



## Slow Down and Think!

By Matthew Heins, Law Enforcement Action Forum Coordinator

Law enforcement is at another crossroads in its evolution. Voices in communities across the country are demanding a plethora of changes to the *status quo*. This is not new – the profession has been examined by many entities and people over the years, from presidential commissions to university academics, and each review has resulted in recommendations for policing reforms.

Current proposals range from the very practical and clearly necessary, to others which can be difficult to comprehend or may seem excessive or unworkable. One frequently-heard desire is for officers to receive training in de-escalation techniques, with the hope that this would lead to peaceful resolutions in more situations.

How do we best respond?

The first step is to recognize that this moment of evaluation is a good thing. All serious professions strive to improve themselves continuously and law enforcement should be no exception. Agencies should welcome feedback and strive to upgrade or better meet their standards – this is how we become more effective and increase public respect. While change can be uncomfortable, good leaders view it from a logical perspective and do their best to keep emotions at bay.

Additionally, we must participate actively in the process because first-hand knowledge and input are essential to the development of appropriate, feasible, and successful improvements. To overcome the normal human inclination to stick with familiar thinking and routines, however, we must also engage in an honest self-evaluation of policing operations and culture – both nationwide and at our individual agencies.

One area ripe for reappraisal is our understanding of the “duty to protect.” Our concept of this duty is often a guiding principal that permeates department culture, training and evaluations and, ultimately, officers’ decision-making in the field. So it’s worth asking: does the way we perceive the duty to protect lead to good officer choices, good outcomes, and effective law enforcement?

If not, can we adjust to achieve better results and simultaneously address some of the concerns being voiced at this time?



## The Duty to Protect

Police officers are instilled with the sense of having a duty to protect and serve the public. From day one at police academy, recruits are trained to be problem solvers and catch the bad guys. This mindset is reinforced during field training programs where pressure is applied to handle problems quickly because timeliness can have life-or-death consequences, or determine whether a crime is prevented or a criminal is caught and brought to justice.

Once officers are on the job, there are additional pressures that, consciously or subconsciously, affect how they approach their work. There is peer pressure to not screw up or appear weak to coworkers. There is pressure from leadership to “be productive” in ways that can be tracked numerically. There is pressure from suspects who would take advantage of any sign that an officer is intimidated or not in control of the situation. There is pressure from citizens who expect you to *do something*.

Given all this, it's no wonder that officers can tend to rush in, take charge, and act swiftly to resolve the problem at hand. However, while this approach may be appropriate and effective in many situations, it is not necessarily the best approach for every call.

In some circumstances, a valuable alternative is for officers to choose *not* to act, or to pause before acting. Similarly, if an initial intervention isn't working or is raising the temperature, officers' best decision may be to step away to let things de-escalate – disengage, regroup, then perhaps try a different tactic.

In the field, however, under the pressures mentioned above, it can be difficult to think of that option and make that decision. In particular, officers with a deeply-ingrained sense of the duty to protect may feel like they are abandoning their duty if they choose to step away or not take action.

But are they? What is the true extent of officers' obligation to intervene?

## The Legal Requirements

In *DeShaney v. Winnebago County Department of Social Services, 1989*, the courts stated, “Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”

Simply put, governmental entities such as cities, villages, or counties are generally not liable for acts of violence or violations committed by one private person against another person, or upon their property.

That said, the courts have identified two circumstances in which there *is* a legal duty for law enforcement to protect a person from other people.

The first circumstance is referred to as a “special relationship.”

The state has a duty to protect a citizen when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs. *DeShaney v. Winnebago County Department of Social Services, 1989*.

When a person is in the custody of law enforcement, there is a legal obligation to provide for their care and well-being. This includes basic needs, such as food or shelter, as well as medical needs. This obligation does not end until the person is released or turned over to another agency. If you fail in this responsibility, you are likely to expose your government entity to liability.

The second circumstance is referred to as “state-created danger.”

The state ... may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts. *Kallstrom v. City of Columbus (1998)*

To show that a state-created danger existed, a plaintiff must establish the following:

- 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party;
- 2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, as distinguished from a risk that affect the public at large; and
- 3) the state knew or should have known that its actions specifically endangered the plaintiff.

The case *Nelson V. City of Madison Heights (2017)* illustrates this standard. A young woman agreed to work as an informant after being caught with drugs. She facilitated a drug deal with her dealer and, during the resulting arrest, an officer disclosed her name to the drug dealer’s companion. The drug dealer subsequently killed the informant. The courts determined the city could be held liable “because the officer’s act ... substantially increased the likelihood that a private actor would deprive her of her liberty interest in personal security.”

In summary: officers have a legal obligation to safeguard the well-being of people in their custody and they may not take actions that knowingly put someone in a danger they would not have been in otherwise.

However, beyond these requirements and depending on the facts of the situation, officers may or may not have an obligation to act – a “duty to protect”

### **A Shift in Thinking**

The legal parameters above, both establishing and limiting the “duty to protect,” offer departments and their officers an opportunity for a shift in mindset. When faced with circumstances in which a person is endangered by other people, or is a potential danger to themselves, officers need to become more strategic in their approach. They need to slow down and think – take a moment to analyze the elements in play and consider all the options available in order to avoid putting themselves or others in harm’s way unnecessarily.

## De-Escalation

Audrey Forbush, LEAF Legal Advisor, notes that, when evaluating the reasonableness of officers' actions, courts are looking more closely at situations where de-escalation was a potential option. This is especially true in cases involving individuals with mental illnesses.

For instance, when officers are summoned to a home of a person who is in the throes of a mental crisis and has barricaded themselves alone in the home but does not have access to firearms ... what should officers do? What are their legal obligations? Has a crime been committed? How can they best provide help? Do they try to make entry into the house?

Officers need to ask: What result do we hope to achieve? What is likely to happen if we enter the home? Could it lead to a physical altercation or the need to use lethal force? What other options are available?

With a fresh understanding of their duty to protect, officers might assess the level of risk and determine that, with no one else endangered, it's best to leave the scene, possibly allowing the person to calm down and voluntarily come out of the house to seek treatment.

Similarly, what about undertaking an arrest for an outstanding misdemeanor warrant discovered during a minor traffic stop or other citizen contact? Are officers obligated to act on the matter immediately or might it be better to simply advise the person of the warrant and instruct them how to take care of it? The best option to limit the potential of an officer or other person getting hurt might be to walk away and address the issue later, at a time and place of the officer's choosing, when the situation is better suited for a more peaceful resolution.

Naturally, these types of options are not available in every circumstance. They must be used strategically on a case-by-case basis. It is impossible to establish hard and fast guidelines, as each situation contains its own set of facts. A tremendous amount of information must be processed before any course of action can be formulated and selected. This takes time, which may not be available once officers arrive on scene – they must start to strategize the minute they receive a call.

## Factors for Consideration

Factors for officers to consider before and during a call or contact begin with recognizing whether it is a criminal matter or a mental health issue. What is your legal foundation for being there? Is the complainant's safety at risk? Is the safety of others at risk? What level of threat are you exposed to? Is there – or is there not – a legal duty to protect an individual, as established by the courts and discussed above?

Finally ... and this is extremely important ... is time on your side to address the situation? Despite internal and external pressures to *do something now!*, slow down and think. Rushing in to solve a problem may have the reverse effect and create additional problems, perhaps aggravating things to the point where lethal force may be the only option left. So, take a moment to evaluate the circumstances with a level head. Is immediate action – or any action – actually necessary? Are alternatives available to allow the situation to de-escalate?

If time is on your side, use it.

## Conclusion

The concept of the “duty to protect” is important to consider when setting standards for officer training and performance because it can drive officer decision-making in the field. Management must be sure officers understand that not every scenario *requires* immediate action. Trainings must establish expectations and give officers tools for developing and considering alternatives, including the option to disengage.

The current spotlight on law enforcement encourages us to rethink existing approaches to policing. Our response must include training officers to slow things down, use time more effectively, and think more purposefully.

## RECOMMENDATIONS

1. Incorporate scenario-based problem solving into training. Through self-examination and repetition officers can begin to develop a problem-solving methodology that includes the option to disengage and regroup.
2. Utilize officers’ in-car or body camera footage to train on what options are available when handling calls for service.
3. Train officers on relaxation techniques to assist them in thinking clearly while under stress.
4. Ensure officer performance evaluations do not conflict with de-escalation techniques that may involve letting a person go free instead of taking immediate enforcement action. Make certain department culture does not put implicit pressure on officers to produce “numbers.”
5. Address cultural norms that support mindsets such as “we do not back down” or “we take it to them.” Focus on the need to think more strategically.
6. Avoid creating a legal “special relationship” by making promises that you will protect an individual.

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*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.*

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure.

Do not hesitate to contact the Michigan Municipal League's Loss Control Services at 800-482-2726 for your risk control needs and suggestions.

**Are you an MML Insurance Program Member? Are you a Law Enforcement Executive?**

If so, visit the MML's online [Law Enforcement Risk Control Manual](#) to access model policies and procedures developed by the LEAF Committee.

Go to: <http://www.mml-leaf.org/lerc.php>

Click on the green "Member Login" box in the left-hand panel.

At the Login screen, enter your username and password.

If you don't have a username and password, click "Request Access" and complete the online form.

The LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Law Enforcement Risk Control Manual. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the state.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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