



Brandon K. Applegate, President,

Greetings, fellow ACJS Members! Inside this special issue of *ACJS Today* you will see a number of articles related to the theme of “Exciting Legal Issues in Criminal Justice.” Please feel free to share these articles with both your colleagues and students.

I joined ACJS in 1991, during my first term in graduate school. In the lull between completing my bachelor’s degree and beginning my master’s program, I had actually written to Larry Travis, who was an ACJS Trustee at the time, to ask about joining. He gave me the sage advice that if I could be patient for a couple of months and wait until I was a full-time student again, dues would be much lower! In any case, I remember how excited I was to be able to join a group of people who shared my intellectual curiosity about criminal justice. Here were people who were fascinated by questions such as “Why do people commit crime?” “How can the justice system be more fair, effective, or efficient?” “What are the most important innovations in

criminal justice?” and so on. I thought of ACJS as an organization whose members were united by an interest in crime and justice.

I suppose I still often define ACJS in these broad terms—as an organization that promotes scholarship and education in criminal justice, with an eye on supporting good crime policy. There is nothing wrong with this definition, but I found myself recently reflecting on what truly makes ACJS a comfortable home for me. The key, I believe, is rooted in the core values of our organization. I recognize that my views may be different from yours, but I will take the risk of trying to explicate a few of these values.

Collegiality. ACJS is a complex organization with many facets, including various standing and ad hoc committees, sections, and broad-ranging initiatives. ACJS is very fortunate to have Cathy Barth as Association Manager and Mary Stohr as Executive Director. They are extremely dedicated and talented. The organization’s vibrancy, however, comes largely from the thousands of hours of work put in every year by volunteers. We work well together toward a larger good, and this spirit results in an exceptional ability to accomplish our organizational goals.

Support. ACJS is about sharing knowledge and understanding. The strength of our organization comes from supporting every member’s growth and advancement—inspiring, encouraging, and guiding each other. Formally, we may see examples of valuing support in the SAGE Junior Faculty Professional Development Teaching workshops, the Doctoral Student Summit, and mentoring awards. I have also

encountered countless individuals informally sharing, applauding, and boosting their colleagues at ACJS.

Integrity. Our members are dedicated to open, honest, and accurate explorations of criminal justice issues. We embrace and celebrate successes in criminal justice education and policy, but we do not shy away from also identifying and addressing shortcomings. Our Code of Ethics outlines a strong moral backdrop for our professional conduct.

Rigor. ACJS members embrace a systematic, scientific approach to understanding crime and criminal justice. We seek to use the most rigorous path to produce and disseminate high-quality knowledge. This is probably most clearly exemplified in the presentations at our annual meeting and in the papers published in our journals. Our organization's commitment to first-rate education manifests in the ACJS standards for program certification.

Inclusiveness. Professors, students, policymakers, practitioners...anyone with an interest in the study of criminal justice is welcome! This is not simply the formal policy of ACJS. It describes the culture of the organization. We warmly welcome new members, we see value in diversity, there are niches for various substantive interests and methodological inclinations, and there are many opportunities for anyone to be actively involved in the business of ACJS.

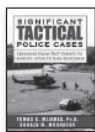
I am sure there are other values that could be ascribed to ACJS and its members, and it is important for us to recognize them. Our values form the foundation of our organization and guide our future. I would encourage you to reflect on what makes ACJS special to you. When you

see me—perhaps next spring (insert shameless plug for the 53rd Annual Meeting to be held in Denver, Colorado, March 29 through April 2, 2016)—please share your thoughts!

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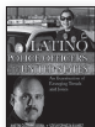


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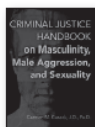
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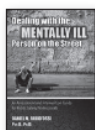


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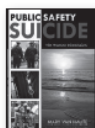


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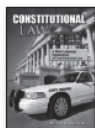


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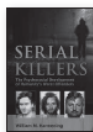


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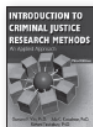


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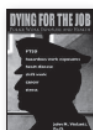


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Court of Appeals opinions concerning black Muslim prisoners in reversing the lower court decisions and permitting Cooper's case to move forward in the district court (*Pierce v. LaVallee*, 1961; *Sewell v. Pegelow*, 1961). Yet even as the *Cooper* decision facilitated the use of a federal civil rights statute by incarcerated offenders, federal judges were just in the early stages of providing initial definitions and protections for prisoners' constitutional rights in 1964.

An especially illuminating example of what has transpired over the past 50 years emerges by comparing the Supreme Court's action in a different 1964 case with contemporary justices' discussions of a related prisoners' rights issue in 2014 and 2015. In 1964, the U. S. Supreme Court, through a denial of a petition for a writ of certiorari, declined to hear a case concerning religious rights claims by Muslim prisoners in New York. In 1962, Martin Sostre and other Nation of Islam members in New York prisons filed a lawsuit asserting that they were denied the opportunity to practice their religion and that they were placed in solitary confinement for seeking to practice their religion (*Sostre v. McGinnis*, 1964). The district court judge concluded that they were genuine adherents to a religion but ruled against their claims. The federal trial court decision said that New York's state courts should have the opportunity to define the nature of prisoners' rights. On appeal, the U.S. Court of Appeals for the Second Circuit declined to rule in the prisoners' favor. Instead, the appellate court said, "It is not the business of the Federal Courts to work out a set of rules and regulations to govern the practices of religion in state prisons. Surely this is a task for state authorities to undertake" (*Sostre v. McGinnis*, 1964, pp. 911–912). On October 26, 1964, the Supreme

Court denied the prisoners petition for a writ of certiorari and thereby declined to provide any definition of prisoners' federal constitutional rights.

Almost exactly 50 years later, on October 7, 2014, the Supreme Court heard oral arguments in the case of Gregory Holt, an offender serving a life sentence in an Arkansas prison. Much like Sostre's case a half-century earlier, Holt's case began with a handwritten petition he filed himself in federal court. He challenged a state prison regulation that barred him from growing a half-inch beard. He asserted that growing a beard was a required element of his Muslim faith. His claim that the prison regulation violated his religious exercise rights under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) was notable for an unusual reason: All nine justices—liberal and conservative—appeared to support the convicted offender's claim during the lawyers' oral arguments in the case. Adam Liptak (2014) of the *New York Times* reported that "several justices expressed an unusual concern[:] They said the question before them... was too easy. Such short beards are not a problem from the standpoint of prison security, Chief Justice John G. Roberts, Jr., told a lawyer for the inmate."

When the Supreme Court issued its decision in *Holt v. Hobbs* (2015), the majority opinion supporting the prisoner's claim was written by Justice Samuel Alito, whose consistent record over his decade-long career on the Court indicated that he was the justice least likely to support rights claims in criminal justice cases (McCall, McCall, & Smith, 2014). In critically examining and rejecting prison officials' purported safety justifications for prohibiting the

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prisoner's beard, Alito's language appeared to ridicule the officials' arguments. Justice Alito pointed to hair lengths and clothing permitted by prison officials and wryly noted: "Hair on the head is a more plausible place to hide contraband than a ½-inch beard—and the same is true of an inmate's clothing and shoes. Nevertheless, the Department [of Corrections] does not require inmates to go about bald, barefoot, or naked" (*Holt v. Hobbs*, slip op. at 14).

The extent to which courts' treatment of prisoners' religious claims changed over the course of five decades is similarly illustrated by the case of John Walker Lindh, the so-called "American Taliban." When he was taken into custody in 2001, Lindh was arguably the American most despised by his fellow countrymen. Lindh was captured among pro-Taliban fighters in Afghanistan in November 2001 and was present at a prison uprising in which a CIA officer was killed. While serving a 20-year sentence in federal prison after pleading guilty to criminal charges, Lindh sued successfully for federal court protection of his right to participate in group prayers with other Muslim prisoners (*Lindh v. Warden*, 2013).

The change over 50 years from the Supreme Court's declining to examine Muslim prisoners' claims about religious rights in 1964 to the justices' consensus about protection of those rights in 2015 deserves recognition for the distance traveled by law—and American society—toward fulfilling the nation's constitutional ideals. This change does not reflect, however, a simple story of judicial leadership in pushing society toward rights-protective values, policies, and practices. In fact, the Supreme Court's decision in 2015 is more accurately

described as reflecting changes in society and and politics that pushed the judiciary to protect religious rights for prisoners. One part of the story reflects the move away from the 1960s societal view of Islam, especially as practiced by prisoners, through the narrow lens of the unfamiliar, politically outspoken, and perceived-to-be-threatening image of the Nation of Islam (Smith, 1993). Over time, the Nation of Islam and related American-based sects became more identified with religious Islam worldwide, and this coincided with an attendant reduction in an exclusive image of a domestic political movement (Podet, 1994).

More important for the judicial recognition and protection of prisoners' religious exercise rights, Congress acted to provide statutory protections for religious freedom in certain contexts, including prisons. As a response to the Supreme Court's decision in *Employment Division of Oregon v. Smith* (1990), which reduced the level of protection for religious exercise rights generally, Congress reacted by enacting two statutes that required more exacting judicial scrutiny of governments' purported justifications for restricting such rights. The Religious Freedom Restoration Act of 1993 (RFRA), although invalidated by the Supreme Court for its applicability to states and localities (*City of Boerne v. Flores*, 1997), continues to provide religious exercise protections against federal laws and regulations. The Religious Land Use and Institutionalized Persons Act of 2000 represented a specific tailoring of the protection for free exercise of religion so that it would pass muster with the Supreme Court to provide the desired effects against overly restrictive state laws and municipal ordinances (*Cutter v. Wilkinson*, 2005). The fact that the people's

elected representatives in the national legislature chose to require greater protections for religious exercise rights than those provided by the Supreme Court indicates a political consensus favoring strong protection for this specific right. The strength of this consensus is further underscored by the congressional decision to include convicted criminal offenders as recipients of this strengthened protection. Indeed, free exercise of religion taps the support of civil libertarians as well as religiously oriented political conservatives, including those who view religion as having a rehabilitative benefit for convicted criminals.

In some respects, when we teach about prisoners' rights using the example of the distance traveled since 1964 for religious rights, we face the same challenge that we face in teaching about *Gideon v. Wainwright* (1963) concerning the entitlement to free legal counsel for indigent criminal defendants facing incarceration. There is justifiable pride in claiming that the *Gideon* decision illuminates our constitutional values and our commitment to seek equal justice for those who lack education, resources, or political power. In writing about the Supreme Court and its role in changing criminal procedure, Archibald Cox referred to the *Gideon* decision as "the single most important reform...wrought" by the Court's decisions (Cox, 1987, p. 248). Yet, the Court's *Gideon* decision was not the engine driving change; it merely solidified the consensus that had already taken hold in the states. At the time that the *Gideon* case was argued, only five states (Alabama, Florida, Mississippi, North Carolina, and South Carolina) "made no regular provision of counsel except in capital cases" (Lewis, 1964, pp. 173, 203). In effect, with its decision in *Gideon*, the Warren Court merely pulled the last straggling states into line with the other states' self-initiated

practices of providing counsel for indigents charged with serious crime.

So, too, with the Roberts Court's decision concerning the Muslim prisoner's religiously mandated beard in *Holt v. Hobbs* (2015). The Court's decision merely pulled seven straggler states (Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, and Virginia) into line with the rest of the country's acceptance of this specific aspect of religious rights for incarcerated offenders (Liptak, 2015).

The parallel between the Supreme Court's decisions in *Gideon* and *Holt* not only cautions against automatically attributing to the highest court credit for policy-shaping decisions that mark the culmination of years-long litigation processes seeking to firmly establish specific constitutional rights. The comparison can also remind us of how celebrating the definitive recognition of specific rights can obscure underlying issues that, in fact, impede the actual enjoyment of rights. In the realm of right to counsel, it is clear from 50 years of experience since *Gideon* that the celebrated Supreme Court decision did not guarantee effective implementation of the right, as many indigent defendants experience substandard representation and little recourse for asserting claims of ineffective assistance of counsel (Task Force, 2011). With respect to prisoners' rights, incarcerated offenders continue to face daunting challenges in seeking vindication and protection for their constitutional rights, including religious exercise rights. In particular, the lack of any right to counsel for prisoners' civil rights and habeas corpus cases, the challenges of *pro se* legal research and representation, and the requirement of exhausting difficult administrative grievance processes prior to filing a civil rights lawsuit all serve to limit the practical availability of judicial

protection for prisoners' rights (Calavita & Jenness, 2015).

For example, in the U.S. Bureau of Prisons (BOP) administrative grievance process, John Walker Lindh had to demonstrate patience and perseverance, in addition to literacy and an understanding of bureaucratic processes, before he could file the lawsuit that ultimately led to the judicial decision favoring congregational prayer for Muslim prisoners (*Lindh v. Warden*, 2013). The course of Lindh's grievance and litigation process was outlined in documents (exhibits) attached to the U.S. district judge's ultimate decision in the case.

Lindh filed an "Inmate Request to Staff Form" on January 15, 2009 concerning congregational prayer. His request was denied by his Unit Manager on January 20, 2009. On January 22, 2009, Lindh continued his claim by filing an "Informal Resolution Form" with his correctional counselor. This request was also denied. Lindh subsequently filed an "Administrative Remedy Form" with the warden of his prison in Terre Haute, Indiana, on February 9, 2009. This request for congregational prayer opportunities was rejected by the warden on February 20. The warden's response gave Lindh notice that he had a 20-day filing deadline if he wished to file an appeal with the BOP regional office in Kansas City. On March 6, 2009, Lindh filed a "Regional Administrative Remedy Appeal" and he received the rejection of his appeal on March 20. The regional director's memo informed Lindh that he had a 30-day deadline for filing his next appeal with the Office of General Counsel at BOP headquarters in Washington, D.C. Lindh filed this administrative appeal—the fifth administrative filing required to complete the

process—and his claim was rejected by the BOP's administrator of National Inmate Appeals on July 28, 2009.

Only after he moved "successfully" through the grievance process—"successfully" meaning never missing a filing deadline or skipping a stage in the process—and received an *unsatisfactory* result was he permitted to file a lawsuit in federal court seeking vindication of his asserted right to congregational prayer under the Religious Freedom Restoration Act. He was fortunate to receive representation by an attorney from the American Civil Liberties Union of Indiana in 2010. Without any right to counsel for such civil cases, most incarcerated offenders are entirely on their own in attempting to represent themselves in court. The ACLU attorney's second amended complaint was filed in December 2010 and set the stage for the bench trial that did not occur until August 2012.

The U.S. district judge's decision recognizing and enforcing Lindh's religious rights claim was issued on January 11, 2013. The four-year process from Lindh's first administrative grievance filing in January 2009 to the court decision vindicating his rights in January 2013 illuminates the difficulties facing prisoners. The validity of Lindh's particular claim to a right to participate in congregational prayer was in dispute, but the impediments and challenges to judicial vindication of prisoners' rights exist even with respect to clearly recognized rights. Lindh, the son of a lawyer who went to schools in affluent suburbs, is much better positioned than most other prisoners to understand and persevere through these processes. Indeed, he is moving through these processes again for two additional claims, one to prevent strip searches prior to

non-contact visits and the other to permit Muslim prisoners to have an above-the-ankle length for their prison uniform pants (Williams, 2015).

Resistance to the acceptance and implementation of prisoners' rights by corrections officials frequently provides opportunities for the denial of rights because of the difficult challenges facing incarcerated offenders in seeking to navigate the grievance process and then proceed with *pro se* litigation. What might motivate such resistance? Clearly, corrections officials desire to assert authority and control within their institutions. With respect to Muslim prisoners, such as Lindh and Holt, is it possible that there are contemporary vestiges of James Jacobs's observations from Stateville, Illinois prison in the 1970s? Jacobs said at that time, "It is impossible to understand the vehemence and determination with which the prison resisted every Muslim demand, no matter how insignificant, except by understanding that what seemed to be at stake was the very survival of the authoritarian [prison] regime" (Jacobs, 1977, p. 59). In the post-9/11 era, there are presumably risks that unfairly generalized criticisms of Muslims, which unfortunately have become a regular part of public discourse among segments of American society, may affect some prison officials (Ogan, Willnat, Pennington, & Bashir, 2014). In addition, resistance to the recognition of rights by prison officials may also be an improper manifestation of a penal harm philosophy (Clear, 1994).

Other important developments affecting prisoners and their rights are also not easily attributable to action by the Supreme Court and other courts. Obviously, the most significant development affecting corrections in recent decades has been the dramatic increase in prison populations from punitive sentencing, including

the skewed racial impacts of such policies, especially with respect to the incarceration of drug offenders (Alexander, 2010). The political developments underlying mass incarceration have significant impacts on incarcerated offenders' constitutional rights through overcrowded living conditions, inadequate medical and mental health facilities, and the transfer of offenders into uncertain conditions and treatment at the hands of corporations running private prisons.

Prisoners face significant challenges in considering litigation as a means to protect rights related to conditions of confinement. The Supreme Court made such cases markedly more difficult with its decision in *Wilson v. Seiter* (1991) requiring proof of corrections officials' subjective intentions ("deliberate indifference") in permitting improper conditions to develop. Congress compounded the impediments to pursuing judicial action when it enacted the Prison Litigation Reform Act of 1996 that limited federal judges' remedial authority in prison cases and imposed additional restrictions on prisoners' civil rights lawsuits (Schlanger & Shay, 2008). The fact that it took a 20-year path of litigation to gain a Supreme Court decision (*Brown v. Plata*, 2011) addressing prison overcrowding and attendant deprivations of medical and mental health care amid shocking conditions in California provides an indication of the high court's limited role with respect to these important issues.

Jonathan Simon argues hopefully that "*Brown v. Plata* offers an opportunity to forge a new common sense about prisons, prisoners, and crime" to counteract and change the recent era of mass incarceration (Simon, 2014, p. 154). Indeed, the *Brown* decision can be seen as the Supreme Court's contribution to the larger social and political developments, such as falling crime rates,

state budget cuts, and a new emphasis on reentry programs, that are motivating states to reduce prison populations. Although budgetary forces and lower crime rates are likely to keep many states focused on how to reduce the size and expense of their prisons, the Supreme Court's future role is uncertain. The vote among the justices to support remedial orders advancing prisoners' rights in *Brown v. Plata* was only 5 to 4. Depending on who wins the 2016 presidential election and the timing of departures by aging members of the *Brown* majority, including Justice Ruth Bader Ginsburg (aged 82 in 2015), Justice Anthony Kennedy (aged 79 in 2015), and Justice Stephen Breyer (aged 77 in 2015), a slight change in the Court's composition could lead to a sudden turn away from *Brown*'s rights-protective orientation toward the problems of still-overcrowded prisons (Smith, 2013).

Fiftieth anniversaries are appropriate moments to reflect on the past. With respect to the Supreme Court's involvement in prisoners' rights, the contrasts between the cases considered in 1964 and 2014 are stark. Clearly, the Court traveled a significant distance from having not yet defined rights for incarcerated offenders in 1964 to having defined a variety of rights affecting religion, access to the courts, medical care, and conditions of confinement in the subsequent five decades (Smith, 2011; Fliter, 2001). Yet a specific examination of Supreme Court's most recent actions affecting prisoners' rights in *Holt v. Hobbs* (2015) and *Brown v. Plata* (2011) reminds us that the high court is merely one player, albeit an important one, in the developments that affect incarcerated offenders' legal protections. As with other aspects of prison policy and prison reform, the effectuation of prisoners' rights also depends on social and political developments affecting prison conditions and the ease (or lack thereof) of

prisoners' access to rights-vindicating processes as well as the actions of corrections officials in choosing to resist or respect constitutional rights. The Supreme Court deserves credit for defining and legitimizing the recognition of various prisoners' rights, but it cannot be viewed as either capable of or committed to ensuring consistent protection of those rights.

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Assessing Trends in Qualified Immunity



*Darrell L. Ross**

With over two million prisoners confined in prison and jails in the United States, and with an average of 44 million contacts made between the police and citizens annually, it is likely that government officials performing their sworn duties will be exposed to a civil lawsuit. In accordance with Title 42 U.S.C. §1983, government officials may be sued for violating a person's constitutional right. Silver (2010) estimated that about 30,000 civil lawsuits are filed annually against law enforcement personnel. Researchers from the 1990s through 2007 report the following claims are commonly alleged in these lawsuits: illegal search and seizure; false arrest/imprisonment; excessive force; failure to protect; vehicle pursuits; wrongful deaths; and administrative issues, including deficient policies, sexual harassment and discrimination, failure to train, and failure to supervise (Kappeler, Kappeler, & del Carmen, 1998; Ross & Bodapoti, 2006; Archbold, Lytle, Mannis, & Bergeron, 2007). Further, the Administrative Office of the Courts (2014) reports that on average since 1975, prisoners in prisons and jails have annually filed 24,500 civil

lawsuits. Common claims filed by prisoners include denial or delay in medical and psychological treatment, failure to protect, excessive force, sexual misconduct/assault by corrections officers, conditions of confinement, due process violations, wrongful deaths, and administrative liability issues similar to their police counterpart (Ross & Bodapoti, 2006; Ross & Page, 2003).

Persons seeking redress of a claim that a criminal justice official (including officers) violated their constitutional rights commonly file their claim in accordance with §1983, as it provides financial remedies for the prevailing plaintiff. Criminal justice officials are protected from civil liability by the doctrine of qualified immunity. Nearly 50 years ago, the U.S. Supreme Court established in *Pierson v. Ray* (1967) the doctrine of qualified immunity. In *Harlow v. Fitzgerald* (1982), the Court further expressed how the doctrine could be asserted by a defendant. The Court has explained that the goal of the doctrine is to balance the competing interests of plaintiffs and their constitutional rights with the need to also protect officials who perform their authorized sworn duties involving the use of discretion. Although *Harlow* did not involve a criminal justice official, the Court opined that when government officials perform discretionary functions within the scope of their official duties, they are entitled to qualified immunity as long as their conduct did not violate the individual's constitutional rights.

The doctrine of qualified immunity is frequently misunderstood by some attorneys, students, and scholars. Although the purpose of

the doctrine has remained unchanged since 1982, the Court has addressed the application of qualified immunity in 15 case decisions, half of them since 2012. Because the Court has emphasized the application of qualified immunity, this article provides a brief overview of its application and identifies the case decisions so that a later reading and study of the doctrine may be performed.

Qualified Immunity

Qualified immunity is premised on performing discretionary acts requiring judgment or deliberation. The Court examines the functions in which the official is performing their sworn duties. There are numerous examples of discretionary acts and among others, they may include arresting a drunk driver, citing a speeding motorist, searching a person, and using a force measure to control and restrain a combative person. Granting qualified immunity is based on two reasons. First, it provides an incentive for officials to perform their duties with confidence in accordance with the law. Although it provides breathing room for reasonable mistakes in judgment, acts performed outside the boundaries of the Constitution are not protected by qualified immunity (*Harlow v. Fitzgerald*, 1982; *Groh v. Ramirez*, 2004; *Ashcroft v. al-Kidd*, 2011). Second, the Court has held that seeking qualified immunity should occur early in the discovery phase of civil litigation in order to resolve the constitutional issue, if possible, prior to trial (*Saucier v. Katz*, 2001; *Ashcroft v. al-Kidd*, 2011). The question that emerges, however, is whether the official violated the constitutional rights of the plaintiff. For example, in *Groh v. Ramirez* (2004), a Bureau of Alcohol, Tobacco, and Firearms (ATF) agent failed to identify items to be included in a search when he sought a search warrant. Groh had a duty

and the Court held officers must conform to the requirements of the Fourth Amendment when seeking a search warrant and denied the request for qualified immunity.

The Court will authorize qualified immunity based upon the actions of a “reasonable officer.” Determining reasonableness can be problematic, and the Court addressed this issue in *Malley v. Briggs* (1986) and *Anderson v. Creighton* (1987). The Court’s decision in both cases addressed the issue of whether the officers knew or should have known that their actions were conducted in accordance with established law at the time and their actions were reasonable. The standard applied by the Court is whether a reasonably trained officer confronted with the same circumstance would have known to act within the contours of the Constitution. For example, referring to the Court’s decision in *Groh*, a reasonably trained officer should know that when securing a search warrant in compliance with the Fourth Amendment, all items to be searched must be included in the affidavit.

Procedures of Analysis

Authorizing qualified immunity hinges on the principle of whether the law was “clearly established” at the time of the alleged misconduct. This is a core principle that the Court has addressed in several case decisions, including *Pearson v. Callahan* (2009), *Ashcroft v. al-Kidd* (2011), *Saucier v. Katz* (2001), and *Brosseau v. Haugen* (2004). “Clearly established law” generally means a reasonable officer understands whether his or her actions would violate a person’s rights because the contours of the right are clearly defined. This generally requires a precedent-setting case with subsequent robust number of consensus cases placing the constitutional question beyond debate

(*Ashcroft v. al-Kidd*, 2011; *Reichle v. Howards*, 2012). For example, the Court's decision in *Terry v. Ohio* (1968) is a precedent-setting case that authorizes a stop and frisk of a person when an officer reasonably believes the person has committed or is about to commit a crime. The decision in *Terry* set the precedent, and subsequent cases examining an officer's conduct would be considered clearly established law.

Beyond determining whether the law is clearly established at the time of the alleged incident, the Court has addressed the procedure for assessing a request for qualified immunity. In *Saucier v. Katz* (2001), the Court reaffirmed that qualified immunity is an affirmative defense and protects officials when they perform discretionary actions, so long as their conduct was lawful. The Court established a two-part test for reviewing a motion requesting qualified immunity. First, a lower court will examine the threshold question: Based on the allegations of the plaintiff, did the official's conduct violate a constitutional right? If the court finds that the official's conduct did not violate a constitutional right, immunity will be granted. Second, a lower court will examine whether the right was clearly established at the time. The right must be clearly established, in that a reasonable official knows that his or her actions violate the right. In *Brosseau v. Haugen* (2004), the Court clarified the procedure and granted qualified immunity to officer Brosseau when she fired at a fleeing motorist who posed a threat to the community as he sped away. The Court opined that the law was not clearly established at the time as only a handful of cases were relevant to the specific facts of the case, despite their past decisions about using reasonable force in *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989).

In *Pearson v. Callahan* (2009), the Court reviewed the sequence of the two-pronged test. The case involved the warrantless search of a subject in his home immediately following the sale of illegal drugs to a police informant. Lower courts had complained that the sequence of the test should not be mandatory. In a unanimous decision, the Court opined that the sequence of the test for considering qualified immunity would not be mandatory and that lower courts could use their discretion when applying the two-pronged test.

The Court further examined the application of qualified immunity in *Messerschmidt v. Millender* (2012). Detective Messerschmidt obtained a warrant to search a residence of a gang member who fired a sawed-off shotgun at his girlfriend in a domestic violence incident. The residence was alleged to contain firearms, firearm-related materials, gang-related items, and the sawed-off shotgun. Detective Messerschmidt drafted the affidavit, and his supervisor and a district attorney reviewed it prior to the magistrate authorizing the warrant. The search yielded the items on the warrant and the suspect was later arrested. The suspect filed a §1983 action claiming the search was unconstitutional. The Court reviewed the case and awarded the detective qualified immunity, overturning the Ninth Circuit Court of Appeals denial of qualified immunity. Although the Court determined that a neutral magistrate is the clearest indication that the officers acted with objective reasonableness, or good faith, more is needed to approve qualified immunity (note the decision in *Groh*). The Court further held that detective Messerschmidt demonstrated probable cause to secure the warrant and acted reasonably, as he took every step that could be reasonably expected, and

determined that qualified immunity was appropriate.

Additional cases have been examined by the Court that addressed whether the law was clearly established at the time of the incident. In *Filarsky v. Delta* (2012), a private attorney was hired by the City of Rialto, California to assist in the internal investigation of firefighter Delta. Delta was suspected of working at home on a home project while on medical leave instead of returning to work. Officials of the fire department compelled Delta to produce the building materials, which affirmed their suspicions. Delta filed a civil action alleging the private attorney and other officials violated his Fourth Amendment rights. The Ninth Circuit Court of Appeals found that the law was not clearly established and denied qualified immunity to Filarsky but granted it to the other officials. The Court examined the specific issue of whether the private attorney was entitled to the protection of qualified immunity. The Court granted qualified immunity to the attorney, holding that it was appropriate to treat all of the defendants the same. The Court concluded that affording immunity not only to public employees but also to others acting on behalf of the government serves to ensure that talented individuals are not deterred by the threat of damages in a civil suit when assisting the government.

In *Reichle v. Howards* (2012), the Court reaffirmed their core principle (clearly established law) by examining a claim involving the First Amendment. Howards approached Vice President Cheney at a mall, made a comment to him, and touched him. Secret Service agents arrested Howards and later released him. Howards sued, claiming that his First and Fourth Amendment rights were violated. The agents were granted

immunity on the Fourth Amendment claim as they possessed probable cause to arrest, but they were denied immunity on the First Amendment claim by the appellate court. Examining whether the law was clearly established, the Court reversed, commenting that a right must be sufficiently clear that every reasonable official would understand what he was doing was violating that right. The Court further opined that because they had never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause, nor was it clearly established law at the time of Howards' arrest, it was reasonable to grant the Secret Service agents qualified immunity.

In *Stanton v. Sims* (2013), the Court examined the issue of qualified immunity involving an officer who pursued on foot a misdemeanor into the yard of a third party. As the officer entered the yard to restrain the person, he kicked in a gate, which struck and injured the shoulder of Sims, the homeowner. Sims filed suit, and the Ninth Circuit Appellate Court denied the officers qualified immunity. The Court examined two questions: (1) may an officer enter the home while pursuing a fleeing misdemeanor subject and (2) was the law in this regard clearly established? The Court addressed the second question and held that Stanton may have been mistaken for entering the yard of Sims but he was not "plainly incompetent." The Court refused to determine the constitutionality of Stanton's actions, reversed the Ninth Circuit's decision, and remanded the case for further proceedings.

The Court further opined on the nature of qualified immunity by examining three cases in 2014. In *Wood v. Moss* (2014), protestors of President Bush sued the Secret Service for damages, alleging discrimination. On a last-minute

decision to change the location for dinner during the campaign, Secret Service agents moved protestors about two blocks away and beyond weapons reach of the President but allowed supporters to remain nearby. After losing on their first legal action, the protestors filed a supplemental complaint, claiming that the agents acted on an unwritten policy from the Bush White House to inhibit the expression of disfavored views at presidential appearances. The Ninth Circuit denied qualified immunity to the agents, ruling that the Government may not regulate speech based on its content. The Court addressed the issue of free speech as asserted by the protestors. The Court reiterated its position, holding that qualified immunity protects government officials from liability unless the official violated a constitutional right. For purposes of qualified immunity, the Court noted that the action of the agents regarding the free speech of persons extends to the First Amendment. The Court, however, reversed the appellate court's denial of qualified immunity, holding that the agents acted for valid security reasons and that there was no clearly established law to control the agents' response. Commenting on the function and responsibility of the agents, the Court determined that it was reasonable for the agents to make an on-the-spot decision to increase the safety of the President by expanding the security perimeter.

In *Tolan v. Cotton* (2014) and *Plumhoff v. Rickard* (2014), officers used lethal force in responding to the actions of the suspect. The Court examined the two-pronged test application in each case. In *Tolan*, the Fifth Circuit Court of Appeals granted qualified immunity to the officer who shot Mr. Tolan after he told the officer, from about 20 feet away, to get his "F-ing" hands off his mother. The appellate court ruled that the law

was clearly established that a reasonable officer may use lethal force in self-defense when he reasonably fears for his life. The Court did not disagree but overturned the decision as the appellate court failed to look at the facts in the light most favorable to the plaintiff (Tolan). The Court did not establish a new legal principle about the use of force or qualified immunity; rather, the Court intervened because the appellate court misapplied the process for reviewing the granting of qualified immunity and remanded the case for further proceedings.

In *Plumhoff v. Rickard* (2014), officers engaged in a high-speed pursuit of Rickard who, with a passenger, fled from the officers after a traffic stop. Officer Plumhoff joined the pursuit, which was captured on video. Rickard recklessly drove his vehicle through traffic at speeds nearing 100 miles per hour and intentionally struck Plumhoff's vehicle twice. Rickard drove into a parking lot, struck another officer's vehicle, which spun him head on into Plumhoff's vehicle. The officers approached Rickard's vehicle and he backed up, struck another police vehicle, and Plumhoff fired three rounds at the vehicle. Rickard maneuvered his vehicle, narrowly missed striking an officer, and began to flee. Two other officers simultaneously fired at Rickard, discharging 12 rounds collectively. Rickard lost control of the vehicle and crashed into a building and died from multiple gunshots. The passenger died from a combination of the crash and from the gunshots. A total of 15 rounds were fired by the officers.

Rickard's estate filed a civil action claiming excessive force in violation of the Fourth Amendment. Qualified immunity was denied by the lower courts, and the Court granted certiorari to examine the excessive force claim and the issue

of qualified immunity. In a unanimous decision, the Court overturned the Sixth Circuit Court of Appeals decision, holding that the officers used objectively reasonable force (lethal force) to end a dangerous high-speed chase. The Court also held the officers were entitled to qualified immunity as the law was not clearly established in 2004 that it violated the Fourth Amendment to use lethal force to prevent the flight of a motorist who operated his vehicle recklessly during a high-speed chase and in close quarters with the police.

Conclusion

Working as a public official in the criminal justice system offers many rewards, but it can also be challenging. A primary challenge facing officials is the risk of being sued for performing the many functions of the job. As this brief overview has shown, officials are protected from liability through the legal principle of qualified immunity as long as they acted in accordance with “clearly established law.” Although the test for awarding qualified immunity in a particular case has changed, the primary purpose of qualified immunity has remained unchanged.

When an official asserts a claim of qualified immunity, the official must show that he or she was acting within clearly established law at the time. This means that the official must be actually knowledgeable about state and constitutional law and criminal procedures. This aligns with Hemmens’s (2015) point “that criminal justice needs to pay more attention to criminal procedure because the rules that govern the police are so important—we must do more to transmit an accurate understanding of, and appreciation for, criminal procedure.” Those

who teach criminal procedure and civil liability courses must strive to strengthen their efforts of preparing our students to enter the profession with a solid knowledge of how to apply the constitution to their varying job functions. Further, officials can avert civil liability by attending ongoing legal training and keeping abreast of changes in the law, complying with their agency policies, and by acting within the boundaries of clearly established law. An ongoing commitment to these principles will assist in maximizing the efforts of applying constitutional protections in every citizen and prisoner contact.

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Why Criminal Procedure Should Matter to Criminal Justice Departments

PAST PRESIDENT'S COLUMN



*Craig Hemmens**

The killings of Michael Brown in Ferguson, Missouri and Eric Garner in New York are neither the first nor the last killings of unarmed people by police officers. The response to these tragic events, however, has been unique. Rather than being overlooked by the national press, these killings received a great deal of attention, and there have been numerous public demonstrations and significant criticism of the police involved and calls for reexamination of police recruitment, training, procedures, and culture. One can only hope that out of these tragedies some positive social change may come.

One very small change that I hope these tragedies can lead to in my part of the world is a reconsideration of the importance of including the teaching and study of law, particularly criminal procedure, in criminal justice departments. It is my belief that criminal justice departments do not

adequately cover criminal procedure at either the undergraduate or graduate level. An understanding of the role of the law in police-citizen encounters is essential to a complete understanding of what happens when the police engage with citizens, be it in their homes, their vehicles, or on the street. Police-citizen encounters are the first—and for most citizens, their only—experience with the criminal justice system. A full understanding of these encounters requires not only knowledge of police history, culture, and practices but also the law that governs the police during these encounters. This body of law is commonly referred to as criminal procedure. Criminal procedure covers the rules that govern police investigatory practices, from search and seizure to interrogations and confessions. It affects virtually every other aspect of the criminal justice system, so an understanding of how it works is essential. Criminal justice students and scholars (as well as the media) need to understand what the police can (and cannot) do when they encounter citizens in public. Misunderstandings are common, as the many public misstatements about the Michael Brown and Eric Garner incidents demonstrated.

Although most criminal justice departments offer an undergraduate class in criminal procedure, this course is often an elective, rather than a required course. Graduate classes on criminal procedure are rare and virtually never required. Even the ACJS Certification Standards do not require criminal procedure training at either the undergraduate or graduate level (ACJS, 2005). When we consider that a significant portion of our

undergraduate students are interested in pursuing a career in law enforcement, and that all criminal justice students need to understand how the law impacts police practices, this inattention to a subject that is at the heart of police work is disappointing.

An excuse frequently offered for this oversight is that students can learn criminal procedure in police training academies. Although it is true this subject will be taught there, do we really want to rely on the police to provide a comprehensive overview of this subject? And do we expect the courses offered by police training academies will include context for the law? As a social science discipline, criminal justice emphasizes the importance of understanding not just what something is, but why. Police training academies tend to teach what legal scholars refer to as “black letter law.” Under this approach, the focus is almost entirely on the elements of the law, with no attention paid to why the law is the way it is or the context in which the law is to be applied. The police officers in Ferguson and Staten Island received their criminal procedure training in police academies. Based on their actions, it appears they learned what was legal, but little else. Criminal justice departments, staffed by faculty with social science training, can offer a fuller, richer, more nuanced overview of the subject matter. And, hopefully, this complex, multifaceted overview will give students the big picture and help them to do the right thing out on the street.

Why Legal Research Matters

Teaching our students about criminal procedure is not enough. To be fully engaged in the transmission of knowledge, faculty must also practice the acquisition of information—in other words, we must conduct research on the subjects we teach, so that we stay current on developments

in the area. This is especially true in an applied discipline such as criminal justice, where the subject under study is a living, breathing thing that can change literally overnight. To teach criminal justice effectively, one must be aware of current developments. To teach criminal procedure, one must be able to conduct research on recent developments in criminal procedure law. Unfortunately, criminal justice doctoral programs do a poor job of preparing students to conduct this form of research.

Criminal justice doctoral programs rarely provide instruction on legal research. This may seem to be a roadblock for those of us interested in conducting research on criminal procedure, but it need not be so. Fortunately, basic legal research skills are easily acquired (a fact many lawyers are reluctant to acknowledge). Legal research can take multiple forms. It includes doctrinal research—research that examines a particular legal issue by examining the case law regarding that issue—as well as more categorical forms of research, such as statutory analysis. Doctrinal research is sometimes looked down upon because it is not theory-driven. Nonetheless, tracing the development of a particular legal doctrine, such as the right to resist unlawful arrest (Hemmens & Levin, 2000) or the knock and announce rule (Hemmens & Mathias, 2005) can provide students, lawyers, legislators, policymakers, and criminal justice personnel with important information.

Statutory analysis involves the collection, review, and analysis of state statutes related to a particular topic (e.g., statutory rape laws or juvenile curfew laws). It is a form of content analysis; the data is the wording of the statutes. The same process can be applied to review case law or agency policies. This form of research can be used on an enormous range of topics in criminal justice. Data collection is relatively painless,

particularly with the widespread availability of legal research databases such as Lexis/Nexis and Westlaw. Although such research is sometimes discounted because it is not theoretical in orientation, the results can be quite informative and useful for criminal justice practitioners. Statutory analysis constitutes a form of meta-analysis, a research methodology currently enjoying great popularity in criminal justice.

Quantification is (rightly) valued in the social sciences in part because it brings a sense of order and uniformity to the study of human behavior, a process that is by its very nature subjective and difficult to quantify. Legal research, with its reliance on precedent and/or statutory analysis, similarly brings a sense of order to the law. This order is no more (nor less) real than the order that quantification brings to social science research. Nolasco, Vaughn, and del Carmen (2010) make a strong case for the validity and credibility of legal research. They argue that cases should be treated as data and the analysis of a series of cases treated as similar to the analysis of survey responses or other quantitative data sources.

Legal Research in Criminal Justice Journals

I believe the marginalization of criminal procedure in the classroom is symptomatic of the marginalization of criminal procedure scholarship in criminal justice. There is a shortage of publication outlets for research dealing with legal issues in criminal justice. There are several reasons for this.

Scholarship in criminal justice is expanding at a great rate. There are more criminal justice PhDs being produced than ever before, and criminal justice departments are increasingly prioritizing and rewarding scholarship and research, similar to other social science disciplines.

Publication expectations are increasing at both research-intensive institutions and institutions where teaching and research are more equally valued (see, e.g., Sorenson, Patterson, & Widmayer, 1992; Sorenson & Pilgrim, 2002; Sorenson, Snell, & Rodriguez, 2006; Steiner & Schwartz, 2006).

Although there has been an increase in the amount of research being done, there has not been a significant increase in the number of quality peer-reviewed outlets for this research. The result is many high quality journals have a backlog of accepted manuscripts. It is not uncommon for a manuscript accepted for publication to wait two years before it is published. Clearly this is not ideal, particularly if the manuscript topic is particularly time sensitive.

Although there have been no studies on the amount of legal research being published in criminal justice journals, my own review of the leading journals tells me that there has been a steady increase in the number of articles dealing with legal issues in criminal justice. Many criminal justice journals do not look kindly upon legal research, however. I have personally been told by the editor of more than one journal that legal manuscripts (and not just mine) are not welcome there. Criminal justice scholars can go outside criminal justice journals of course, but some departments look askance at this practice, as it means the research is not increasing the visibility of the department within the discipline. And the most common academic publication outlet for legal research, law reviews, are (with rare exceptions) not peer-reviewed and thus many departments do not count law review publications toward tenure requirements.

So what is a criminal justice scholar interested in conducting research on legal issues to

do? First, I believe we should let editors know that we believe legal research is an appropriate topic for publication in a journal. This can be done as an author, of course, but such advocacy is likely to be more effective coming from manuscript reviewers and members of editorial boards. I encourage authors to contact journal editors and ask whether legal research is welcome, and I encourage editorial board members to push journal editors to expand their horizons and consider legal-oriented manuscripts. As a discipline, we can also let the major journal publishers, such as Sage and Taylor & Francis, know that we are interested in seeing more legal research published and more journals that welcome legal research.

We can also take our case to the national criminal justice academic organizations that publish journals. Both the American Society of Criminology and the Academy of Criminal Justice Sciences publish top-ranked journals, and these organizations control the general editorial policy of these journals. We can ask that these organizations, when they are recruiting journal editors, to make it clear to these prospective editors that law-oriented manuscripts should be given fair consideration along with theory-testing articles. Additionally, we can encourage these organizations to create new journals, to provide additional outlets for criminal justice scholarship in general and law-related scholarship in particular.

Last, we can look to sections within these organizations, such as the Law and Public Policy Section of ACJS, for assistance. A number of ACJS sections have created journals or are affiliated with journals. Examples of such affiliations include the Police Section and the Corrections Section—in fact, the Corrections Section has affiliated with a leading corrections journal (*The Prison Journal*) and is in the

process of establishing a new corrections journal (*Corrections: Policy, Practice and Research*).

I confess I have tried to convince the ACJS leadership to establish another journal to go with the two existing (and very successful) ACJS journals, but to no avail—but perhaps if more voices are heard, minds can be changed. In the interim, I have convinced my colleagues at Washington State University that the department should support a new online journal that will focus on publishing research on legal issues in criminal justice. This journal, *The Journal of Criminal Justice and Law*, will debut in 2016, and it is currently accepting manuscripts (my apologies for the shameless plug!). I mention this to say we do not have to sit back and wait for others to change their minds. We can work together to make the change we see a need for.

Conclusion

Criminal justice needs to pay more attention to criminal procedure because the rules that govern the police are so important. These rules affect virtually every aspect of police work, especially those situations where the police interact with citizens, be they suspects, witnesses, or victims. In our role as educators of future police officers, administrators, policymakers, and informed citizens, we must do more to transit an accurate understanding of, and appreciation for, criminal procedure.

To accomplish this, the discipline must stop treating law-related classes and

research as a bastard stepchild. This means we need to increase and prioritize courses dealing with criminal procedure, support and promote legal scholarship in criminal justice journals, and conduct this research using both legal and social science research methodologies. It is time for legal scholars in criminal justice to stop settling for being on the outside looking in and to demand better treatment for their teaching and research by the academy.

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Highlights from the 2015 Conference in Orlando



The Doctoral Summit was a smashing success, and a good time was had by all!



Past ACJS President Craig Hemmens enjoying some quality time with his undergraduate students, Maria and Miguel (Washington State University).



Phil, Otto, and Phil enjoying some well-deserved refreshments at the ACJS Ice Cream Social.



President's Reception (it was packed and people came early and stayed late)



Jackie Helfgott, Faith Lutze, Fran Bernat and ACJS Executive Directory, Mary Stohr enjoying themselves at the Conference.



1st ACJS Vice President, Lorenzo Boyd recruiting a few members for future committee work.



Nancy Rodriguez, newly appointed National Institute of Justice Director, with Nicholas P. Lovrich at the Division of Governmental Studies and Services/Washington State University reception.



Rosemary Gido's 70th Birthday Celebration!



Minorities and Women Section
Group Picture



Nancy Rodriguez, Craig Hemmens, Rolando del Carmen and his wife (Dr. del Carmen mentored Nancy when she was earning her master's degree at Sam Houston State University)



Alex Piquero presenting Past ACJS President, Ronald Hunter with the prestigious Founder's Award.



ACJS President, Brian Payne presenting an award to Ms. Piper Kerman, author of the book, *Orange is the New Black*.



Incoming President Brandon Applegate accepts the gavel from outgoing President Brian Payne.



ACJS President Brian Payne acknowledging David May for an extraordinary job as Program Chair.



Ms. Lexie Galan presents her important work on rape victim blaming at the ACJS Poster Session.



Group shot of the Police Section Meeting



Janice Joseph (editor) and the Ethnicity and Criminal Justice Board Meeting.



David Montague getting serious about Disney!



ACJS Executive Board Member, Brandon Applegate networking with Mitch Lucas, President of the American Jail Association



International Section group picture

Misrepresenting the FBI Active Shooter Report: A Response to Lott

Pete Blair, Ph.D* and M. Hunter Martaindale**

The March 2015 edition of *ACJS Today* published a paper by John Lott criticizing the report titled “A Study of Active Shooter Incidents in the United States Between 2000 and 2013” released by the FBI in September of last year (see Blair & Schweit, 2014 for the entire report). As part of the team that produced this report, we feel the need to respond to this criticism and explain the importance of these data. Lott’s essential argument is a straw man; he accuses us of saying something that we did not and then attempts to show this is wrong. We provide the specifics of this straw man argument below.

The Straw Man

Lott begins by admitting the FBI report is about active shooter incidents and not mass murders or mass shootings. Active shooter events are a specific type of attack that involves one or more individuals *attempting* to commit mass murder by firearm, regardless of what the outcome of this attempt is. In some instances, many deaths occur. However, in the majority of cases, fewer than three deaths result. Active shooter events have garnered substantial public and law enforcement attention since the Columbine High School shootings in 1999 and even more so following the 2012 shootings at Sandy Hook Elementary School. The first text pages of the report (pp. 4–5) identify the definition of active shooter incidents and distinguish them from mass murders and shootings. Throughout the FBI report, the only times the terms *mass murder* or *mass shooting* are mentioned are to clarify that

active shooter incidents and mass murder shootings are not synonymous (e.g., pp. 7, 9, and 20 all state that only 40% of the active shooter incidents reviewed qualify as mass murder under the federal definition of three or more people killed during a single incident).

Lott then cites a number of news headlines in which the media mistakenly reported mass shootings were on the rise. The media reports did not say that mass murders were on the rise; rather, they stated that mass shootings were. We agree with Lott’s assessment that some media outlets got it wrong. At the press conference releasing the report, we went to great lengths to clarify how active shooter events were different from mass murders and mass shootings. Several speakers made this point and specific sections in the report were highlighted in an attempt to make it clear that, in most of these events, fewer than three people were killed and fewer than five were shot. While we went to great efforts to avoid misrepresentations by the media, they unfortunately happened anyway. We have little control over this. We wonder if some members of the media intentionally misreported findings in an attempt to generate a bigger headline or advance their own agendas. Nonetheless, the report does not misrepresent the data.

Next, Lott accuses the FBI of a bait and switch, stating, “While the FBI study discusses ‘mass shootings or killings,’” (p. 19). However, the report does not discuss mass shootings or

killings other than to distinguish them from active shooter incidents. It is at this point that he begins to confound mass shootings with mass murders. His definition of a mass public shooting requires that a specific number of people die, but it does not require that a certain number of people be shot. Lott then switches his focus from mass shootings to mass murder (using the criteria of the number of people killed instead of the number shot) while still periodically referring to mass shootings.

Lott then suggests that other cases should be included in the data set, that the definition of mass shootings should be two or more killed, that official data should be used, and that the time frame of the analysis should be longer. Lott concludes that the increase in mass shootings (really murders) is much smaller than the FBI claims and statistically insignificant. His analysis can be criticized on a number of points (e.g., discussing mass shootings without considering the number of people shot, the use of two deaths as the definition of mass murder when three or four is typical, the use of significance tests on what should probably be considered population data). Most important, the FBI report never claims mass murders or shootings are on the rise.

We reported an increase in the number of active shooter incidents, most of which were not mass murders or shootings. Overall, Lott's paper is clearly a straw-man argument. His assertion that the FBI claims mass shootings are on the rise is simply not true. Lott then attempts to show that mass shootings/murders are not on the rise (puzzling, the data still show an upward trend after the adjustments) to prove that what the FBI report does *not* say is wrong. We turn now to why we think the study of active shooter events is important and why we collected these data.

The Importance of Studying Active Shooter Events

The authors of this response work for the Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Texas State University. The mission of this center is to provide the best, research-based active shooter response training in the nation. We study active shooter events and train first responders to deal with these events for one reason: to save lives. We believe the more we know about these events, the more successful we can be.

To accomplish this objective, we needed to identify active shooter events for study. The first place we looked was existing "official" data sets such as the Uniform Crime Reports (UCR) and Supplemental Homicide Reports (SHR). We were quickly confronted with one of the standard issues in secondary data analysis—trying to fit data that were collected for one purpose to another. As there is no specific criminal statute for active shootings, official data do not directly address our question. We could have used some form of homicide to get at the issue (as Lott did), but that would miss a large part of the picture. For our purposes, we could learn as much (or more) from events where few or no where few or no people were killed as we could from events where many people were killed. For example, if we used only homicide-based data, we would miss cases like the 2011 attack at Deer Creek Middle School in Colorado. The shooter opened fire on 8th grade students exiting the school until a teacher tackled the shooter and ended the

attack. Consequently, only two students were shot; both survived. We would also miss cases like the recent attack at a Garland, Texas anti-Islam event where an alert police officer was able to stop two heavily armed shooters before they could hurt the attendees; only a security guard was injured. Knowing about these types of events provides important information about active shooter events and they should not be excluded. In some ways, including these events provides a perspective that is similar to the branch of homicide research that compares fatal outcomes (homicide) to non-fatal outcomes (e.g., attempted murder and aggravated assaults; Brookman, 2005).

Next, we looked at other collections of active shooter events. We found these to be incomplete, and they often did not explain how cases were defined or located. Consequently, we decided we needed to collect our own data. We first conducted searches of newspaper archives and supplemented these with FOIA requests for police reports and reviews of SHR data. We chose 2000 as our starting year because 1999 marked a significant change in how police respond to these events. Prior to the Columbine High School shooting, the standard patrol response to an active shooter was to contain the incident and call for a special weapons and tactics (SWAT) team. However, following Columbine, patrol officers were now expected to enter active shooter attack sites to end the shootings as quickly as possible (Blair, Nichols, Burns, & Curnutt, 2013). We were most interested in how these events unfolded following the change in police response tactics.

In 2013, we partnered with the FBI to do a more extensive search, and they were able to obtain police reports we could not. This improved the quality of the data. We also engaged in

systematic vetting of cases to ensure we had the best possible information.

We acknowledge in the FBI report that our data are imperfect. Even “official” data have substantial issues, most of which have been thoroughly dissected by scholars (see Kelling, 1996; Stephens, 1999; Wolfgang, 1963). However, we believe we have collected the best data currently available on active shooter events. We are also constantly trying to improve our data. As new cases come to our attention, they are vetted and incorporated, as appropriate (we are doing this with the cases identified by Lott).

For our purposes, we wish to collect operationally useful data. This includes information on shooting environments, number of people hurt, how shooters were equipped, and the manner in which events concluded. First responders around the country have used the information in the FBI report to help them better prepare for and react to these types of events. We feel providing imperfect but relevant data is preferable to allowing police and other first responders to operate in the dark.

In conclusion, because official data did not contain the information we needed, we had to develop our own. This required choices between various options with different strengths and weaknesses. While our data is imperfect, it nonetheless represents the best attempt to date to comprehensively capture active shooter events. Because it is the best available data, it can help inform response procedures and hopefully help save lives. Changes in mass murder trends, while

important for other purposes, are not relevant to a police officer responding to an active shooter event.

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Authors' note: The authors would like to thank Kim Rossmo, Lucia Summers, and Marcus Felson for their helpful comments on early versions of this response.

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Call for Papers: British Society of Criminology Conference 2015

The British Society of Criminology would like to invite submission of abstracts for papers at their annual international conference being hosted by the Plymouth Law School, Plymouth University. The conference runs from 1st July to 3rd July 2015 with the postgraduate conference from 30th June to 1st July 2015.

The overarching conference theme is 'Criminology: Voyages of Critical Discovery'. Our aim is to provide space for criminologists to undertake reflexive and critical voyages through debate and contestation. We would therefore encourage conference submissions that provide a forum for an inclusionary dialogue that will promote a dynamic conference environment. As such we would particularly welcome delegates' consideration of how they might *Engage Debate, Challenge Orthodoxy* and/or *Promote Innovation*.

Key Dates

Call for abstracts closes - Monday 25 May 2015

Early Bird registration closes - Friday 15 May 2015

Notification to authors (no later than) - 1 month of receipt of abstract

Conference registration closes - Monday 22 June 2015

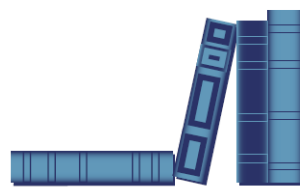
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Historian's Corner



Willard M. Oliver*

GREETINGS!

In the summer of 1916, Berkeley Police Chief August Vollmer, working with the University of California at Berkeley, began a program in higher education for his police officers that would earn them a college degree. The summer program ran from 1916 to 1932, only missing one summer (1927) due to a lack of funds. From 1929 to 1931, Vollmer served "on loan" from Berkeley as the first professor of policing at the University of Chicago, and after his official retirement from the Berkeley Police Department in 1932, he served as a full-time professor of policing at the University of California. The policing program, titled "Criminology" at the time, was the antecedent for modern-day criminal justice education. Therefore, in the summer of 2016, criminal justice education will celebrate its 100th anniversary.

In a recent Historian's Report to the Academy of Criminal Justice Sciences Executive Board, I alerted our leadership to the upcoming anniversary. They, in turn, asked me if I would be willing to guest edit a special issue of ACJS's *Journal of Criminal Justice Education*. With the blessing of the current editor, George Higgins, it was agreed that I would guest edit the September 2016 issue of the *Journal of Criminal Justice Education* in order to mark this milestone in

criminal justice education. The special issue will be titled "Recognizing 100 Years of Criminal Justice Education." Therefore, this Historian's Corner is a call for papers.

The papers for this special issue should focus on the history and development of criminal justice education over the past 100 years. That is a fairly wide-open topic, but one that I think will capture an excellent collection regarding our discipline's history. Papers may include such topics as histories of early police training programs and their contribution to CJ education; histories of early colleges/universities that impacted the development of CJ education; the specific contributions of early police leaders and/or police scholars to CJ education; the development of criminal justice curriculum over the past 100 years; the historical development of Ph.D. programs in CJ education; the impact of crime commissions and task forces on the development of CJ Education; biographies of leading individuals who contributed to the creation and development of CJ education; and, perhaps, if you have been around long enough, reflections on the development of CJ education across a 30+-year career.

The deadline for paper submissions is March 1, 2016, and papers should be sent directly to me at woliver@shsu.edu. If you are feeling really nostalgic, you may even send them to me the old-school way, by mail, typed, and double-spaced; however, just remember to enclose five printed copies (remember those days?).

ACJS Today

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Submission Deadlines

December 15th
February 15th
April 15th
August 15th
October 15th

*The editor will use his discretion to accept, reject or
postpone manuscripts.*

Article Guidelines

Articles may vary in writing style (i.e. tone) and
length. Articles should be relevant to the field of
criminal justice, criminology, law, sociology or related
curriculum and interesting to our readership. Please
include your name, affiliation and email address,
which will be used as your biographical information.
Submission of an article to *ACJS Today* implies that
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