

Suicide By Cop? How Junk Science and Bad Law Undermine Police Accountability¹

hey ace remember when we was standing on the balcony on the 10th floor of the holiday inn about 5am and the smog was down over the city lol and you were singing air force one by nelly whilst we both wrote our names in the condensation on the windows I often wonder if our names are still there....

-Bernadette Harakati, Tributes for Asa Sullivan²

Introduction

On June 6, 2006, three San Francisco police officers entered an apartment where Asa Sullivan was staying with a friend in response to a call from a neighbor that the door was open. After knocking down an interior door and arresting another friend, the officers found Asa in the attic and surrounded him. As a federal circuit court would later note, Asa was not accused of a crime, did not pose a threat to public safety, and could not escape. The court continued, “He had not initially caused this situation. He had not brandished a weapon, spoken of a weapon, or threatened to use a weapon. Sullivan, in fact, did not have a weapon.”

Officers had various and conflicting accounts of the events that unfolded over a 12-minute standoff, but they entered the attic with their guns drawn. As noted by the appeals court,

The officers stated that Sullivan refused to show his hands and made disturbing statements, such as “Kill me or I’ll kill you” and “Are you ready to shoot me?” Officer Alvis stated that she thought she saw something in Sullivan’s hands and when he moved his right arm that she thought he was going to shoot her. Officer Keesor stated that he saw something that looked like a gun in Sullivan’s hand, heard a pop, and began shooting at Sullivan.

When Officer Alvis first saw Asa in the attic, another officer responded over the radio “Hey, why don’t we just pull back really quick, set up a perimeter and just try to get him later?” Officer Alvis responded “I have him at gunpoint. He’s not going anywhere.” Shortly afterward, Officers Alvis and Keesor fired their entire magazines, 25 shots in all, striking Asa 16 or 17 times, including five times in the face.³ Asa Sullivan was mixed race – Black, Native American, and white – and at the time of his killing, he was 25 years old with a six-year old child.

Derek Chauvin’s murder of George Floyd in 2020 and a spate of high-profile killings of Black people at the hands of law enforcement since 2014 have renewed attention to the frequent use of deadly force by police officers, especially against Black people. In a typical year in the United States, somewhere between 1,000 and 1,500 people are killed by the police. Black people are killed by police at twice the rate (27%) of their percentage in the population (13%). Black men in particular are more than three times more likely to be killed by police than white men, and a 2021 study published in *The Lancet* found that racial disparities in police shootings have only

¹ Early research for this piece was conducted by Ana Henderson-Arjona and Murtaza Husain, third-year law students in the Berkeley Law Policy Advocacy Clinic.

² <http://www.gonetoosoon.org/memorials/asa-sullivan-1980-2006>.

³ The family visited the body and counted 17 bullet holes; police reports said he was shot 16 times.

grown since 2000.⁴

In spite of these horrific numbers, police killings are grossly underreported. In part as a result of the cozy relationship between medical examiners and the police, The 2021 Lancet study also found that more than half of all fatal encounters with the police between 1980 and 2018 were listed as another cause of death. Even in high-profile cases like Mr. Floyd's, whose killing at the knee of a Minneapolis police officer was recorded on video that quickly went viral, the county medical examiner found that "the presence of fentanyl and methamphetamine in Mr. Floyd's system and his underlying health conditions" contributed to his death.⁵

In this context, Asa Sullivan's killing was tragically all too common. At the time of his death, he was the 17th person to die at hands of the San Francisco Police Department (SFPD) over the prior 10 years. Like in almost all earlier and subsequent cases, and consistent with practices in police departments across the country, the SFPD did not classify his death as an unlawful killing, nor did it provide any information or support to his family. Nevertheless, Asa's family was determined to pursue justice.

Advocates for police accountability and racial justice have been working for many years to end the excessive use of force by law enforcement through a variety of mechanisms, including pursuing administrative sanctions, criminal liability, and civil liability. Due largely to the power of police unions and the structure of the disciplinary process, higher ups rarely impose meaningful administrative sanctions such as suspension or termination. Criminal liability is even more rare – prosecutors decline to bring criminal charges in more than 98% of killings by police, and notwithstanding a few recent notable cases, they almost never obtain convictions.

With respect to civil liability, victims of police violence have for many decades sought money damages from those responsible through Section 1983 lawsuits alleging violation of their constitutional rights, but the legal hurdles are significant.⁶ First, qualified immunity shields many officers from liability of any kind to the extent that their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁷ Second, U.S. Supreme Court holdings give courts wide latitude to determine the reasonableness of officers' conduct, and narrow substantially the overall inquiry about their use of excessive force.⁸ Finally, even if officers are found to have violated a victim's civil rights, they almost never

⁴ Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-Regression, *The Lancet* (2021), [https://doi.org/10.1016/S0140-6736\(21\)01609-3](https://doi.org/10.1016/S0140-6736(21)01609-3).

⁵ Jennifer Valentino-DeVries et al., How Paid Experts Help Exonerate Police After Deaths in Custody, *The New York Times* (Dec. 26, 2021), <https://www.nytimes.com/2021/12/26/us/police-deaths-in-custody-blame.html>.

⁶ *Monroe v. Pape*, 365 US 167 (1961) (holding that plaintiffs could sue Chicago police officers under Section 1983 for an unlawful search and seizure that violated their Fourth Amendment rights).

⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 815–18 (1982) (shielding from liability officers who engage in excessive force unless a federal court in their jurisdiction previously held that a similar action violated the Constitution).

⁸ *Tennessee v. Garner*, 471 U.S. 1 (1985) (using deadly force on unarmed fleeing persons suspected of a crime constitutes a seizure that federal courts must subject to a Fourth Amendment reasonableness analysis); *Graham v. Connor*, 490 U.S. 386 (1989) (extending *Garner* to apply a Fourth Amendment reasonableness standard to all excessive force claims arising out of an arrest or investigatory stop, not only those that involve deadly force on unarmed fleeing persons). Erwin Chemerinsky, *Presumed Guilty* (2021) (documenting the role the U.S. Supreme Court has played in limiting police misconduct by eroding the exclusionary rule and officer and municipal liability).

incur personal liability because of formal and informal indemnification—the government typically pays all money damages, which reduces any deterrent effect on officers.⁹

In addition to these legal hurdles, police officers, police unions, and their advocates also aggressively defend against civil rights lawsuits by invoking science to mitigate or escape liability for excessive use of force. These defense strategies are often deployed in cases involving so-called “non-lethal” police techniques, including the use of weapons, such as tasers and pepper spray, or the use of physical restraints, such as choke holds. Over the last few decades, a “cottage industry of exoneration” has grown of medical examiners, law enforcement officials, and lawyers who advise and train officers to defend themselves against liability for their misconduct.¹⁰

To bolster this strategy, interested parties have funded many of the studies on the safety and efficacy of non-lethal techniques.¹¹ The studies, including some in peer-reviewed journals, often have conflicting findings. Those written by the network of experts who testify on behalf of police tend to find that such police techniques are safe and non-lethal. Studies from outside experts often find at least some increase in the risk of death from the same allegedly non-lethal techniques.

In recent years, defenders of police killings have seized on the concept of “excited delirium” as the cause of death for victims in custody independent of officer conduct.¹² Part of a larger category of so-called “custody death syndrome,” excited delirium is used as an explanatory mechanism to absolve police officers of responsibility for killing people in their care.¹³ Police training is so pervasive on the issue that one of the other officers in George Floyd’s killing asked Officer Derek Chauvin, who was later convicted of murdering Mr. Floyd, whether they should roll Mr. Floyd on his side, adding, “I just worry about the excited delirium, or whatever.”¹⁴ Notably, more than half of all deaths in police custody that are attributed to excited delirium involve Black and Latinx victims.¹⁵

In spite of the lack of scientific evidence about its existence and its racially disparate impact, federal courts have accepted excited delirium as a valid medical condition and a factor relevant to establish whether an officer’s use of force was reasonable.¹⁶ Expert critics of excited delirium

⁹ Joanna Schwartz, *Shielded* (2023).

¹⁰ Jennifer Valentino-DeVries et al., *How Paid Experts Help Exonerate Police After Deaths in Custody*, *The New York Times* (Dec. 26, 2021), <https://www.nytimes.com/2021/12/26/us/police-deaths-in-custody-blame.html>. See also, Ingrid V. Eagly and Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 *TEX. L. REV.* 891 (2019) (describing the proliferation of privatized police policymaking and the role of Lexipol LLC in creating internal regulations for law enforcement agencies across the United States.).

¹¹ [See, e.g., Axon Medical, manufacturer of tasers.]

¹² Osagie K. Obasogie, *Excited Delirium and Police Use of Force*, 107 *VA. L. REV.* 1545 (2021).

¹³ First described in the 1990s by law enforcement risk management professionals, <https://web.archive.org/web/19970410001343/http://laaw.com/cdsldm.htm>.

¹⁴ Tom Lyden, *Excited Delirium Dilemma: Explanation or Excuse for In-Custody Deaths?*, *Fox9*, <https://www.fox9.com/news/excited-delirium-dilemma-explanation-or-excuse-for-in-custody-deaths> (11/15/20).

¹⁵ Obasogie (2021).

¹⁶ In some cases, courts have used excited delirium to require officers to use less force and more care. *Id.* at ___.

call it junk science:

*Excited delirium implies that there is a medical condition that predisposes certain individuals, often black men, to die in police custody. It draws upon aspects of real medical conditions such as delirium, psychosis, drug intoxication and sudden cardiac death. But it manipulates them to form a broadly applicable blanket diagnosis that serves the interests of law enforcement and absolves officers of accountability.*¹⁷

Excited delirium is not the only pseudoscience invoked by defenders of police accused of using excessive force. Following Asa’s killing, his mother, Kathleen Espinosa, sued the individual officers and the City of San Francisco, alleging unreasonable use of force.¹⁸ In Asa’s case, there was no question about whether he died as a result of lethal techniques – two police officers shot him 16 or 17 times at close range. The question was whether the officers’ use of lethal force was nevertheless justified against an unarmed and cornered suspect, thereby absolving officers of liability for Asa’s killing. It would take federal courts – from the trial level to the U.S. Supreme Court and back – more than eight years to answer this question.¹⁹

The claims in *Espinosa v. City and County of San Francisco* turned on whether the officers’ use of force against Asa was reasonable and necessary given what they knew at the scene. To defend itself and the officers at trial, the City offered evidence of Asa’s police records, medical records, and social and developmental history, some of which dated back to his birth and none of which was known to the officers at the time of the event. Most importantly, the City called an expert on “suicide by cop.” Reviewing the City’s evidence, which included snapshots of Asa’s involvement in the child welfare system and with law enforcement, the expert testified that Asa spontaneously decided to commit suicide when confronted by police officers.

The judge in Asa’s case allowed the expert to testify about suicide by cop, because the U.S. Court of Appeals for the Ninth Circuit in another case from San Francisco had recently held that such testimony was admissible to assess the credibility of the officer’s account of the events leading up to a shooting.²⁰ The earlier case arose out of the police killing of Cammerin Boyd, a 29-year-old Black man. Since the Ninth Circuit holding in *Boyd*, the City of San Francisco has relied increasingly on suicide by cop to shield its officers from liability in civil rights lawsuits. At the end of Asa’s case in 2014, the jury returned with a verdict in favor of the police officers and the City, finding unanimously that their actions were reasonable because Asa Sullivan wanted to die at the hands of police.²¹

“Suicide by cop,” like excited delirium, is a relatively new law enforcement theory. And like excited delirium, suicide by cop is not an accepted medical condition or scientifically established

¹⁷ Méabh O’Hare, Joshua Budhu & Altaf Saadi, Police keep using “excited delirium” to justify brutality. It’s junk science, *The Washington Post* (Jul. 17, 2020), https://www.washingtonpost.com/outlook/chokehold-police-excited-delirium/2020/07/17/fe907ec8-c6bc-11ea-b037-f9711f89ee46_story.html.

¹⁸ *Espinosa v. City and County of San Francisco*, 598 F.3d 528 (9th Cir. 2010).

¹⁹ [note some of the procedural steps/hurdles in the case: 2010, CA9 upheld trial court denial of SJ motion based on qualified immunity; 2012, SCOTUS declined to review CA9 ruling; finally went to trial in 2014.]

²⁰ *Boyd v. City & County of San Francisco*, 576 F.3d 938, 945-46 (9th Cir. 2009).

²¹ *Espinosa v. City and County of San Francisco*, 598 F.3d 528 (9th Cir. 2010).

phenomenon. According to the theory, some people choose to engage in behavior deliberately intended to elicit a lethal response from police. Suicide by cop has not been described extensively in academic literature or recognized formally by the mental health profession or any other scientific or medical body, but police regularly invoked it as an exculpatory rationale for using lethal force.²²

Although the term had been used informally since at least the 1980s, suicide by cop did not become a part of scholarly and professional literature until the early 1990s.²³ In 1985, the concept of “suicide by police” first emerged in a forensic medical journal.²⁴ In 1991, a California newspaper used the term for the first time.²⁵ A catchy headline, law enforcement agencies began studying and invoking this theory to describe what they saw as a growing phenomenon that undermined their public relations, harmed their officers’ mental health, exposed them to liability, and implicated their training methods.²⁶

In recent years, city attorneys have increasingly used this theory to defend police officers and their actions in Section 1983 civil rights cases stemming from police killings of civilians. To bolster this defense, lawyers hire forensic psychologists as experts to testify that the victim wanted to die at the hands of police. These experts gather and point to evidence not available to officers at the time of the killing, including a victim’s social history and medical records, to establish that a particular individual had suicidal intent and therefore wanted to die in an interaction with law enforcement. Testimony from these experts is often key to absolving officers of liability for killing civilians. In Asa’s case, expert testimony about suicide by cop was the key defense evidence that led the jury to determine that the SFPD officers acted reasonably and therefore did not violate his civil rights.

In Part I of this article, we describe the recent phenomenon of “suicide by cop,” including the cottage industry of professionals who have developed and advanced the theory. In Part II, we identify several troubling aspects of suicide by cop, including the dearth of authoritative and independent scientific or medical research. In Part III, we describe the role of suicide by cop in civil rights lawsuits brought against police officers for excessive use of force. In Part IV, we return

²² [But cf. Boyd, holding that the trial court did not abuse its discretion by admitting expert testimony: “Dr. Keram testified to knowing of approximately ten peer-reviewed articles and four non-peer-reviewed publications on the subject.”]

²³ Flynn at 556.

²⁴ Flynn at 556.

²⁵ Clark Brooks, *Suicide by Cop*, San Diego Union-Tribune, Aug. 26, 1991, at C1.

²⁶ See H. Range Hutson et al., *Suicide by Cop*, *Annals of Emergency Medicine* 32:6 (Dec. 1998), [https://www.annemergmed.com/article/S0196-0644\(98\)70064-2/fulltext](https://www.annemergmed.com/article/S0196-0644(98)70064-2/fulltext) (concluding that more awareness of suicide by cop could:

- (1) improve law enforcement public relations (“Further research into this topic could have a significant impact on police-community relations by illustrating the role of many shooting suspects in causing their own deaths.”);
- (2) help officers with trauma (“Police officers themselves could better adjust to the trauma of shootings by gaining an appreciation of the suicidal nature of many subjects.”);
- (3) curb litigation (“The ability to curb litigation also would occur as juries more appropriately assess the culpability of all parties to a shooting.”); and
- (4) improve police training (“Finally, management could adjust police training and tactical operations to more appropriately respond to the phenomenon of suicide by cop.”))

to Asa's case to explore in more depth the implications of suicide by cop in the courtroom. We conclude by making recommendations to address this troubling trend toward junk science that shifts the blame for excessive use of force from the police to the victim, shields police officers from accountability for their actions, and undermines civil rights laws.

I. What is "Suicide By Cop"?

Beginning in the 1990s, police departments began studying and developing the theory of suicide by cop to describe what they saw as a growing phenomenon. In order to better understand a police officers' perspective on and use of the suicide by cop theory, we requested articles, books, and videos related to suicide by cop from the California Commission on Peace Officer Standards and Training. We found that the theory is increasingly being used to defend actions by law enforcement, especially in the context of officer-involved shootings. This strategic use of suicide by cop theory stems in large part from police departments' desire to decrease their criminal and civil liability for excessive use of force.

Suicide by cop has become an increasingly common way for police departments to characterize officer-involved shootings after the fact, often to justify poor police work or misconduct. According to James Fyfe, Ph.D., "the term 'suicide by cop' ...has become a catchy descriptor for a far larger number of cases in which officers put themselves unnecessarily into harm's way and must then shoot their way out of it."²⁷

In fact, trainers and upper level management within law enforcement agencies affirmatively encourage invocation of the defense. In 2006, Chief Psychologist of the Los Angeles County Sheriff's Department Audrey Honig advised that all officer involved shootings be investigated as suicide by cop incidents, including assaults that do not involve deadly force.²⁸ Honig suggested that this strategy may be a way to "buffer and protect our agencies" from public outcry and civil litigation resulting from police shootings.²⁹

Honig further directed that the first officer on the scene note suicide by cop as a potential explanation in the original police report about the shooting. She also emphasized the importance of including spontaneous statements made by family members/witnesses because such statements are exceptions to the hearsay rule and can be admitted in court.³⁰ She continued, "The determination that an incident constitutes an actual or attempted suicide by cop can make the difference between significant personal and organizational liability and zero liability. An

²⁷ James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. AM. ACAD. PSYCHIATRY L. 345, 346 (2000). James J. Fyfe, PhD, is an author and nationally recognized expert on the use of force by police, and a leading authority on the police use of force and police accountability. His research has been cited extensively, most notably by the U.S. Supreme Court majority opinion in *Tennessee v. Garner*, 471 U.S. 1 (1985).

²⁸ Audrey L. Honig, *Suicide by Cop: Reducing Personal and Organizational Liability Through Investigation*, J. OF CAL. LAW ENFORCEMENT, May 2006 at 6 ("An argument can readily be made that all officer involved shootings should be assessed to determine whether or not they meet the criteria for suicide by cop since not all such attempts conclude with the death or even injury of the subject").

²⁹ *Id.* at 5.

³⁰ Honig at 7 ("Spontaneous statements about a desire to die are frequently made [by family members] immediately following an incident").

ounce of prevention is truly worth a pound of cure.”³¹

Officers are also taught how to avoid liability through other means. The California Commission on Peace Standards and Training Telecourse on suicide by cop teaches police officers how to avoid litigation, recommending that officers stay at the hospital with suicide by cop victims, check in with the family over time, and let the family know that police are there to help.³² The theory is that providing support to families can decrease the chances of litigation against the police.

A former police author and well-known author on firearms and policing, R.K. Campbell³³ argues that “even if a person is known to be mentally ill, you cannot hesitate to act if he or she threatens your life. It doesn’t matter if every instinct tells you that he or she is attempting a police-assisted suicide; you cannot assume that an emotionally disturbed person who is armed will not kill you in pursuit of his or her own certain destruction.”³⁴ In a suicide by cop telecourse published by the California Commission on Peace Officer Standards and Training, Dr. Park Dietz discusses suicidal individuals specifically: “[w]e therefore have to have policies and procedures that allow the officers to act without hesitation with regard for their own safety regardless of whether some of the offenders are really suicidal.”³⁵

Relatedly, training on suicide by cop emphasizes that the officer is not accountable for the person’s death. Instead, police officers are taught that the suicidal individual is a “perpetrator” of a crime and the officer is the “victim” – an unwilling executioner of suicidal individuals, or “criminals.”³⁶ In a suicide by cop video published by the California Commission on Peace Officer Standards and Training, multiple speakers throughout the video tell police officers that “a suicide by cop event is a trap – you are the victim.”³⁷ According to Ronald M. McCarthy, a retired Los Angeles police officer who has trained more than 30,000 police officers in the United States, “[t]he research tells us that rarely is an officer who uses deadly force guilty of a crime. And,

³¹ Id. at 8. Honig is listed as a consultant on the website of Americans for Effective Law Enforcement (AELE) with expertise in (among other things) suicide by cop, <https://www.aele.org/ALHonig.html>. AELE published an article on the topic in its monthly law journal, *Suicide by Cop*, 2007 (8) AELE Mo. L. J. 101.

³² California Commission on Peace Officer Standards and Training: Training Program Services Bureau, *Suicide By Cop* (1998).

³³ R.K. Campbell is a writer in the firearms and police field with more than 500 articles, columns and reviews published in more than 20 magazines and numerous annuals. He serves as contributing editor at *Women and Guns* magazine, contributing writer at *Gun Week*, and contributing staff writer at *SWAT* magazine. His work frequently appears in *Police* magazine and he is executive editor of *Boar Hunter* magazine. He holds a degree in criminal justice and has served in most police capacities.

³⁴ R. K. Campbell, *Don’t Go With Them*, 29 *POLICE: THE LAW ENFORCEMENT MAGAZINE* 60, 62-63 (2005).

³⁵ [source]

³⁶ California Commission on Peace Officer Standards and Training: Training Program Services Bureau, *Suicide By Cop* (1998); Dean Scoville, *Getting You to Pull The Trigger: Growing phenomenon of “suicide by cop” puts officers in unwitting role of assisting the death wishes of others*, *POLICE: THE LAW ENFORCEMENT MAGAZINE* (Jan. 31, 2017), <http://www.policemag.com/channel/patrol/articles/1998/11/getting-you-to-pull-the-trigger1.aspx>

³⁷ California Commission on Peace Officer Standards and Training: Training Program Services Bureau, *Suicide By Cop* (1998)

almost always, the officer does not violate agency policy or rules.”³⁸

II. Suicide by Cop as Forensic Science?

Psychologists, psychiatrists, and criminologists have begun to define, study, and normalize the concept of suicide by cop within their respective fields. They have proposed after-the-fact methodologies to reconstruct a person’s state of mind in order determine whether the individual was suicidal during a confrontation with police. They rely on information about an individual’s conduct during the encounter, as well as the person’s criminal, familial, economic, and psychological history. In turn, these practitioners are enlisted by attorneys as courtroom experts to testify about their interpretation of evidence in light of these methodologies to label the encounter suicide by cop.³⁹

A review of the literature relied upon by suicide by cop experts demonstrates several shortcomings in research methods and the conclusions derived from the work. First, research on suicide by cop is conducted almost exclusively through collaboration between law enforcement and social science experts. Second, suicide by cop studies rely on law enforcement-defined cases that are subjectively classified. Finally, imprecise research concepts and design allow for overbroad classification of suicide by cop.

A. *Law enforcement and social scientists mutually benefit from suicide by cop research.*

While suicide by cop has been the subject of numerous articles in publications catering to law enforcement agencies,⁴⁰ academic research on suicide by cop in psychology, psychiatry, and criminology is a relatively recent phenomenon undertaken by a small pool of researchers. However, much of the work in the field has still been conducted through encouragement, facilitation, or long-term collaboration with law enforcement agencies:

- Vivian Lord, a criminal justice professor who provides expert consulting and testimony in suicide by cop cases, was introduced to suicide by cop theory by police officers in North Carolina who shared anecdotes of homeless, mentally ill people confronting officers with apparently deadly force to get them to shoot.⁴¹ Her work and collaboration with other researchers on suicide by cop was “facilitated further when the Behavioral Science Unit of the FBI invited several of the researchers to present at one of their special-topic conferences.”⁴²
- Dr. Emily Keram, another frequently called expert in suicide by cop cases, describes being introduced to the subject by a city attorney who asked her to review a cluster of officer-

³⁸ John A. Kolman, *Patrol Response to Contemporary Problems: Enhancing Performance of First Responders Through Knowledge and Experience* 221 (John A. Kolman) (2006). (Chapter 16: Litigation and surviving lawsuits and prosecution, written by Ronald M. McCarthy).

³⁹ Vivian B. Lord, *Suicide By Cop: A Comprehensive Examination of the Phenomenon and its Aftermath*, at page 8.

⁴⁰ See e.g., *The Police Chief*, Virginia; *FBI Law Enforcement Bulletin*; *First Responder Magazine*.

⁴¹ Vivian B. Lord (2015-06-23), *Introduction, Suicide By Cop: A Comprehensive Examination of the Phenomenon and its Aftermath* (Kindle Location 260). Looseleaf Law Publications, Inc. Kindle Edition.

⁴² *Id.*

involved shootings.⁴³ She later published an article on suicide by cop, co-authored with the city attorney, which she presented at the FBI Academy.⁴⁴

Law enforcement agencies and social scientists have been partners in developing a field of expertise that has been mutually beneficial. For police departments and officers, suicide by cop is a lens through which police shootings become reasonable, innocent, and lawful. Like other expert witnesses, for academics and practitioners, suicide by cop is a field from which they can be enlisted and paid to testify on behalf of cities and law enforcement.⁴⁵

B. Suicide by cop researchers rely on police and other biased sources for their samples.

Suicide by cop research is founded primarily on law enforcement self-reporting about the incidents at issue and the victims involved. Except for anecdotal discussions about their own patients' suicidal ideations, none of the researchers' study samples involve direct communication with victims and those who knew them. Such sampling methods combine sources that often provide incomplete, biased, or unverifiable information about the incidents deemed by the researchers to count as suicide by cop.

Most of the studies rely exclusively or primarily on nonrandom police files and reports of police shooting incidents. For example, the Los Angeles Sheriff's Department collaborated on and co-authored a 1998 study based on a sample of the department's files on officer-involved shootings over a span of ten years.⁴⁶ Similarly, a 2009 study collected its sample of 256 suicide by cop incidents from 707 case files and "primary investigative files" of officer-involved shootings from 90 North American police departments in the United States and Canada from 1998 to 2006.⁴⁷ Vivian Lord's 2010 study relies on a sample of 242 cases from the FBI's Hostage Barricade Database System.⁴⁸

Other researchers cited authoritatively in suicide by cop studies use sampling methods that are even more fraught. An oft-cited study by Homant and Kennedy in 2000 "include[d] for analysis all those cases from various sources that had previously been identified as probable suicides by cop," including: 40 from a Lexis-Nexis search judged by the author to show that the victim sought to be killed, five from a "20/20" news program about suicide by cop, three from "various internet sources," eight from cases in which the authors served as expert witnesses, and

⁴³ [source]

⁴⁴ [source]

⁴⁵ Suicide by cop researchers recognize their role as potential expert witnesses in § 1983 cases. An anthology by Vivian B. Lord, "Suicide by Cop: A Comprehensive Examination of the Phenomenon and its Aftermath," mingles articles about research and findings in the field, with chapters pertaining directly to the theory's application in court by expert witnesses. These chapters serve to acclimate the reader to the demands involved in serving as an expert and how to overcome them. See e.g., "Chapter 5: Legal Representation in Civil Lawsuits Arising from Police-Involved Shootings," "Chapter 7: Expert Witnesses: Suicide by Cop," "The Path from Research to Expert Witness."

⁴⁶ H. Range Hutson et al., Suicide by Cop, ANNALS OF EMERGENCY MEDICINE 32:6 (Dec. 1998).

⁴⁷ Mohandie et. al, Suicide by Cop Among Officer-Involved Shooting Cases, J. FORENSIC SCI., March 2009, Vol. 54, No. 2, at 457.

⁴⁸ Vivian B. Lord et al., Suicide by Cop: Police Shooting as a Method of Self-Harming, JOURNAL OF CRIMINAL JUSTICE 38: 889-895 (2010). The HOBAS is a post-incident database that stores historical data from participating law enforcement agencies on hostage/barricade, suicide, kidnapping, and attempted suicide incidents.

others “supplied by prosecutors who had become aware of [the authors’] interest in the area.”⁴⁹

Setting aside concerns regarding the data sources and sampling methods in such studies, researchers must rely only on their subjective assessments to retroactively classify police shootings as suicide by cop. Because the literature lacks a single definition of suicide by cop, or even agreed-upon criteria to classify cases as suicide by cop, we have no objective or authoritative study of its prevalence. The L.A. Sheriff’s Department study qualifies its findings by noting that “as with any retrospective study analyzing previously compiled information, inherent biases may exist,”⁵⁰ but most studies of suicide by cop overclaim without acknowledging their limitations.

C. The suicide by cop literature is overinclusive of people and circumstances.

Death by suicide, whether at the hands of the police or otherwise, requires intent on the part of the person who commits the suicidal act.⁵¹ Some people may choose to end their lives by provoking a violent confrontation with police. For example, in a small number of cases, victims of police shootings have left notes to that effect.⁵²

Determining suicidal intent in cases where the individual is already dead is inherently problematic.⁵³ In fact, suicide by cop research is considered by its own proponents to be “inadequate for assessing suicidal intent” directly.⁵⁴ As such, researchers have proposed different methods for “assess[ing] [suicidal intention] by building up a picture of... ‘chains’ of behavior rather than a single behavior.”⁵⁵

Suicide by cop experts assert that a plethora of behavioral and demographic factors extracted from their collective studies allow them to assess whether a police shooting is suicide by cop.⁵⁶ But the practical effect, instead, is that any individual victim and any set of circumstances can easily be framed as suicide by cop. This body of research incorporates a very broad spectrum of victim behavior and history into the realm of potential suicide by cop. Where victims do not meet one or many of these characteristics of suicide by cop, they nonetheless fit

⁴⁹ Robert J. Homant & Daniel B. Kennedy, Suicide by police: A proposed typology of law enforcement officer-assisted suicide, 23 POLICING INT’L J. POLICE STRAT. & MGMT. 339 (2000). See also, Robert J. Homant, Real and perceived danger in police officer assisted suicide, JOURNAL OF CRIMINAL JUSTICE 28 (2000) 43-52, at 47 (relying on the same sample as the prior study).

⁵⁰ H. Range Hutson et al., Suicide by Cop, ANNALS OF EMERGENCY MEDICINE 32:6, 665 (Dec. 1998).

⁵¹ Ian K. McKenzie, Forcing the police to open fire: A cross-cultural/ international examination of police-invoked victim-provoked shootings, JOURNAL OF POLICE CRISIS NEGOTIATIONS, 6(1), 5-25 (2006). [general source for this proposition?]

⁵² [source(s)]

⁵³ David Best et al., Police shooting as a method of self-harming: A review of evidence for ‘suicide by cop’ in England and Wales between 1998 and 2001, INT’L J. OF SOC. OF LAW 32 (2004) 349–361 at 350 (judgments regarding intention are problematic because it is not always the case that a person expressly intends to die).

⁵⁴ Vivian B. Lord, Suicide by Cop: Police Shooting as a Method of Self-Harm, Journal of Criminal Justice 38: 889-895 (2010).

⁵⁵ Id.

⁵⁶ [Are there any experts “on the other side” of this issue? Big issue in Boyd is that there didn’t appear to be an expert on the plaintiff’s side.]

another.⁵⁷ The work of these researchers almost guarantees that an expert testifying in court can find evidence to support a conclusion of suicide by cop.

Existing studies identify a plethora of situational and demographic factors that point to evidence of suicidal intent. Prior encounters or noncompliance with law enforcement, including instances where an individual is not central to the interaction, are used to establish such intent.⁵⁸ Additionally, alleged verbal communication about suicide both prior to and during an incident can be used to show suicidal intent. For example, the Mohandie study found that 87% of his sample cases indicated prior suicidal communication, while 61% talked about suicidal ideation during the incident.⁵⁹ Even where such express suicidal intent is not present, studies assert that the majority of suicide by cop cases are “spontaneous,” wherein individuals decided to be killed only after a confrontation with police had ensued. Including such a variety of situational and behavioral propositions as indicators of suicidal intent allows for almost any victim of police use of force to be categorized as committing suicide by cop.

Researchers point to many other characteristics and histories of victims as indicators of suicidal intent. They cite clinical depression, life situations perceived as embarrassing or shameful, traumatic losses, or even a spiritual belief that suicide is wrong as signs of suicidal intent.⁶⁰ They further cite low socioeconomic backgrounds, criminal records, family members killed by police, mental health histories, and drug use as additional indicators.⁶¹ These characteristics are present in many people’s lives, especially for people living in poverty or who may be marginalized, rendering race and poverty a proxy for an after the fact diagnosis of suicidal intent. Without irony, Hutson includes the possibility of receiving gain through resultant civil litigation as an indicator of suicidal intent.⁶²

Practically and in court, existing studies on suicide by cop serve as a statistical smorgasbord that enables experts to incorporate any set of facts into a seemingly legitimate narrative of suicide by cop. Despite the aforementioned flaws, some courts have shown a willingness to entertain suicide by cop as a legitimate theory. In doing so, these courts have opened the door to evidence that often maligns the victim and distracts from the primary inquiry regarding the reasonableness of the officer’s use of force given the discreet facts of the confrontation.

III. Suicide by Cop in the Courtroom

Suicide by cop is most often asserted by law enforcement as a defense against claims of

⁵⁷ See e.g., *Boyd v. San Francisco*, Testimony of Dr. Keram Doc 427:

A: In the Hudson study, I believe it was 57% of people had a weapon in their hand that they did not drop after the police told them to drop it.

Q: We don’t have that situation in this case, would you agree...

A. No, it’s more similar to the 43% of cases where people did not have a weapon in their hand.

⁵⁸ See e.g., H. Range Hutson et al., *Suicide by Cop*, *ANNALS OF EMERGENCY MEDICINE* 32:6 (Dec. 1998); Mohandie et. Al., *Suicide by Cop Among Officer-Involved Shooting Cases*, *J. FORENSIC SCI.*, March 2009, Vol. 54, No. 2.

⁵⁹ *Id.*; H. Range Hutson et al., *Suicide by Cop*, *ANNALS OF EMERGENCY MEDICINE* 32:6 (Dec. 1998)

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Boyd v. City and County of San Francisco*, Document 468 at 69, 10/1/08.

excessive use of force in the context of Section 1983 civil rights lawsuits.⁶³ In order to prevail on a Section 1983 claim, the victim of police misconduct, or the victim's surviving family, must show that an officer, while acting in their official capacity, behaved unreasonably and used excessive force.⁶⁴ By claiming that a particular victim intended to carry out his or her own suicide by cop, officers attempt to justify the use of force and provide an alternate explanation for the circumstances that brought about the victim's harm or death. Additionally, the use of suicide by cop distracts from any police misconduct that may have led up to or created the situation that resulted in the shooting (e.g., warrantless entry, escalation of tension and violence, or failure to de-escalate).

To establish suicide by cop as a defense, cities and police departments call upon forensic experts to testify about whether a victim behaved consistent with their definition of the phenomenon. Because there is no generally recognized methodology for determining whether a particular incident was a suicide by cop, experts are permitted to use their personal theories to support their conclusions.⁶⁵ These experts often look at evidence of the victim's background about which they would not normally be permitted to testify – past medical records, criminal history, social service interactions, etc. – to offer an opinion as to whether the person was suicidal at the time of their death.⁶⁶

The admission of testimony describing a victim's past is particularly problematic because these records almost invariably contain information that officers on the scene did not know or have access to at the time of the shooting. When evaluating whether an officer's use of force was legally "reasonable," the officer's actions must be examined in the context of what he or she knew at the time of the event in question, not with what he or she knew in hindsight. However, in recent suicide by cop cases, information about the victim's past and unknown to officers at the time of the incident is admitted into evidence to support defense claims that victims wished

⁶³ 42 U.S.C. § 1983 (2012). [note here/somewhere that these cases could be brought in state court, under different, less-rigorous rules, based on ordinary negligence?]

⁶⁴ See, e.g., California Civil Jury Instruction 3001. Excessive Use of Force - Unreasonable Arrest or Other Seizure— Essential Factual Elements (42 U.S.C. § 1983), <http://www.courts.ca.gov/partners/documents/caci-2016-complete-edition.pdf>.

⁶⁵ As noted above, there is no standardized definition of suicide by cop theory. Best, Quigley and Bailey have compiled a set of nine observable risk factors for suicide by cop. David Best, Anna Quigley & Alan Bailey, Police shooting as method of self-harming: A Review of the Evidence for Suicide by Cop in England and Wales Between 1998 and 2001, 32 INT'L J. SOC. L. 349, 352 (2004). Hutson et al. present their own indicators of suicidal intent, focusing predominantly on the subject's behavior at the time of the shooting and less so on the subject's history, as Keram does). Ian McKenzie, Forcing the Police to Open Fire, 6 J. POLICE CRISIS NEGOT. 5, 10 (2006) (citing Hutson). McKenzie has established an analysis of suicidal intent, focusing on the assessment of mens rea based on a sequence of events (not merely the presence of one or two behaviors). Id. Emily Keram developed her own methodologies for categorizing precipitators of suicide by cop based on her interviews with patients and through her own case research. Keram Declaration in *Espinosa v. City & County of San Francisco*, page 7). Dr. Keram's methodology focuses on the subject's history, such as unemployment, criminal history, mental health history, substance abuse history, and history of suicide attempts. Keram Report at 13, *Espinosa v. City & County of San Francisco*, No. 4:06-cv-04686-JSW (N.D. Cal. May 2, 2008).

⁶⁶ Fed. R. Evid. 703 (2021). However, "the expert may be required to disclose those facts or data on cross-examination." Fed. R. Evid. 705 (2021).

to bring about their own deaths, rendering the force used by police reasonable and warranted.

A. The Supreme Court held in Graham that hindsight evidence is inadmissible.

In Section 1983 civil rights cases alleging police misconduct, courts must determine whether the officer's behavior could be considered "reasonable" under the circumstances of the event in question.⁶⁷ In *Graham v. Connor*, the Supreme Court held that courts must assess the reasonableness of a particular use-of-force incident from the perspective of an officer on the scene, and not with the benefit of hindsight.⁶⁸ In other words, courts can only evaluate the officer's conduct based on circumstances the officer was aware of at the time of the incident. This protection is intended to keep officers from using later-discovered evidence to justify their actions. For example, if an officer used force against an individual without knowing they were armed, the officer could not use the later-discovered weapon to justify the prior use of force.

Because of *Graham*, courts typically limit evidence to facts and circumstances known to the officer. However, when the facts immediately preceding the shooting are in dispute, some courts have admitted expert testimony on suicide by cop if it is relevant to determining whose account of events is more credible.⁶⁹ In the majority of these cases, the victim has been killed in the incident at issue. In such case, experts rely on otherwise inadmissible hindsight evidence to "diagnose" the victim's suicidal intent. This can include evidence of strained familial relationships, evidence of financial struggles, substance abuse, and any history of contact with police or mental health services.

Most individuals, at some point in their lives, struggle with strained relationships, financial woes, and mental health concerns. Many people turn to mental health services to receive help and many individuals have frequent contact with police, especially people living in low-income communities of color that are disproportionately the targets of over-policing, prosecution, and punishment. The relationship of these characteristics to suicidal intent are unclear, but their admission into evidence can be highly prejudicial to the person or family bringing the lawsuit.

B. Boyd interprets Graham to permit the introduction of hindsight evidence.

In May 2004, San Francisco Police Department officers shot and killed 29-year-old Cammerin Boyd outside his vehicle after a high-speed chase. Mr. Boyd's family sued the officers and the City of San Francisco alleging that Mr. Boyd had been attempting to surrender to the police.⁷⁰ Mr. Boyd had two prosthetic legs, and he had to lean against his car for assistance in lowering himself to the ground in the face of police with drawn weapons. The officers, however, testified that Mr. Boyd was reaching into the dashboard of his car as if to grab something, prompting

⁶⁷ The use of force against a victim is considered to be a "seizure" within the meaning of the Fourth Amendment. U.S. CONST. amend IV. *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), establishing that an officer's behavior must be "reasonable" under the "totality of the circumstances" the officer is confronted with.

⁶⁸ *Graham v. Connor* elaborates on the "totality of the circumstances" test, noting that the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 396.

⁶⁹ *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 943–44 (9th Cir. 2009).

⁷⁰ *Id.*

them to open fire and kill him.

In *Boyd v. San Francisco*, the U.S. Court of Appeals for the Ninth Circuit held that “[i]n a case such as this, where what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible.”⁷¹ In reaching this conclusion, the Ninth Circuit relied on footnote 12 in *Graham v. Connor*.⁷² The *Boyd* court said the footnote allowed “a factfinder [to] consider outside evidence in assessing the credibility of an officer’s account of the circumstances that prompted the use of force”⁷³

The text of footnote 12 in *Graham* reads:

*Of course, in assessing the credibility of an officer’s account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen.*⁷⁴

Thus, the *Boyd* court interpreted the *Graham* footnote to admit hindsight evidence to support an officers’ version of events, even though the footnote appears intended to allow hindsight evidence only to challenge the credibility of an officer’s account.

As a result of the *Boyd* court’s inverted reading of *Graham*, it admitted expert testimony of forensic psychiatrist Dr. Emily Keram to support the defense theory that Mr. Boyd intended to commit suicide by cop.⁷⁵ After performing a “psychological autopsy” on Mr. Boyd, Dr. Keram concluded that “Mr. Boyd did commit a suicide by cop on May 5th, 2004.”⁷⁶ Relying solely on hindsight evidence, Dr. Keram testified that Mr. Boyd’s actions both as a teenager and a few days prior to his killing reveal his intent to commit suicide by cop. For example, the court admitted evidence of a 1993 high-speed chase that resulted in the loss of Mr. Boyd’s legs to show that the day he was killed by police was *approximately* the eleventh anniversary of that car chase, because Dr. Keram testified that attempted suicides occur more frequently around significant anniversaries.⁷⁷ The court also admitted evidence of Mr. Boyd’s arrest in Oakland three days before he was fatally shot, because Dr. Keram testified that the arrest was a “practice run” and

⁷¹ *Id.* at 944.

⁷² The Ninth Circuit Court of Appeals also relied on *Billington v. Smith* 292 F. 3d 1177 (9th Cir. 2002), where the court allowed witness reports and the decedent’s blood alcohol level to analyze reasonableness in an excessive force case. *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002). However, the admitted evidence in *Billington* was contemporaneous to the event, and it was not Suicide by cop theory that relied on character/propensity evidence. Ultimately, the court in *Boyd* held that “all of the challenged evidence was properly admitted, since it had a tendency to make a fact of consequence more or less probable.” *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, ___ (9th Cir. 2009).

⁷³ *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009) (quotations omitted).

⁷⁴ *Graham v. Connor*, 490 U.S. 386, 399 n. 12, 109 S. Ct. 1865 (U.S. 1989).

⁷⁵ Under the federal rules of evidence, expert testimony is admissible at trial if it is based on reliable principles and methods that are applicable to the facts of the case. *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 597 (1993). The *Boyd* court held that “the suicide-by-cop theory” was “generally accepted in the relevant professional community” and therefore reliable. *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 945 (9th Cir. 2009).

⁷⁶ *Boyd v. San Francisco*, Testimony of Dr. Keram, Case 3:04-cv-05459-MMC Doc. 427 Filed 08/19/08, at 4428.

⁷⁷ *Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 948 (9th Cir. 2009).

such rehearsals are a “telltale sign” of suicide by cop cases.⁷⁸

C. Suicide by cop is plausible only if we assume the officer’s version of events is true.

Although the *Boyd* court admitted Dr. Keram’s testimony purportedly to help resolve the disputed facts about the officer’s version of events, her testimony did just the opposite. In order to demonstrate that Mr. Boyd showed intent to commit suicide, Dr. Keram accepted the officer’s version of events to be true. She assumed in rendering her opinion that Mr. Boyd did in fact reach inside his vehicle for a weapon. Dr. Keram’s opinion that Mr. Boyd was engaging in suicide by cop significantly relied on him having provoked the officer by reaching into his car, but that “fact” in the officer’s account was itself disputed. That is, her testimony was plausible only if the officer’s version of events was true and not disputed.

Dr. Keram also declined to consider alternate explanations of Mr. Boyd’s behavior and other contradictory evidence in her testimony.⁷⁹ For example, when presented with evidence that Mr. Boyd was trying to surrender to police – he attempted to demonstrate that he was not carrying a weapon by gesturing to his waistband and taking off his shirt – Dr. Keram testified that Mr. Boyd was engaging in performative conduct so that his family could prevail in a subsequent civil rights lawsuit against the police.⁸⁰ When asked about evidence that Mr. Boyd raised his hands in the air and stated, “Please don’t kill me, I don’t want to die,” Dr. Keram testified that the statements did not demonstrate lack of suicidal intent.⁸¹ On the contrary, she said, it is “very common for people to be ambivalent during the final moments of the suicide-by-police event” and “people who are committing suicide by police may at first appear to surrender.”⁸²

Dr. Keram also testified that Mr. Boyd was experiencing post-intoxication depression and “intensely suicidal thoughts” when he was shot by police.⁸³ However, she later admitted under cross examination that she had no idea when Mr. Boyd had taken drugs and had no scientific or medical basis for saying that he was experiencing post-intoxication depression.⁸⁴ In Mr. Boyd’s medical records, there was no indication that he was suicidal, had suicidal ideation, or had ever attempted suicide.⁸⁵

Ultimately, Dr. Keram’s testimony did not help resolve disputed facts. She testified on the assumption that the officer’s disputed account was correct, and she incorporated other seemingly contradictory evidence to buttress her testimony about suicide by cop. As a result of

⁷⁸ *Id.*

⁷⁹ *Boyd v. San Francisco, Testimony of Dr. Keram, Case 3:04-cv-05459-MMC Doc. 427 Filed 08/19/08, at 4461.* When asked if she considered alternative explanations, Dr. Keram states that she considered whether Mr. Boyd, “because he had ingested the substances that were found in his system that he—that his mental state was such that he was really not able to think clearly enough to have formed an intent to engage in behavior that would bring him to his goal [suicide by cop]. She dismissed this possibility based on his “methodical and goal-oriented behavior.”

⁸⁰ *Boyd v. San Francisco, Testimony of Dr. Keram, Case 3:04-cv-05459-MMC Doc. 427 Filed 08/19/08, at 4456-4457.* However, under cross examination, Dr. Keram did not seem aware that Mr. Boyd had a pending personal injury lawsuit against the Oakland Police Department from which he would not be able to recover if he died. *Id.* at 4476.

⁸¹ *Id.* at 4500-4501.

⁸² *Id.* at 4456-4457.

⁸³ *Id.* at 4440.

⁸⁴ *Id.* at 4487.

⁸⁵ *Id.* at 4471.

the admission of hindsight evidence and Dr. Keram's testimony, and without any expert testimony to the contrary, the jury in Cammerin Boyd's case reached a unanimous verdict that police officers had not used unreasonable force in killing him as he attempted to surrender.

IV. Suicide by Cop in Boyd's Shadow

I went into that attic myself, just as he had that night, and climbed to the area where he was last alive. I saw my brother's blood covering the floor and walls. There were holes from bullets everywhere, in the rafters and the walls. From where he would be positioned, it looked like bullets sprayed up from the bathroom below through the ceiling into the attic. A big hole was in the attic floor over the bedroom, where they must have pulled him down.

I couldn't help but cry while I was in that place, trying to put myself in his place to find out what happened. Then the chief herself changed the report twice and said the facts were not clear, they were just preliminary reports, and he was holding a cylindrical object in his hands that the officers thought was a gun. Then the report was changed again, stating he held an eyeglass case. After 14 hours of their crime scene team investigation there with my brother's body, they found no weapon. The chief portrayed my brother like he wanted to get shot and the officers reacted appropriately.

-Kahlil Sullivan, "In that attic..."⁸⁶

After *Boyd*, courts in the Ninth Circuit have increasingly admitted expert testimony about suicide by cop, and law enforcement agencies are increasingly using the theory to defend themselves against civil rights lawsuits. Any dispute about the true version of events during or immediately prior to violent police encounters opens the door for law enforcement to introduce a wide array of otherwise inadmissible evidence to characterize victims as criminal and suicidal. These characterizations of victims can be outcome determinative in cases, even if the suicide by cop testimony does not ultimately resolve the disputed facts.⁸⁷

Although the Federal Rules of Evidence broadly call for the exclusion of prejudicial evidence that could bias a jury, and *Graham* broadly prohibits the use of hindsight evidence, forensic experts testifying about the victim's suicidality present to the jury highly damaging hindsight evidence on the deceased's medical, social, and economic background.⁸⁸ This wide-ranging inquiry often calls attention to evidence that is more prejudicial (likely to unfairly bias the jury) than probative (likely to help prove something).⁸⁹

⁸⁶ <http://sfbayview.com/2009/06/in-that-attic-i-saw-my-brother's-blood-covering-the-floor-and-walls/>.

⁸⁷ [An initial review of other circuits suggests that CA9 is perhaps an outlier in admitting such evidence in Section 1983 cases – more to explore here.]

⁸⁸ Fed. R. Evid. 403 (2015).

⁸⁹ *Rascon v. Hardiman*, 803 F.2d 269, 278 (7th Cir. 1986) ("The magistrate indicated that she refused to admit the history "because to classify Rascon as a 'mental case' would suggest that it would be reasonable to subdue him based on a supposed status rather than his conduct at the time." [...] We cannot disagree with this assessment. Fed. R. Evid. 403 dictates that relevant evidence be excluded if its probative value is substantially outweighed by its prejudicial effect. Relevant evidence may be excluded under this rule in order to ensure against the "likelihood that the evidence will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented...." [...] Further, this court has recognized that the "trial court's balancing of probative

Our preliminary research suggests that victims and their families do not prevail in Section 1983 excessive force cases when suicide by cop evidence is admitted.⁹⁰ Plaintiffs prevail more often when this hindsight evidence is excluded or limited in some way.⁹¹ Expert testimony on suicide by cop in officer-involved shootings effectively chills Section 1983 civil rights litigation either by keeping civil rights cases out of court or by providing police with a successful defense.⁹²

The implications of the holding in *Boyd* have become clearer in subsequent cases such as *Asa Sullivan's*. After eight years of legal wrangling with the City's lawyers, the family finally got its day in court. Relying on the decision in *Boyd*, the court in *Asa's* case admitted Dr. Keram's testimony, which concluded that his encounter with the police was an example of spontaneous suicide by cop. According to Dr. Keram, *Asa* decided he wanted to be shot by police rather than go to jail on a bench warrant for his arrest for a possession of marijuana charge.⁹³ And like in *Boyd*, relying

value and unfair prejudice is highly discretionary and its decision on admissibility will be accorded 'great deference.');

Wallace v. Mulholland, 957 F.2d 333, 336 (7th Cir. 1992) ("The lesson of *Rascon* is the danger that a jury will conclude that a mentally deficient plaintiff, regardless of his actual behavior, somehow "asked for" mistreatment at the hands of two policemen is greater than the value of such evidence to explain the police officers' use of force. That general proposition seems especially correct where—as here—the police officers had no specific knowledge of Michael's condition before they tried to take him away."); *Palmquist v. Selvik*, 111 F.3d 1332, 1340 (7th Cir. 1997) ("As we ruled in *Wallace* and *Rascon*, evidence relating to the plaintiff's mental and emotional state and past actions is not admissible in judging the use of excessive force."); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) ("Knowledge of facts and circumstances gained after the fact (that the suspect was unarmed) has no place in the trial court's or jury's proper post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise, as the trial court ruled in this instance, the jury would possess more information than the officer possessed when he made the crucial decision. Thus, we are convinced that the objective reasonableness standard [...] be determined exclusively upon an examination and weighing of the information Officer Berry possessed immediately prior to and at the very moment he fired the fatal shot. The reception of evidence or any information beyond that which Officer Berry had and reasonably believed at the time he fired his revolver is improper, irrelevant, and prejudicial to the determination of whether Officer Berry acted reasonably "under the circumstances.").

⁹⁰ *Espinosa v. San Francisco* (2010) (admitted hindsight evidence, including mental health records, criminal records, family history, employment/financial records; city prevailed); *Flanary v. City of Kelso* (2005) (admitted hindsight evidence, including speculation about drug use, mental health history; city prevailed); *Pickard v. Holton* (2015) (admitted hindsight evidence, including criminal history, history of drug use, mental health history, prior suicide attempts; city prevailed).

⁹¹ *Reed v. City of Modesto* (2015) (Suicide by cop expert testimony excluded, victim prevailed); *Samanda Dorger v. City of Napa* (2015) (Suicide by cop expert testimony excluded, victim prevailed); *Dennis Mueller v. Daniel Cruz* (2017) (Suicide by cop expert testimony was admitted but in a very limited manner; the judge excluded some of the evidence upon which the suicide by cop theory typically relies, including mental health diagnosis, school discipline records, drug use history, toxicology screen results; ended in settlement).

⁹² [One family we interviewed told us that knowing that the theory could be used discouraged them from bringing a suit. But see, *Rahi Azizi*, *When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects*, 41 *GOLDEN GATE U. L. REV.* 201 (2011) (providing examples of how evidence of suicide by cop could be beneficial for plaintiffs in Section 1983 cases because it can garner sympathy for victims).]

⁹³ "At the time that he came to law enforcement attention, Mr. Sullivan had an outstanding SWAP warrant as a result of his failure to report to the court ordered work program." Keram Report at 14. "On 5/27/05 Mr. Sullivan plead guilty to one felony count of 11359 of the H&S Code, possession of marijuana. He was placed on probation. He violated probation, served additional jail time, and agreed to serve six months in county jail through the Sheriff's work alternative program (SWAP) or other programs supervised by the Sheriff's Department. His probation was

heavily on Dr. Keram's testimony and related evidence, the City persuaded a jury that the police acted reasonably in the face of Asa's purported desire to die that day.⁹⁴

In offering her expert opinion in Asa's case, Dr. Keram relied predominantly on hindsight evidence,⁹⁵ including medical and psychiatric evaluations of Asa from his childhood and during stays in a residential facility, juvenile hall, and the county jail.⁹⁶ She concluded that these records showed a proclivity for irrational behavior. As in *Boyd*, Dr. Keram testified that Asa wanted the police to kill him in spite of medical records showing no risk of suicide.⁹⁷ Dr. Keram also testified that Asa's "demographic factors" (employment records, police records, mental health records) showed he was at high risk of spontaneous suicide by cop.⁹⁸

Dr. Keram's conclusions were grounded solely in hindsight evidence about Asa's family, community, and personal history, which she described in a written report prepared for the court. She included evidence that Asa was in foster care when he was a toddler while his mother stayed in women's shelters, as well as evidence they were evicted when he was growing up.⁹⁹ She noted recorded phone records with social workers and depositions prepared for trial to opine that Asa had issues with his family or other loved ones, describing Asa's relationship with his mother as "chaotic" and suggesting that he did not have any meaningful support and reason to live.¹⁰⁰

Dr. Keram also described Asa as "chronically unemployed" and a father who could not "meaningfully" contribute financially to his son, ignoring evidence that he was working three jobs at the time of his death. She also appears to downplay Asa's strengths in her report, making cursory note of his IQ score of 122 (in the superior range), and providing very little information about his efforts to seek better employment and support his son.¹⁰¹ Overall, Dr. Keram characterized Asa as someone who was continually let down by family members,¹⁰² selfish, unable to read emotions properly, and prone to poor judgment, suggestive to Dr. Keram of his desire to die at the hands of police.¹⁰³

Dr. Keram used selective anecdotes from Asa's history of police contacts to demonstrate his

extended to 6/9/08. He failed to report to the SWAP program and a warrant could have been issued for him. His additional sentence would have been done in jail at that point." Keram Report at 9.

⁹⁴ Espinosa, Individually And As Personal Representative Of Sullivan, Estate Of V. City And County Of San Francisco; Police Chief Fong; Officer Keesor; Officer Alvis; Officer Morgado, JVR No. 1503120044, Jury Verdict and Settlements.

⁹⁵ Excerpts of Proceedings – Testimony of Emily Keram, M.D. at 147-48, *Espinosa v. City & County of San Francisco*, No. 4:06-cv-04686-JSW (N.D. Cal. Oct. 24, 2014). Emily Keram further admits that an individual could have many suicide by cop risk factors/indicators and not actually develop an intent to commit suicide by cop. She also admits that suicide by cop can be used to cover up cop killings. *Id.* at 107, 194.; Keram Report at p. 3.

⁹⁶ Keram at 4-6.

⁹⁷ Testimony 74-76.

⁹⁸ *Espinosa v. San Francisco*, No. C 06-04686 JSW, Report of Dr. Emily Keram, at 14, 19.

⁹⁹ Report at 2, 4.

¹⁰⁰ *Id.* at 5, 17.

¹⁰¹ See generally Keram Report in *Espinosa v. City & County of San Francisco*, No. 4:06-cv-04686-JSW (N.D. Cal. May 2, 2008). Report at 4.

¹⁰² Testimony p. 62.

¹⁰³ Testimony p. 64.

contempt for law enforcement and therefore a likelihood of irrational or illegal behavior on the day in question.¹⁰⁴ For example, in her report, Dr. Keram highlights Asa’s arrest for carrying a bread knife while at school.¹⁰⁵ In recounting this incident, Dr. Keram failed to note that Asa had started carrying the bread knife after he was the victim of an attempted stabbing at school in the months before his arrest.¹⁰⁶

Like in the *Boyd* case, Dr. Keram interpreted events to support her theory of suicide by cop. For example, in the moments before he was killed, Asa was reported to have been taking deep, steadying breaths. Dr. Keram attributed this behavior to “pumping up,” which refers to a change in the pattern of breathing that could indicate that an individual was changing from thinking about suicide by cop to acting on suicide by cop.¹⁰⁷ Dr. Keram failed to note that Asa suffered from Wolf-Parkinson-White Syndrome, which is characterized by episodes of fast heartbeats, dizziness, and difficulty breathing.¹⁰⁸

Dr. Keram was accurate in at least one respect: without further medical definition or explanation, she concluded at trial that Asa was at “high risk of premature death.”¹⁰⁹ And as noted above, the jury in the case returned with a verdict in favor of the police officers and the City, finding unanimously that their actions were reasonable because Asa Sullivan wanted to die at the hands of the police.¹¹⁰

V. Recommendations [very preliminary, looking for lots of help here!]

Researchers: First, outside experts should conduct a thorough review of the existing literature and undertake independent research about suicide by cop, which should be published in credible, peer-reviewed journals. Professionals with a vested interest in the findings (e.g., law enforcement, paid experts who testify for plaintiffs or defendants, the plaintiff’s bar) can be consulted to help define research questions and interpret preliminary findings, but they should not be included in funding or conducting the research or in making published findings.

Until there is more independent and credible data about suicide by cop:

Law enforcement should place a moratorium on training officers about suicide by cop as a phenomenon and insurance policy against liability, focusing instead on improving de-escalation training and methods for working with people with behavioral health and other disabilities.¹¹¹

Courts should not allow expert testimony about suicide by cop or related evidence otherwise inadmissible under *Graham*.

¹⁰⁴ Keram Report at 9, *Espinosa v. City & County of San Francisco*, No. 4:06-cv-04686-JSW (N.D. Cal. May 2, 2008).

¹⁰⁵ Report at 5.

¹⁰⁶ Keram Report at 1-2, *Espinosa v. City & County of San Francisco*, No. 4:06-cv-04686-JSW (N.D. Cal. May 2, 2008). [was any of this addressed in cross and/or through expert testimony offered by the plaintiff’s lawyer?]

¹⁰⁷ *Espinosa v. City & County of San Francisco*, Keram Testimony at 96.

¹⁰⁸ *Espinosa v. San Francisco*, No. C 06-04686 JSW, Report of Dr. Emily Keram, at 11.

¹⁰⁹ Keram Report at 19, *Espinosa v. City & County of San Francisco*, Testimony at 38.

¹¹⁰ *Espinosa v. City and County of San Francisco*, 598 F.3d 528 (9th Cir. 2010).

¹¹¹ See, e.g., Guidance for Emergency Responses to People with Behavioral Health or Other Disabilities, DOJ and HHS (2023).

Professional associations in forensics and related fields (e.g., psychiatry, psychology, criminology) should formally call on their members to refrain from collaborating with law enforcement in excessive use of force cases alleging suicide by cop.

Finally, because prospective reform is insufficient to undo the harm of this pernicious practice, prosecutors should reopen cases involving suicide by cop where excessive use of force may have been used to determine whether criminal charges are appropriate.¹¹²

Conclusion [TBD]

* * *

We will never know what really happened that night my brother was murdered, although there still stands a need for accountability and the truth.

-Kahlil Sullivan, "In that attic..."¹¹³

¹¹² Steve Eder & David D. Kirkpatrick, The Police Killings Were Years Ago. New Prosecutors Are Reopening Cases, The New York Times (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/us/prosecutors-investigating-police-killings.html?referringSource=articleShare>.

¹¹³ <http://sfbayview.com/2009/06/in-that-attic-i-saw-my-brother's-blood-covering-the-floor-and-walls/>.