

# Course and Scope of Employment

*The potential effect of the Montana Supreme Court's Decision  
on L.B. v. USA*

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# Course and Scope Defense Under Attack

## Ninth Circuit asks state whether federal government can be held liable for sexual assault

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The James Browning U.S. Court of Appeals Building in San Francisco. Photo By Wikimedia Commons

In Montana, if a citizen is sexually assaulted by a state, county or municipal law enforcement officer, the victim can sue the agency for which the officer works. But in Montana, it's unclear whether that same principle applies to a federal law enforcement agent because the officer is a federal employee.

# *LB v. United States of America*

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- Awful Facts
- Procedural Posture
- In summary, LB argues:
  - *Maguire v. State* (Seminal Sexual Assault Case) has been implicitly overruled by *Paull v. Park County*
  - Physical encounters with police are expected and a power imbalance exists between LEOs and citizens
    - Should adopt position of the minority of jurisdictions
  - A disparity of remedies exists between citizens assaulted by federal officers v. non-federal officers

“Under Montana law, do law enforcement officers act within the course and scope of employment when they use their authority as on-duty officers to sexually assault members of the public?”

*L.B. v. United States*, No. 20-35514 (9th Cir. 2021)



# Respondeat Superior v. Direct Liability

## RESPONDEAT SUPERIOR

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- “let the superior make answer” Black’s Law Dictionary (9<sup>th</sup> ed. 2009)
- Also known as vicarious liability or indirect liability

## DIRECT LIABILITY

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- Liability for one’s own wrongs
- Examples include:  
Negligent, hiring, training supervision

# Respondeat Superior generally

- ◉ Premised on the notion that when the servant acts, it is as if the master were acting.
- ◉ The servant or agent must have been acting in the "course of his employment," in "furtherance of his employer's interest," or "for the benefit of his master," "in the scope of his employment," etc.
- ◉ But a servant who acts entirely for his own benefit is generally held to be outside the scope of his employment and the master is relieved of liability.

*See Kornec v. Mike Horse Mining, 180 P.2d 252, 256 (Mont. 1947).*

# What conduct is generally within an officer's course and scope of employment?

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- Generally speaking, acts done for the employers' interest and benefit.
- Factors to be considered include:
  - Is the conduct commonly done by such employees?
  - Time, place and purpose of the conduct.
  - Employer reasonably expects the conduct will be done.
  - The extent of the departure from the normal method of accomplishing an authorized result.



# Course and scope law in Montana has been well established for a long time

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- *Ellinghouse v. Ajax Live Stock Co.*, 152 P. 481, 485 (1915):
  - “A servant may abandon his master’s employment for the time to accomplish some purpose of his own. If in accomplishing this purpose he does an injury to another, his master is not liable; but a mere deviation from the master’s directions with reference to the business in which he is employed is not an abandonment of his employment, and so long **as he is doing some act in furtherance thereof he will be regarded as acting within its scope**, and the master will not be excused on the ground that he did not authorize the particular act, or that he had no knowledge of it, or that in doing it the servant exceeded his authority, or, again, that he did it at a place to which his duty did not call him.
- *Accord Staff v. Montana Petroleum Co.*, 88 Mont. 145, 291 P. 1042, 1045 (1930) (quoting the passage above as the “well settled” Montana law).

# Early course and scope cases explain analysis

- *Kornec v. Mike Horse Mining* (1947)
  - Employee assaulted Kornec
  - Contentious relationship between Kornec and the mine
  - “When a servant in carrying out his duties makes an assault . . . as a result of a quarrel which arose as a consequence of his performance of the tasks imposed and at the time and place of performance of the duties he was employed to do,” the employer is liable.
- *Keller v. Safeway Stores* (1940)
  - Safeway was liable for manager’s slanderous statement that customer paid with a bad check.
  - Was considered to be acting on Safeway’s behalf in attempting to get Safeway paid back for the bad check.

**The Montana Supreme Court's  
most recent course and scope  
opinion outlines the Court's  
current view on course and scope  
analysis.**

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*See Brendan v. City of Billings, 2020 MT 72*

# *Brendan*

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- The Supreme Court discussed the considerations and limitations of respondeat superior doctrine.

*“[T]he elemental limitations of [respondeat superior] protect employers from becoming insurers against all harm suffered by third parties with whom their employees may interact.” 2020 MT 72, ¶17.*

# Facts of *Brendan*

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- ◉ Supervisor provides initial positive official reference for employee
- ◉ Employee leaves to go work for MRL
- ◉ Later, supervisor calls MRL hotline with anonymous tip reporting the former employee had stolen from the City, had a violent encounter and was an “HR nightmare”



## The Montana Supreme Court's Test for Course and Scope under *Brendan*

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- MRL fired employee who then sued the City and alleged it was vicariously liable for the supervisor's actions
- The test focuses on the employee's purpose for engaging in the tortious actions. *Brendan*, ¶14

# Was the act authorized and why did the employee act?

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- The Court explained, “a tortious act occurred within the scope of employment if the act was either expressly or implicitly authorized by the employer or was incidental to an expressly authorized act.” *Brendan*, ¶14.
- Was “the employee was at least partially motivated to serve the employer’s interest ‘to some extent.’” *Id.*, at ¶18; *Restatement (Second) of Agency* § 235 cmt. a (“It is the state of the servant’s mind which is material. Its external manifestations are important only as evidence.”).

# Fact issues precluded summary judgment in *Brenden*

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- Reversed Summary Judgment granted to the City finding:
  - A jury could find that the supervisor was implicitly authorized to make such statements; and
  - The supervisor's purpose in doing so could have been at least partially motivated to correct a prior positive reference.

# The Legislature's current view of course and scope in Montana

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## ◉ Mont. Code Ann. § 2-9-102:

- Governmental entities liable for torts except as specifically provided by the legislature.
- Every entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function



# *No duty to defend or indemnify for intentional or criminal acts*

- Mont. Code Ann. § 2-9-305(6)(b)
  - Government employees may not be defended or indemnified if:
- The claim is based on oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment or
- The conduct constitutes a criminal offense as defined in Title 45, chapters 4 through 7 .



# Sexual Assault

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- Prime example of a criminal act done outside the course and scope of employment



# *Maguire v. State of Montana (1992)*

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- **Seminal Sexual Assault Course and Scope Decision in Montana**
  - Mental health caretaker responsible for dressing and bathing a woman with a mental disability raped and impregnated her.
  - Facts can be likened to those of an officer. Disabled patient was held or “in custody” of the hospital. Caretaker only had access to this patient by virtue of his employment situation.
  - The Court specifically considered whether rape was outside the course and scope of employment.
  - Held: “It is clear this rape was outside the scope of Lloyd Drummond’s employment.”

# The *Maguire* Court explicitly rejected:

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- Application of § 214 (non-delegable duty exception) to the act of rape by employee.
  - “[W]e have limited application of the non-delegable duty exception to the *respondeat superior* doctrine to instances of safety where the subject matter is inherently dangerous.”
  - Declined to extend exception “when an intentional tort is committed only because of or by virtue of the employment situation.”

# That's the Legislature's Job

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- “[S]uch a major change to the respondeat superior doctrine is best left to the legislature.” *Maguire*, 835 P.2d at 185.



# Successful use of *Maguire* in defense of Cities and Counties

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- *S.H.* and *T.F.*



# Background of S.H. and T.F. Cases

S.H. and T.F. brought separate cases against the City of Helena, one of its former officers and Lewis and Clark County.

Both alleged they were forced to have sex with an MRDTF Officer while working as confidential informants (C.I.s) for the MRDTF.

S.H.: addicted to meth and had a very hard life, including previous sexual assaults, watching her father commit suicide when she was a child, etc.

T.F.: sexually abused as a child, struggled with drugs and committed suicide over the course of the civil case after her child was removed from her custody.



# Co-Defendant Matt Thompson



- In 2007, described his wife as his “best friend”
- Was an involved member of his church and community, teaching Senior High Bible Study, serving on two missions trips and coaching his daughters’ softball teams.
- He reported enjoying his (previous) job as a School Resource Officer, because he enjoyed “building relationships” with students and providing them with “a strong law enforcement and adult commitment.”

# MRDTF

- To further his career, Thompson applied and was selected for the MRDTF
- Multi-agency Drug Task Force which collaborates in working toward the goal of detecting, apprehending and prosecuting illegal drug crimes
- Necessary part of law enforcement
- Often work irregular hours, without “direct” supervision



# Rural Task Force of the Year

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- During Thompson's tenure, the Task Force was successful.
- It appeared to everyone that Thompson – and the Task Force – was doing a good job.
- In fact, the MRDTF was the most successful drug task force in Montana during Thompson's tenure.



# Inappropriateness Reported

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- In 2012, a report was made that Thompson was having an inappropriate relationship with a C.I. -- this was NOT S.H. or T.F.



- The City immediately placed Thompson on leave and opened an investigation

## Thompson (eventually) admitted to:

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- Having sex with 4 C.I.'s.
  - This included Plaintiff S.H., but did not include Plaintiff T.F.
- He stated the sex was consensual and NOT the result of force, coercion or intimidation.



Thompson resigned in lieu of termination.

He resigned only 5 days after the investigation began.

Despite the resignation, the investigation continued . . .



- Plaintiff S.H. was interviewed as a part of the ongoing investigation.
- She admits to having sex with Thompson, but claims it was consensual and that it had nothing to do with her cases.

## INVESTIGATION COMPLETED

- The Police Chief forwarded the investigation to the County Attorney's Office for potential criminal charges.
  - Investigation determined ALL sex occurred between consenting adults
- Montana DCI also reviewed investigation
  - DCI determined it was a "thorough and complete investigation" and that there were "no aspects of this case that were not meticulously investigated."



# Reporting Thompson to POST

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- ◉ The City notified POST of resignation right away
- ◉ Spoke with them before making a formal complaint regarding his behavior
- ◉ The City, County and POST had concerns about protecting the identities of C.I.s
  - POST “flagged” Thompson’s file, but didn’t pull his certificate since that would have triggered Thompson’s ability to have a public hearing where potential C.I. identities could have been disclosed.

# Four Years Later . . .

## Litigation ensues

- S.H. sued the City, Thompson and the County
- Claimed the sex was non-consensual
- Claimed local authorities were aware of ongoing sexual abuse

### Former Helena cop accused of sexually assaulting confidential informant

ANGELA BRANDT Independent Record Jun 8, 2016 1

99¢ YOUR FIRST MONTH!



Former Helena police officer Matt Thompson is seen in a file photo from 2007. Thompson is named in lawsuits alleging sexual abuse.



f t e p b

A former Helena detective is accused of repeatedly sexually assaulting a confidential informant for a drug task force in a lawsuit. The suit names the City of Helena, Lewis and Clark County and Matt Thompson, who left the force in 2012, the same year of the alleged abuse.

Thompson forced the woman to engage in sex acts while on duty, according to the suit. He also is accused of physically attacking the victim and threatening her with criminal charges. The suit says Thompson told the woman her children would be taken away if she did not comply with his advances.

Attorneys for the victim claim Thompson admitted to having sexual relations with multiple confidential informants, including the woman suing him. They also say local authorities were aware of the ongoing abuse of informants.

# A few months later . . .

- T.F. also filed suit
- Claimed Thompson groomed her in High School while he was an SRO.

## Second suit accuses former Helena officer of sex assault



TOM KUGLIN Independent Record Oct 21, 2016 3

99¢ YOUR FIRST MONTH!



Former Helena police officer Matt Thompson is seen in a file photo from 2007. Thompson is named in lawsuits alleging sexual abuse.



A former Helena detective has been accused of sexually assaulting a second confidential informant in a new civil lawsuit filed this week. Both suits name the city of Helena, Lewis and Clark County and Matt Thompson, who left the force in 2012, as defendants.

The latest suit filed Oct. 18 alleges that when Thompson was a school resource officer at Capital High School, he interacted with the alleged victim, identified as T.F. After going to work for the Missouri River Drug Task Force, the suit goes on to say that Thompson recruited T.F. as a confidential informant.

The suit alleges the victim was provided alcohol by Thompson while she was underage, and he sexually assaulted her on two occasions, all while she worked as an informant.

[MORE INFORMATION](#)

# S.H.'s and T.F.'s claims

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## ◉ Direct Liability against the City

- Alleged the City negligently hired, trained and supervised Thompson

## ◉ Vicarious Liability against the City

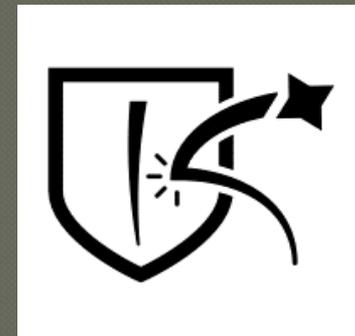
- Alleged the City was vicariously responsible for Thompson's actions



# Defense and Indemnity

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- The City (and the MMIA) did not defend Thompson.
- Montana law requires a City to defend and indemnify an employee who is sued civilly for actions taken within the course and scope of employment. MCA § 2-9-305(2); *see also* § 2-9-305(4).
- However, Thompsons' ADMITTED acts of consensual sex were outside the course and scope of employment—let alone the alleged act of rape. *See id.* § 2-9-305(6) (employee may not be defended for crimes or acts outside the course and scope of employment).
  - Rape and even consensual sex are NOT part of an officers' job duties.



# To Defend or Not Defend . . .

- Employees need not be defended or indemnified by the employer if a judicial determination is made that:
  - 1) “the conduct upon which the claim is based . . . does not arise out of the course and scope of the employee's employment;” or
  - 2) “the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7.” MCA § 2-9-305(6)(a), (b).
- When a judicial determination has not been made (as in our cases), “the governmental entity employer may determine whether those exclusions apply.” *Id.* § 2-9-305(7).
- If whether the exclusions of subsection (6) apply is **disputed** and **the governmental entity employer concludes that it should clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or other legal action**, the employer is obligated to provide a defense or assume the cost of the defense of the employee until a final judgment is rendered in that action holding that the employer did not have an obligation to defend the employee. The governmental entity employer does not have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection.



## *Compare with Koon v. City of Fort Benton*

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- ◉ Alleged acts outside the course and scope. However, the officer there DENIED the allegations.
- ◉ The City via the MMIA defended that officer, but did not indemnify him.

# Summary Judgment Granted in SH and TF

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## ◉ Judge Menahan found:

- Claims were Barred by the Statute of Limitations and the Direct Liability Claims Failed.
  - “S.H. has offered no evidence that City or County officials knew Thompson would use his position of authority to force her to engage in sexual activity.”
- Defendants Cannot be Vicariously Liable for Thompson’s Conduct.
  - MCA § 2-9-305(6)(b), Employers cannot indemnify for criminal offenses.
  - Only liable for acts taken in the course and scope of employment. Plaintiffs and their expert repeatedly alleged Thompson committed a crime.





# Liability Considerations

## Defenses

- Vicarious Liability Claims
  - Sexual assault is OUTSIDE the Course and Scope of the job of a police officer. *Maguire v. State*, 835 P.2d 755 (Mont. 1992).
  - Employers are not liable for CRIMES committed by employees. MCA § 2-9-102; *see also* MCA § 2-9-305(b)(6) (defense and indemnity)
- Direct Liability Claims
  - Public Duty Doctrine
  - Nothing indicated to anyone that Thompson had a propensity to commit sexual assault.

# *How were SH and TF different from Koon?*

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Plaintiff's counsel (same as in LB) made similar arguments to those being considered in LB which included . . .

# Typical Legal Arguments in Response to *Maguire* . . .

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- ◉ Adopt the California Absolute Exception, which allows claims against municipalities when the officer had an opportunity to sexually assault someone simply by virtue of their employment. *See Mary M. v. City of Los Angeles*, 54 Cal. 3d 202 (Cal. 1991)
- ◉ Attempts to utilize Montana’s “Common Carrier”/ Non-Delegable Duty Exception/*Restatement (Second) of Agency* § 214.
- ◉ The *Maguire* Court declined to create an exception when the tort “is committed only because of or by virtue of the employment situation.” 835 P.2d at 759.
- ◉ This was argued and considered in *Maguire*, but the Court held “such a major change to the *respondeat superior* doctrine is best left to the legislature.” 835 P.2d at 759.

# Other differences with respect to case resolution

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- Koon was filed in the Great Falls Federal District Court
- Pending before the Hon. Judge Brian Morris
  - Oral argument on the Town's summary judgment motion provided impression that there was a possibility of the Court finding fact issues

# *Maguire* Implicitly Overruled?



"Ever have one of those days when you feel like just letting all the lower court ruling stand?"

## *Paull v. Park County, 2009 MT 321*

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- A probationer was injured while in transit from Florida to Montana, after the employee of a private transport company hired by Park County caused the vehicle to roll over.
- The transportation company had no insurance and dissolved after the accident.



# *Paul* cont'd.

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- The Montana Supreme Court applied the non-delegable duty exception to find the State liable because:
  1. Transporting prisoners is “inherently dangerous;”
  2. The State had a continuing protective relationship with the probationer under the Interstate Compact for Adult Offender Supervision. Mont. Code Ann. § 46-23-1115 (State was “responsible for the supervision of offenders who are authorized pursuant to this compact to travel across state lines to and from the compacting states.” ); and
  3. The State had hired an independent contractor to fulfill its mandatory duty

# *Smith v. Ripley*

446 F. Supp. 3d 683, (D. Mont. 2020)



- Federal Case
- Ripley was a state employed CPS worker
- Ripley controlled Smith's contact with her children whom the State had custody of.
- Ripley raped Smith while her in home collecting work related to her case

# *Smith* cont'd:

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- In deciding Smith's vicarious liability arguments against the State, the Federal Court followed *Maguire* stating:
  - "Rape is outside the scope of employment, even if it occurs in the workplace and under conditions conducive of predatory conduct." *Smith*, 446 F. Supp. 3d 683, 687, 691-92.
- But the Federal Court misinterpreted *Paull* finding a non-delegable duty of protection existed via statute:
  - "The Child Abuse and Neglect Chapter, along with the specific statute here, clearly recognizes the State's responsibility for the children and families that it sweeps into its jurisdiction through abuse and neglect proceedings." *Id.* at 691. (citing Mont. Code Ann. §§ 41-3-423, 41-3-101.)

# Contrary to LB's arguments otherwise, *Paull* did not overrule *Maguire*

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- The *Paull* Court (1992) did not analyze *Maguire*, where it had expressly stated it would not expand the limited scope of the non-delegable duty exception, and that such a change should come from the Legislature.
- The Court's most recent decision on respondeat superior, *Brenden* (2020), reiterates that *Maguire* “declin[ed] to extend the non-delegable duty doctrine” to impose vicarious liability.

# The Alleged “Dichotomy”

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- ① The *Paull* case and the subsequent reliance on it has prompted confusion.
- ② However, *Paull* should be limited to its specific facts.
- ③ No specific law enforcement case has been decided against non-federal law enforcement officers thereby supporting Plaintiff’s alleged dichotomy argument.

# Amici's Arguments in LB

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Aside from the legal arguments we have already discussed

Rape is never a part of a law enforcement officer's duties

- It serves no law enforcement purpose
- LB wrongfully argued this was just like Use of Force

Victims have a remedy

- Perpetrators subject to criminal prosecution
- Perpetrators subject to civil liability
- Direct liability claims can still be brought
  - Under § 1983
  - Under common law
    - Subject to appropriate defenses

# Oral Argument



# Helpful language from Justice Baker's Dissent in *Brenden*

- [A]n employee's tortious conduct is outside the scope of employment when the employee is engaged in an independent course of conduct not intended to further any purpose of the employer. An independent course of conduct represents a departure from, not an escalation of, conduct involved in performing assigned work or other conduct that an employer permits or controls. **When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer.** The employee's intention severs the basis for treating the employee's act as that of the employer in the employee's interaction with the third party.

Restatement (Third) of Agency § 7.07(2) cmt. B

- Justice Baker's dissent was joined by Justices McGrath and McKinnon

# Major policy changes should left to the Legislature

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- Answering the certified question in the affirmative would be a major sea change in respondeat liability law.
- Legislature is in the best position to address such changes
  - Consideration of additional statutes that would be impacted
  - Consideration of lack of insurance coverage/taxpayer dollars to cover increased litigation/claim costs
  - Crippling costs on already overburdened and underfunded law enforcement agencies.
- Perhaps address the problem with a remedy?

# What Would the Supreme Court Ruling Do?

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- ◉ Defense of Employees?
- ◉ Coverage for claims/verdicts?
- ◉ Will anything change with hiring, training, supervision?
  - Actually have to train officers not to have sex?
  - Mandate that no one officer will work ALONE, ever?
    - But SH and TF – that was the rule and the sex still occurred
  - What will this do to agencies, especially smaller ones?
- ◉ Will it actually deter the criminal behavior?
  - No one has made the argument that officers are not being screened or trained properly on this issue?
  - Even less liability for the perpetrator since someone else will have to pay for the crime