Legal Liabilities and Risk Management

LEARNING OBJECTIVES

1. Know and understand civil liability through state tort law and liability for violations of constitutionally secured rights under Section 1983 liability.

2. Be aware of different forms of immunity, indemnification, and representation types of damages.

3. Know legal issues related to presentence investigation reports.

4. Understand legal issues related to parole board members and parole board functions.

5. Understand case law and legal requirements related to probation or parole revocation proceedings.

6. Be aware of legal parameters associated with shaming techniques and polygraph examinations.

INTRODUCTION

Throughout the remainder of this text, students will notice that this chapter will be referred to on a fairly regular basis. If there is any one chapter that is critical for both administrators and general practitioners alike, it is this one. Knowledge of liability law is very important for what should be intuitively obvious reasons. However, it should also be noted that risk management activities are also central to the good administration of a community supervision agency. Such activities make the world of difference between an agency under good stewardship and one that is plagued with internal and external problems.

In addition, much of the information for this chapter has been derived from a handful of sources. Most of these sources are federal government documents that allow for the free use of their content without copyright concern or infringement. Though this is, quite naturally, a wonderful benefit to researchers and writers in the field of criminal justice, it is not necessarily the free access to material that is the basis for the use of these identified documents. Rather, it is the sheer expertise of the persons who generated these government publications that has led to the heavy use of their works. Indeed, the mere fact that this information is disseminated through the federal government lends credibility to its accuracy and pertinence. With this in mind, one work by del Carmen, Barnhill, Bonham, Hignite, and Jermstad (2001) is an invaluable and exhaustive resource when discussing the issue of liabilities with probation and parole officers.
The current chapter will utilize the information provided by del Carmen et al. to a great extent when deriving various mainstream aspects of liability.

The means by which liability may ensue are many. First, liability issues can occur at both the state and the federal levels of government. Second, this liability, though most often civil, can be criminal as well. In most cases, the sources of liability are not restricted to community supervision officers but often serve as the basis of liability for any actor who is employed by the state. Nevertheless, just as with other practitioners that act under "color of law" (a term we will expound upon later in this chapter), community supervision officers typically incur potential liability due to their role as agents of the state (state being used in a general sense to cover local, state, and federal government). In addition, the types of liability may include a variety of forms and may come from multiple sources. For instance, civil and even criminal liability can emerge, and a community supervision officer can be subject to both state and federal levels of civil liability, depending upon the circumstances. For the purposes of this chapter, we will first begin with state-level forms of liability and will progress to the federal level.

**STATE LEVELS OF LIABILITY**

Civil liability under state law often is referred to as “tort” law. A **tort** is a legal injury in which the action of one person causes injury to the person or property of another as the result of a violation of one’s duty that has been established by law (del Carmen et al., 2001; Neubauer, 2002). Torts can be either deliberate or accidental in nature. A deliberate tort refers to an act that is intended to have a certain outcome or to cause some form of harm to the aggrieved. On the other hand, an accidental tort would generally be one that is committed out of negligence with the intent of harm being nonexistent. These types of state law liability exist for all public servants, and this of course includes community supervision officers. Likewise, it is clear from this very brief description that community supervision officers can be held liable for damages to either property or a person and that this liability can occur whether the act is intentional or unintentional.

**Intentional Torts**

According to *Black's Law Dictionary*, an **intentional tort** is one in which the actor was judged to have possessed intent or purpose to cause injury, whether expressed or implied. This means that an intentional tort has numerous components, all of which must be proven by a plaintiff if the suit is to prevail. The components of an intentional tort that must be proven are as follows:

- The act was committed by the defendant.
- The act was deliberate and can be shown to be such due to the fact that the defendant had to have known of the potential consequences of the act.
- The resulting harm was actually caused by the act.
- Clear damages can be shown to have resulted from the act.

A hypothetical example might be a scenario where Parole Officer X conducts a home field visit to a parolee’s house. While in the house, the parole officer assaults the parolee and says, “I can reach out and touch you anytime and if you say anything about it, I will have your parole revoked.” The parolee is injured, has to go to the doctor for internal injuries, and decides to disclose the source of his injuries. In this case, the parole officer has obviously committed an intentional tort. The assault was committed by Parole Officer X (the defendant in this case), the assault was obviously on purpose and Parole Officer X was clearly cognizant of his actions, and clear damages in the way of physical injuries occurred as a direct result of the assault.
It is clear that the above hypothetical scenario was a physical tort action. The physical assault itself makes this evident. It should be made clear that physical tort actions can consist of a number of actions that are not as severe as an outright assault but that might nonetheless constitute a physical damage to the person or his or her property. For example, false arrest, where the person is illegally arrested while also in the absence of a warrant, and false imprisonment, where the person is illegally detained after arrest, both constitute grounds for a physical tort yet are not the typical assault or battery circumstances (i.e., excessive use of force) that come to mind with physical torts. Other types of physical torts might involve the person's property. These torts would need to be intentional (such as breaking an offender's property as a means of intimidating him or her) if this was not to be considered an act of negligence. Though the list could go on into eternity, perhaps it is sufficient to say that there are many avenues of potential liability when considering physical torts alone.

When considering nonphysical torts, the list of potential liability issues grows even larger. This is particularly true with community supervision personnel. The reason for this is actually quite simple. Though physical contact and restraint is frequent between custodial staff and inmates in jails and prisons (resulting in more per capita issues revolving around the use of force), it is not near as commonly needed between community supervision officers and their client caseload. Rather, community supervision officers are required to keep large amounts of personal information organized and confidential (remember, in particular, our discussion in Chapter 3 regarding PSI information), and they are entrusted with a great deal of latitude and discretion while conducting their duties. Most of the community supervision officer's duties include the exercise of effective communication skills with his or her clients. Because of the dynamics involved in this type of supervision, physical torts will tend to be less likely with community supervision officers than with custodial staff. When coupled with the increasing need to be mentally fit for the challenges associated with community supervision processes, it is clear that a whole set of stressors associated with this job make nonphysical torts much more likely than physical torts for most community supervision officers.

For the community supervision officer, there are several specific types of offenses or damages that might fall under nonphysical torts. These might include defamation, invasion of privacy, misrepresentation of facts, malicious prosecution, and wrongful death. Likewise, acts that cause harm to a person's reputation, privacy, and overall emotional well-being can all be grounds for nonphysical tort as well. Because this area of liability is most common among community supervision officers and because the categories of potential tort liability are so broad, it is necessary to expound on many of these concepts to ensure that the student has a clear understanding of each potential source of liability. Though the following discussion will not be exhaustive, it will highlight the more common areas of liability that community supervision officers face in their day-to-day functions.

First, defamation is an invasion of a person's interest through his or her reputation. In order for this to occur, some form of slander or libel must have occurred against the aggrieved individual. Many students use the term slander loosely but often have an unclear understanding of that term. Because of this, we will break these terms down further within the context of defamation to ensure clarity of understanding. Slander is any oral communication that is provided to another party (aside from the aggrieved person) that lowers the reputation of the person that is discussed and, when taking all of the facts and circumstances together, is such that at least a substantial minority of a given community would find such facts to actually be damaging to that person's reputation. Thus, the aggrieved and/or the community supervision officer do not serve as the arbiters in determining this criterion; rather, it is the perception that others have when hearing this information that determines whether it is slanderous. On the other hand, written forms of information that tend to diminish an aggrieved person's reputation would be called libel, not slander (and this is where many students have loose or even incorrect understanding of the
terms). In such cases, it must be clear that the parties reading this information did indeed understand the material, and the information must cause a negative perception of the person, thus generating a negative reputation. As with slander, this must be demonstrated as an outcome that would impact at least a substantive minority of the community population.

Naturally, there is some fluidity in determining whether slander or libel has occurred. In fact, slander is very difficult to prove without any other corroborating evidence than the aggrieved person's testimony. Though extreme cases could exist where a community supervision officer repeats slanderous information about an offender on community supervision to numerous persons in the community, creating the opportunity for multiple points of testimony and thus causing damage to the offender's reputation among a sizable number of persons in the community, this is not likely to occur with untrue statements or circumstances. On the other hand, libel may actually reach a fair number of people in a much more expedient fashion through a printed source that is widely copied and distributed among numerous people. This is also more easily proven since it is, after all, in writing for all to see at points in the future. However, community supervision officers do tend to be careful with what they put into writing, particularly if such records may be used outside of their own agency, thus making this less common than one might think. Regardless, the fact of whether the information is true or untrue is actually critical to determining slander or libel. Indeed, any proof that a statement's content is true is an absolute and irrefutable defense against slander or libel. This is the case regardless of how damaging a statement may be (del Carmen et al., 2001). Thus, as long as community supervision officers ensure that their information is, as a matter of material fact, true and accurate, they do not need to worry about being found liable for defamation.

**Invasion of privacy** is a general term that involves multiple forms of action and legal concepts. Aside from the commonly understood issue of interfering with a person's reasonable right to privacy (the actual right to privacy itself being fluid in nature), invasion of privacy can also occur if the aggrieved can show that there is some form of encroachment or damage to their very personality. Both of these aspects are related to the right to essentially be left alone (del Carmen et al., 2001). These areas of concern might include (1) an intrusion into the aggrieved person's private affairs or violation of his or her seclusion, (2) publication of facts that are arranged or stated in such a manner as to portray the person in a false light, and (3) the public disclosure of private facts about the aggrieved person. For community supervision officers, this might occur when communication of some incident in their client's private life occurs in an unauthorized context. This can also include other behaviors related to surveillance, such as “peeping” or spying, taking unauthorized photographs of the offender, or the unauthorized hiring of other persons to conduct such acts on behalf of the community supervision officer.

The next category, infliction of emotional distress, refers to acts (either intentional or negligent) that lead to emotional distress of the client. Emotional distress can occur due to words alone, gestures, or conduct. In the context of community supervision officers, tactics that bully or abuse the client would fall within this category. Even words alone can involve liability, depending on the circumstances and context, such as a situation where the community supervision officer causes verbal insult to the offender client while in public. However, one simple incident, though not likely to be in adherence to agency policy, typically does not incur liability unless the situation can be shown to be “extreme” and “outrageous” (del Carmen et al., 2001). In other cases, it may be that the emotional distress must be profound enough to cause physical symptoms or injuries (e.g., accidental injuries due to worry/anxiety from mental abuse, heart attack, ulcer, or post-traumatic stress disorder that results in nightmares and self-injurious behavior). In other cases (depending on that state's laws), the outrageous conduct of the community supervision officer may, in and of itself, be sufficient grounds for liability, regardless of whether injuries can be proven (del Carmen et al., 2001).
The next area of potential nonphysical liability involves the misrepresentation of facts. In order for liability to be incurred through the misrepresentation of facts, the community supervision officer must provide some sort of false representation of either a past or present fact that is used in a decision-making outcome related to the offender. The very nature of community supervision makes personnel working in this field fairly vulnerable to this possibility. Community supervision officers must routinely provide facts (again, consider the PSI from Chapter 3) and compile information and also may find the need to share this information with authorized agencies or persons. The welfare of the client often hinges on the accuracy of the PSI and the probation/parole officer’s effective discretion when releasing this information. Naturally, community supervision officers are open to liability when they deliberately generate injurious falsehoods and, whether detected or not, are breaking the law and are in violation of most all agency rules.

The last area of nonphysical tort that will be discussed is that of malicious prosecution. Malicious prosecution is when a criminal accusation is made by someone that has no probable cause, and when he or she generates such actions for improper reasons. In such cases, the accused must be, as a matter of material fact, innocent of the charges that were made. Take for instance a scenario where Parole Officer X is talking with a female parolee on his caseload. The female parolee is attractive and Parole Officer X knows that before serving prison time, the female parolee was an exotic dancer and an active prostitute. Parole Officer X propositions her for sex. Parole Officer X states that he will help the parolee to get further recommendations to receive custody of her children from a current foster home where the children reside; if the parolee does not consent to sexual relations, Parole Officer X threatens to charge her with prostitution as well as soliciting an officer of the court (the implication being that Parole Officer X will tell the judge that the female parolee propositioned him for positive recommendations in exchange for sexual favors). The female parolee refuses to comply with the request and Parole Officer X files criminal charges against her for prostitution and soliciting/bribing an officer. Unbeknownst to Parole Officer X, a private investigator hired by the female parolee was hidden in the room and recorded the entire conversation on video and audio. The female parolee was ultimately found to be innocent of the charges and, in turn, charged Parole Officer X with malicious prosecution. Parole Officer X lost his job and the female parolee sued the agency, later settling out of court.

Negligence Torts

The next primary category of state tort is those that are acts of negligence. In many cases, these types of torts are filed by persons that are injured by the criminal behavior of probationers or parolees that recidivate while under supervision. Presumably, these plaintiffs contend that the agency and its staff have neglected their duty to ensure the safety of the public. In the vast majority of cases, these suits are not actually won, particularly if the community supervision officer has adhered to agency policy. Most agencies have sufficient policy safeguards to ensure that an adequate good-faith attempt is made at public safety and, presuming that the officer follows policy, liability is not likely to be incurred. Nevertheless, this area of concern can be troublesome since it is never pleasant to be faced with the prospect of a lawsuit. This can (and does) add to the stress of the community supervision officer, with lawsuits being yet another contributor to the high rate of burnout.

It is important to have a clear understanding of what negligence is, and is not. For the purposes of this text, negligence is defined as doing what a reasonably prudent person would not have done in similar circumstances, or failing to do what a reasonably prudent person would have done in similar circumstances. Essentially, negligence is the failure to exercise the same degree of caution, foresight, and good judgment that any other reasonable person would have in a similar situation. One key point to keep in mind is the
term “reasonable person.” This is a common term used by the U.S. Supreme Court in a variety of cases. Though this term does not have a specific definition, it does provide a general criterion against which liability can be assessed. Nevertheless, it can be seen that there is a great deal of fluidity with this concept. Aside from the vague conceptualizations associated with such general definitions, the following minimal conditions are typically required to establish a case of negligence:

1. A legal duty is owed to the aggrieved person.
2. A breach of that duty must have occurred, whether by the failure to act or by the commission of action that was not professionally sufficient to fulfill that duty.
3. The aggrieved can demonstrate that an injury did occur.
4. The person with the duty owed to the aggrieved person committed the act (or lack of action) that was the proximate cause of the injury.

In addition, there are three general classifications of negligence; these are slight, gross, and willful negligence. **Slight negligence** is the failure to exercise the standard of care and attention that highly conscientious and attentive persons might use. Thus, slight negligence can be considered an accidental lapse of judgment, typically from someone who ordinarily does exercise due caution in the performance of his or her duties. **Gross negligence** is a failure to exercise the standard of care and attention that is even less than that which would be expected from someone who was already careless in his or her duty. Thus, persons committing gross negligence are truly derelict in their duties, falling short of those who are already careless and haphazard in the fulfillment of their duty. Last, **willful negligence** occurs when the person commits an act that is in flagrant disregard of consequences that are probable and that he or she was most assuredly able to foresee.

In most all cases, no true liability will be found for slight negligence, the only exceptions being those instances where the offense is one where the agent is held *strictly liable* (strict liability offenses are those where no culpability is required for the person to be guilty of the offense, such as with traffic offenses, or even statutory rape). Though the commission of slight negligence may violate policy or procedure that the agency has set, and though the employee may (or may not) be subject to internal disciplinary action, there is no damage or wrong that has been inflicted upon a person or his or her property so as to rise to the level of being legally liable for remuneration or compensation. Naturally, liability can and does attach for both gross and willful negligence. However, it should be clear that all three types of negligence have fairly broad and open definitions. This is actually quite problematic because the results in determining liability may not always be uniform or consistent. While this is true among judges that are tasked with providing their own subjective input, this is especially true with juries who tend to be less well versed in the law or standards of accountability. This creates some inconsistencies in the classification of negligence offenses and the corresponding awards for damages that ensue. Despite this, even among juries, the tendency is to consider the seriousness of the charge in correlation to the gravity of the damage that has been incurred by the aggrieved party.
Liability Under Section 1983 Federal Lawsuits

This avenue for civil redress is one of the most frequently used by persons seeking damages from the government. Though there is substantial history associated with this particular form of liability, this text will delve right into the substantive issues associated with Section 1983 (42 U.S.C. § 1983) liabilities. Essentially, there are two simple requirements that must exist in order for liability to be imparted to a person so charged:

1. The person charged (the defendant) acted under color of state law.
2. The person charged violated a right secured by the Constitution or by federal law.

Both of these requirements need some bit of explanation. First, the term “color of state law” must be clarified. This term simply means that the actor committed the behavior while under the authority of some form of government. In this case, the term “state” is meant to imply government in general, regardless of the level of government (i.e., local, state, or federal) that is associated with the agency. Thus, local jailers, county probation officers, and state parole officers all act under the color of state law when they are performing their duties in the employment of their respective agencies. This liability does not, however, apply during their off-time “normal” lives. In further clarifying this concept, del Carmen et al. (2001) note that anything that a community supervision officer does in the performance of his or her regular duties and during the usual hours of employment is considered to fall under the color of state law. In contrast, whatever this same person does as a private citizen during his or her off hours falls outside and beyond the color of state law.

Though specific mention has been made regarding local-, county-, and state-level agents, it should be noted that federal agents can also be held liable under the basic tenets of Section 1983. Thus, federal probation officers can be held liable by this federal statute that was initially intended to govern lower levels of government. Often, however, when federal agents are sued for violation of a constitutional or federally protected right that occurred while under the color of state law, this process may be referred to as a Bivens suit. This is because it was the U.S. Supreme Court case of *Bivens v. Six Unknown Agents* (1971) that clarified this avenue of liability for federal agents.

Likewise, the case of *Richardson v. McKnight* (1997) has made it clear that private individuals that are under contract with a public agency may be held liable just as if they are public servants because they are, in fact, acting under the color of state law. This would naturally include persons with private companies that provide PSI work and other such functions that are sometimes contracted out in some areas of the nation. This can also include private medical staff, mental health professionals, and other such actors if they are under contract or work for the community supervision agency.

Next, in order for a Section 1983 claim to prevail, the defendant (in this case, the community supervision officer) must have violated either a constitutional right or a right that is created or protected by federal law. Note that when considering Section 1983, this only applies to those rights guaranteed by the United States Constitution (not a state constitution), and it also only applies to rights secured by federal (not state) law. Thus, if a probation or parole officer conducts an illegal search of an offender (a 4th Amendment right) or if he or she inflicts cruel or unusual punishment (freedom from this is protected under the 8th Amendment), he or she can be held liable under a Section 1983 lawsuit. Similarly, if a federal law is passed providing certain rights or protections to individuals, a community supervision officer may not violate that right or protection without subjecting him- or herself to liability. In our previous examples with Parole Officer X, it was found that he had assaulted a parolee while saying “I can reach out and touch you anytime and if you say anything about it, I will have your parole revoked.” This assault resulted in physical injuries to the parolee, which were grounds for an intentional tort. This excessive use of force is also sufficient grounds to be a violation of the
parolee’s 8th Amendment protections against cruel and unusual punishment. Thus, Parole Officer X is liable under Section 1983 as well.

However, in other cases, it may not be so clear whether an infraction rises to the level of a constitutional violation. Likewise, the Supreme Court case law regarding community supervision is a bit scant in comparison to prison case law and case law related to policing. Thus, there may be a lack of uniformity and clarity in interpretation of the fine-line distinctions in federal protections, and this may vary from one circuit court to another. Therefore, it is very important that community supervision officers stay abreast of the legal rulings and developments in their own circuit area. Regardless, the overall general concepts and protections do, for the most part, have similarities throughout the nation since they all have a constitutional basis.

Also, it is important to note that both of the two elements previously noted must be present. If either is lacking, then there simply is no liability under Section 1983. However, as was noted just previously in regard to Parole Officer X, the officer can be held liable under some other form of legal protection, such as under state tort law, or the penal code, or other possible ordinances or laws. In such cases, Section 1983 protections will not apply. For instance, Parole Officer X goes to a local club on the weekend and becomes inebriated. While in his drunken stupor, he gets into an altercation with another person at the club and is sued by the club owner and the person that was assaulted. While he is indeed likely to be found liable for damages, he was not acting under color of state law (being off duty during this time) and is therefore not liable under Section 1983.

While Section 1983 suits can be effective for aggrieved parties that have had their constitutional or federally protected rights violated, it should be made clear to the student that this actually creates a limiting effect on the use of Section 1983. Indeed, when reading about liability issues, it can seem as if state actors are constantly in danger of liability and that the risk is high that they will make a mistake that ultimately holds them liable for some type of tort or Section 1983 suit. Actually, this is not true at all for the vast majority of community supervision officers, particularly if they are prudent and attentive to their duties and the processes that must be utilized (i.e., agency policies and procedures) when carrying out those duties. There are many protections and limitations that actually safeguard the public agency, and community supervision officers enjoy these protections.

In regard to Section 1983 itself, it is important to point out that violations of an offender’s rights do not automatically become a constitutional or federal issue. Rather, as del Carmen et al. (2001) put it, “the violation must be of constitutional proportion” (p. 34). Though there is some degree of ambiguity in determining what exactly is (and is not) an issue of constitutional proportion, it does underscore the fact that most cases that will incur federal liability must be serious—perhaps even “unusually serious” according to del Carmen et al.—if they are to be considered sufficient grounds for a Section 1983 suit. Simple words, threats, gestures, and even actual pushes or shoves do not automatically constitute a civil rights violation (del Carmen et al., 2001; Weisz & Crane, 1977). However, the U.S. Supreme Court case of Morrissey v. Brewer protects the offender’s rights during parole revocation hearings, making such actions clear violations of a constitutional right.

In addition, it should also be pointed out that agencies can be held liable in some circumstances if they allow certain policies or customs to exist within their jurisdiction. In Monell v. Department of Social Services (1978), the U.S. Supreme Court held that local units of government can be held liable for an unconstitutional action by an officer if it occurred in adherence to a policy or custom that had been set in that agency. The specific definitions of a policy and especially those of a custom have been fluid and subject to much interpretation in a number of cases. The key thing to remember with this ruling is that this applies only to local governments, not state or federal governments. However, defenses that are common for state and federal levels of government have changed over time, and it could be, in future years, that concern for an organizational culture that reinforces customs in violation of the offender’s rights could extend to state or federal agencies as well.
Last, courts have applied this ruling to many local agencies around the United States, and, in some states—such as Colorado, Georgia, and Washington—probation officers may be employed as municipal probation officers. In these specific cases, it is perfectly feasible that the rulings in Monell would or could apply since municipalities are local forms of government. This distinction is seldom noted in discussions related to liability but is an important point for community supervision officers that are so employed. This is especially the case if these officers find themselves working in an environment that has accepted norms or customs that are not consistent with federal protections or if the agency does not ensure that employees are maintaining adequate levels of ethical behavior.

**FORMS OF IMMUNITY AND TYPES OF DEFENSE**

One key protection for community supervision officers, as agents of the state, is potential immunity from tort suits. Official immunity is a term that refers to being legally shielded from suit. Official immunity is granted to those professions that must be allowed to, at least in the majority of circumstances, actively pursue their duties without undue fear or intimidation. Otherwise, law enforcement, correctional, and judicial professionals simply could not fulfill their duty correctly. However, official immunity comes in a number of different forms, reflecting the different levels of responsibility and liability associated with different functions in the justice system. For the purposes of this text, students need only discern between absolute immunity and qualified immunity.

**Absolute immunity** exists for people who work in positions that require unimpaired decision-making functions. Judges and prosecutors have this type of immunity since their jobs require that they make very important decisions regarding the livelihood of persons in their courts; these decisions must be made free of intimidation or potential retribution and therefore these court actors enjoy absolute immunity when carrying out their responsibilities. This type of immunity is also referred to as judicial immunity, in some cases, as it is usually reserved for judicial officers of the court rather than those who fulfill an executive function.

For typical community supervision officers, protection through immunity is typically referred to as qualified immunity. **Qualified immunity** requires that the community supervision officer demonstrate three key aspects prior to invoking this form of defense against suit: (1) the community supervision officer must show that he or she was performing a discretionary act, not one that was mandated by agency policy; (2) the community supervision officer must have been acting in good faith, that is, holding the sincere belief that his or her action was correct under the circumstances; and (3) the community supervision officer must have acted within the scope of his or her designated authority. Thus, most community supervision officers do not enjoy the same level of immunity as their colleagues in the judicial arena since they have to demonstrate the grounds for their possession of immunity. However, there is one key exception; in the Fifth and Ninth Circuits, community supervision officers are given immunity when completing presentence investigation reports (PSI’s) due to the fact that this is more of a judicial function than an executive function and also because courts tend to request PSI’s from community supervision agencies so that judicial sentencing can occur.

In addition, in most cases, higher-level officials that must make judgewise decisions are considered to be performing judicial functions that warrant absolute immunity. One key example would be most state parole boards that are tasked with granting parole, making release recommendations, or conducting revocation hearings for parolees that recidivate or commit technical offenses. Though exact particulars may vary from state to state, parole board members tend to have absolute immunity when performing the aforementioned functions.
This brings us to an additional consideration that shields community supervision staff/personnel from liability. The public duty doctrine of tort law holds that in general, community supervision officers are not liable for failing to protect a member of the public from injuries inflicted by an offender on their caseload. This is because general functions of public safety and security are owed to the public as a whole but not necessarily to any one individual in particular. Though it would seem that community supervision officers would be liable to the public (particularly in light of this text’s discussion in Chapter 2), the simple truth is that, for the most part, they are not. This concept is aptly explained by del Carmen et al. (2001), who state,

Injured members of the public file lawsuits against probation/parole officers and departments because they link the injury caused by probationers or parolees to negligent supervision or failure to revoke probation or parole. The public assumes that, had the offender been properly supervised and had the probation/parole been revoked upon violation of conditions, the injury could have been prevented. Logical as this thinking may be, it generally has no basis in law. The reality is that, were it not for the protection against civil liability given by the public duty doctrine, nobody would ever want to be a police, probation, or parole officer. These are high-risk occupations that profess public protection as a part of their mission, yet they hardly have any control over what the public or their supervisees do vis-à-vis the public; therefore, they are protected against civil liability. (p. 25)

Despite the fact that agencies are not liable for recidivism from offenders under supervision, the issue of public safety is still considered very important to community supervision agencies. In fact, many have adopted more of a law enforcement model than a casework model. The emphasis on supervision is taken very seriously by community supervision agencies, and it is highly unlikely that any such agency would be calloused toward the community’s safety. Yet, all of this emphasis occurs among these agencies even though they are not liable for keeping the public safe as a whole. Thus, it is clear that agencies have a sincere desire to simply be of service to the public, evidenced by the fact that so much effort is put into the security aspect of community supervision, even though they are not liable should they fail to be able to provide a perfect safety scorecard to citizens in the community.

This lends support to the points made in Chapter 2 regarding the fact that community safety can only be obtained with the help of the community itself. Probation/parole officers cannot, all by themselves, ensure or guarantee safety for the community. These individuals are frequently overloaded with their caseloads and cannot guarantee any better forms of security considering agency resources and normal human limits. The public duty doctrine, just explained earlier in the block text, makes this clear and provides support for the involvement of the community if supervision of offenders in the community is likely to be improved.

Finally, while it is true that there is no guarantee of safety to the public as a whole, supervision agencies and supervision officers may be liable when a special relationship exists between the person being protected and the community supervision agency/officer. Though these are a minority of cases, they do occur from time to time. For instance, if a community supervision officer knows that a crime—especially a violent crime—is likely to be committed by an offender on his or her caseload, and if the officer has the means to prevent it, but negligently fails to do so, this may incur liability. One clear area where this would be likely is in cases of domestic abuse, particularly if the offender were on supervision for crimes of domestic abuse and especially if the crime were again perpetrated against the original victim of his abuse. In such a case, it is likely to be considered negligence if the community supervision officer has knowledge of the crime’s likelihood but fails to act. Another situation that might constitute a special relationship is when the offender is given a specific order from the court, such as when a pedophile is ordered to stay away from school zones, and the offender does not comply with this order. If the community supervision officer knows that this is occurring and he or she does not act, liability can be incurred. Though these special relationships can occur, they are very rare, and, in
the overwhelming majority of the cases, officers respond to these situations and harm is prevented. Beyond their rarity and the tendency for officers to respond in such events, it is not always easy to determine that special relationships actually exist since these are determined largely on a case-by-case basis according to the circumstances. However, aside from this special relationship exception, the public duty doctrine holds community supervision officers free from liability in ensuring public safety and security. If the case were otherwise, the nation would probably not be able to employ persons in the community supervision field, thus requiring the use of more prisons and further expense due to the false positives that this would essentially generate.

Beyond the initial forms of liability protection (i.e., qualified immunity and the public duty doctrine) that are afforded community supervision officers, there are some defenses that officers can raise on their own behalf. First among these is the good faith defense. The good faith defense essentially buffers a community supervision officer from liability in Section 1983 cases (not state tort cases), unless the officer violated some clearly established constitutional or federal statutory right that a reasonable person would have known to exist. This basic premise was established in the U.S. Supreme Court case of Harlow v. Fitzgerald, in which the Court added that judges may determine both the law and whether that law was clearly established at the time that the action had occurred. Thus, even if a law has been passed that makes the officer’s conduct illegal or questionable, if it is new, obscure, or relatively unknown, community supervision officers may not be held liable. It can then be concluded that if reasonable public officials were able to substantially differ on the legality of a given supervision officer’s actions, that officer would most likely be entitled to qualified immunity. Finally, it should be mentioned that the good faith defense is an affirmative defense and thus must be invoked by the defendant (the community supervision officer) who has the burden of proof to establish the good faith claim.

Because of this defense and due to other court cases since Harlow, it is clear that community supervision officers must be well versed on the constitutional and federal rights of offenders. In addition, this knowledge must be constantly updated for two key reasons. First, rulings by the various circuit courts (and occasionally the U.S. Supreme Court) are always developing and federal laws go through revisions, making it a very real likelihood that the officer’s duties can be affected. Second, officers are only human and do not remember all of the complex nuances of the law after an initial introduction to a given set of guidelines. Rather, repetition helps to reinforce this knowledge to ensure that liability issues stay at the forefront of the supervision officer’s mind when under the stress of his or her routine and non-routine functions. In addition, the Harlow case has also placed a responsibility on community supervision agencies to ensure that their policies are updated and that they keep their officers informed on legal updates that occur. In fact, agencies are well served if they do this and, of course, document the fact that such information has indeed been disseminated to members of the agency.

From the previous discussion of both state tort and Section 1983 forms of lawsuit, it is clear that the issue of good faith is important. The notion that the officer acted in good faith (the sincere belief
that his or her action was appropriate) is important to establishing qualified immunity against state tort suits. Likewise, as with the Harlow ruling, good faith (genuine attempt to follow well-established federal laws and citizen rights) also serves to protect community supervision officers from Section 1983 lawsuits. It is the same term, good faith, but its application to the two types of lawsuit (state tort and Section 1983) is different. Because students often find the differences in state tort law and federal protections under 42 U.S.C. Section 1983 a bit confusing, and because the terminology regarding good faith defenses is similar in appearance but different in actual application, students are encouraged to examine Table 5.1 for further clarity in classifying each type of legal redress and its particular parameters.

### Table 5.1
Comparing State and Federal Lawsuits Against Community Supervision Officers

<table>
<thead>
<tr>
<th>State Tort Cases</th>
<th>Federal Section 1983 Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Based on state law.</td>
<td>Based on federal law.</td>
</tr>
<tr>
<td>Plaintiff seeks money for damages.</td>
<td>Plaintiff seeks money for damages and/or policy change.</td>
</tr>
<tr>
<td>Usually based on decided cases.</td>
<td>Law was passed in 1871.</td>
</tr>
<tr>
<td>Usually tried in state court.</td>
<td>Usually tried in federal court.</td>
</tr>
<tr>
<td>Public officials and private persons can be sued.</td>
<td>Only public officials can be sued.</td>
</tr>
<tr>
<td>Basis for liability is injury to person or property of another in violation of a duty imposed by state law.</td>
<td>Basis for liability is violation of a constitutional right or of a right secured by federal law.</td>
</tr>
</tbody>
</table>

**Good faith defense usually means the officer acted in the honest belief that the action taken was appropriate under the circumstances.**

**Good faith defense means the officer did not violate a clearly established constitutional or federal right of which a reasonable person should have known.**


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**INDEMNIFICATION, REPRESENTATION, AND TYPES OF DAMAGES**

When community supervision officers are faced with lawsuits (whether state or federal), the issue of legal representation is an automatic concern. This issue, as well as that of indemnification (payment for court costs), is one that varies greatly from state to state. As a general rule, most states around the nation are willing to provide assistance in civil cases, but this is not always true when the charges are criminal in nature. While it is typical for states to cover financial costs associated with civil proceedings, many do not do this automatically, and this makes it likely that officers will occasionally face such instances without any financial assistance from their place of employment—a scary thought indeed.

Most states do cover an officer’s act or failure to act in civil cases, provided it is determined that the incident occurred within the scope of the officer’s employment. In some cases, this may also require a good faith element where it can be reasonably shown that the officer did act in good faith within the scope of his or her duty. However, the particular way each state defines good faith, for purposes of deciding whether to cover an employee in a suit, may vary. For instance, good faith may be seen as simply not being grossly negligent, while in other states, good faith may be held as not having violated a state rule or law. In still other states, the definition may stay with the notion that the officer believed that the act was proper and appropriate.
under the circumstances. This all of course contrasts with the use of good faith in Section 1983 suits where 
good faith is clearly defined. In most cases, however, if the officer's behavior was within state guidelines, the 
officer will be represented by that state's attorney general. That said, the attorneys general in all states have 
a wide degree of discretion in choosing whether to defend an officer faced with a civil suit. If it should turn 
out that the “AG” (as the attorney general's office is sometimes called) does not agree to defend the officer, 
that individual will have to retain private counsel at his or her own expense.

The student should consider the implications of this decision that go beyond the mere fact that the 
employee will have to obtain his or her own form of legal representation. Indeed, if the state does refrain 
from defending an employee, this can be perceived as a negative statement by the judge (or worse yet, the 
jury) that is assigned to the particular case. Though this information is not necessarily disclosed during 
proceedings in many states, it is plausible that judges (and perhaps some jury members) may be aware of 
the case and the fact that the representing counsel is not in the employ of the state attorney general's office. 
This would then raise suspicion for many that were knowledgeable of how such systems are intended to 
operate. Regardless of whether such information does or does not prejudice the judge or jury, it would be 
quite discomforting to know that your agency has declined to defend your actions that are about to be 
examined in a court of law.

However, once the issue of representation is resolved, the last issue of concern tends to revolve around 
the payment of legal costs. Most typically, when state tort cases are involved, both the plaintiff (in this case, 
it would be the offender) and the defendant (the community supervision officer) would pay their own 
attorney's fees, and this would remain so, regardless of the case outcome. Thus, even if the community 
supervision officer is found innocent of the allegations made by the offender, the officer will still likely have 
to pay his or her own court costs if it is a state tort case. To remedy these concerns, some officers may opt 
to purchase their own professional liability insurance, but they will typically be required to pay the premium 
themselves, and, in some states, they may not even be able to purchase such insurance if there are no 
companies operating to underwrite the policy.

If, on the other hand, the case is a civil rights case, it would most likely be filed under Section 1983. In 
civil rights cases, the Civil Rights Attorney's Fee Awards Act of 1976 provides that courts may award payment 
of legal fees to the plaintiff (usually the offender) if the individual's allegations prevail (or win) in a suit 
involving a person's civil rights or rights dictated by federal statute (del Carmen et al., 2001). Such payment 
even extends to cases that are settled out of court or that result in some sort of decree. Conversely, if the 
community supervision officer (as the defendant) prevails in such a case, this act allows him or her to then 
claim attorney's fees from the plaintiff (the offender), so long as the officer can show that the offender's suit 
“was frivolous, unreasonable, or unfounded” (del Carmen et al., 2001, p. 46).

Most states have some sort of indemnification policy, but this does not necessarily mean that the state 
will automatically compensate the officer. In most all cases, the officer must have acted within the scope of 
his or her duty, and the defining factors in determining the scope of an officer’s duty can vary greatly from 
state to state. In addition, many states place a limit on the amount that will be reimbursed or paid. This also 
varies from state to state, but if the award in court exceeds this amount, then the officer will be required to 
pay the difference.

Finally, most all civil cases (particularly tort cases) seek to obtain monetary damages. The amount can 
vary greatly, depending on the type of injury, the type of tort that is found (i.e., gross or willful negligence), 
and the severity of that injury. Most often, these financial awards come in the way of compensatory 
 DAMAGES, which are payments for the actual losses suffered by a plaintiff (typically the offender). In some 
cases, PUNITIVE DAMAGES may also be awarded, but these monetary awards would be reserved for an offender 
that had been harmed in a malicious or willful manner by agency staff; however, these damages are often 
added to emphasize the seriousness of the injury or to serve as a warning to other parties that might observe
the case's outcome. The type of award for civil rights cases under Section 1983 suits can also vary greatly and often is similar to those under tort law. As with tort cases, the specific award may depend on the circumstances of the case or the nature of the right that has been violated.

However, it is common for Section 1983 cases to also result in other types of remedies that go beyond financial awards. These remedies are typically geared toward agencies rather than individual officers, though both financial damages and additional awards can be made. One such non-monetary award that is occasionally granted is the declaratory judgment, which is a judicial determination of the legal rights of the person bringing suit (Neubauer, 2002). An example might be a suit where a probationer sues for violation of certain due process safeguards during revocation proceedings. A court may award a declaratory judgment against the agency to ensure that future offenders under supervision are afforded the appropriate safeguards established by prior Supreme Court case law. In addition, courts may employ injunctions against an agency. An injunction is a court order that requires an agency to take some form of action or to refrain from a particular action or set of actions (Neubauer, 2002). While injunctions are not as common in community corrections settings as they are in institutional corrections settings, they still remain as a potential remedy, particularly when federal civil rights or federal statutes are violated.

LEGAL ISSUES OF DISCLOSURE WITH PRESENTENCE INVESTIGATION REPORTS

Students may recall that the issue of presentence investigation reports was discussed at length in Chapter 3, demonstrating the importance of these documents. As mentioned in that chapter, the U.S. Supreme Court held that the PSI is confidential in nature in the case of Williams v. New York, due to the perception of the Court that the presentence investigator is a neutral party with no vested interest in the punishment of the offender. However, the Federal Rules of Criminal Procedure require federal judges to disclose to either the defendant or the defendant’s counsel the presentence information relied upon in sentencing. The only information that is not required for disclosure is diagnostic information or opinions that could undermine rehabilitation program efforts if the information were disclosed. In addition, information obtained based on a promise of confidentiality or that which might, if disclosure were to occur, result in any type of harm to the defendant or other persons is also restricted from disclosure. Importantly, offenders have no right to the disclosure of a codefendant’s PSI.

Generally speaking, courts will release information that was used as a basis for determining the offender’s sentence. In addition, some states mandate that the information in the PSI may be given to counsel without any such disclosure to the offender him- or herself. In essence, the offender’s counsel may be given access to the information with clear instructions that the information is not to be released to the client. Though this is not often done, it is important to understand the parameters that surround an offender’s rights. In fact, the U.S. Supreme Court has not found it necessary to consider the constitutional parameters regarding disclosure of PSI content, being content to leave this to legislatively set guidelines such as those set by the Federal Rules of Criminal Procedure. Similar to the federal government, states also tend to require the disclosure of PSI information to defendants, taking it upon themselves to bear the burden of ethical and fundamentally fair disclosure to the accused.

Aside from the disclosure to the defendant, there is the additional concern of disclosing the PSI content to third parties. Most often, the third-party question revolves around victim access to the offender’s PSI records. Further, there are few if any specific statutes that require the PSI to remain confidential after the offender has been sentenced. In fact, several states have explored this exact issue. States such as Arizona, Louisiana, and Montana have addressed the issue of third-party disclosures. At this time, Arizona does allow the crime victim to inspect the PSI report once it has been made available to the defendant. The state of
Louisiana has a similar statute that allows both the victim and the victim’s designated family members to view the contents of the PSI. In Montana, prosecutors are allowed to disclose the contents of the PSI report to the victim. Thus, in different states, the process may be different, but in most cases the victim does have access to the offender’s records.

One additional issue regarding liability, PSI’s, and community supervision officers has to do with the officer’s legal standing when completing the report. This is perhaps the most relevant issue for the day-to-day probation or parole officer. It has been examined in numerous federal and state courts, and it is very clear that community supervision officers are given absolute immunity when completing these reports. This must of course be nearly mandatory if one expects the community supervision officer to be able to complete this function of the job. When one considers the excessive paperwork, the number of offenders on standard caseloads, and the fact that the completion of PSI’s is one of the more time-consuming functions within a community supervision agency, it is clear that absolute immunity is warranted. Again, this is a practical matter, if nothing else. The job simply could not get done if the situation were otherwise, and it is doubtful that anyone would agree to take on the task if one could routinely be held liable for honest mistakes that were made under such working conditions.

This last note regarding honest mistakes is also an important point. The provision of absolute immunity does not extend to cover cases where it is found that the discrepancies in the report are due to some sort of malice or intended ill will on the part of the community supervision officer. In such cases, the officer is liable and the offender that is sentenced on the basis of that report has basically had his or her right to due process violated (thus raising a Section 1983 issue). The officer is then liable under both state law and regulations (this violation constituting a tort) and under federal law. Last, it should be pointed out that even in cases where information is false but due to an honest mistake on the part of the officer, the offender’s right to due process has still been violated, but in such a case the officer acted within the scope of his or her duty and would be presumed to have sincerely believed that the information was true and correct. This would also exempt the officer from federal liability since the absolute immunity acts as a full shield from suit, presuming (again) that no hurtful intent existed.

The last issue to be discussed in this section addresses the use of PSI’s and parole. This is brought up because, in most cases, classification workers—staff who determine housing and job assignments—in a prison system, as well as institutional parole officers, tend to refer back to the PSI when making critical decisions regarding the placement of offenders in programs within prisons (as discussed in Chapter 3) and when making determinations regarding parole eligibility. In such cases, the key question for the offender revolves around the issue of due process (as per the 14th Amendment) when decisions impact his or her liberty interests. When an offender is incarcerated, his or her liberty interests are severely diminished and, because of this, the due process issues become considerably different from when the offender was a “free world” citizen being tried for an offense. (We will discuss due process issues, as established in Wolff v. McDonnell, for inmates and offenders on community supervision later in this chapter.) Thus, the more pressing issue for this immediate discussion is whether such offenders actually have a legitimate liberty interest in the first place. From a purely constitutional perspective, the answer is a simple and resounding “no, they do not have any such liberty interest.” The case of Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex makes this clear.

In Greenholtz, it was found that due process does not apply to parole release proceedings unless there is a specific state law (no such federal law exists) that virtually creates an expectation that parole will be granted. Such a law would have to have clear language that establishes parole as an expectation to which an inmate is entitled if such were to be considered a point of fact. If such does indeed exist, then that state has created a liberty interest for its inmates where none had existed before. It is not clear why a state would desire to make such a provision, but nonetheless, this is the requirement if a liberty interest is to be established.
However, even in such a case, the associated due process safeguards for such proceedings would then need to be granted and established by state statute or administrative regulation since this is not, after all, a right that was secured or protected by the U.S. Constitution or by federal law. This means that access to various inmate files, such as PSI’s, will be dependent upon the statute that regulates such proceedings or procedures.

**LIABILITY OF PAROLE BOARD MEMBERS FOR VIOLATION OF SUBSTANTIVE OR PROCEDURAL RIGHTS**

For the most part, it is clear that parole boards are not typically liable for violations of substantive or procedural rights when determining initial parole decisions. This should not be confused with decisions during parole revocation hearings. During revocation hearings, the Supreme Court case of *Morrissey v. Brewer* clearly establishes a number of rights related to due process through a prompt informal inquiry before some form of impartial hearing officer. However, initial decisions to grant parole are simply a privilege to which an inmate has not constitutionally secured a right. Though inmates do not have a right to parole, they do have a right to not be discriminated against on the basis of race, religion, sex, creed, and so forth, when such determinations are being made. One case, *United States v. Irving*, was filed under Section 1983 in the Seventh Circuit. In this case, the offender alleged systematic racial discrimination against African American inmates with respect to parole board decisions for release. Interestingly, the circuit court did hold that the parole board members themselves had absolute immunity when faced with such a suit. However, the Seventh Circuit noted that the offender could still sue for declaratory relief (essentially requesting an injunction that the parole board change their practices) due to the fact that the court did find evidence that tended to demonstrate discrimination on the part of the parole board.

Thus, it may be that individual parole board members are immune from liability when performing their functions. Yet, on the other hand, offenders do still retain certain civil rights under the 14th Amendment that must be honored by parole boards just as they must be honored by custodial corrections officials. This is a reasonable point since, after all, the desire to eliminate bias and discrimination among government officials was the reason that Section 1983 forms of redress were created. Just as prison officials must provide constitutional treatment of prisoners, so should parole-granting bodies.

One additional point of interest regarding parole board liability should be mentioned. It revolves around the rights of offenders that are released on parole, only to later find out that such a release was a mistake on the part of the parole board. While such instances are not common, they have occurred frequently enough to be ruled on by more than one federal court. Indeed, two lower courts have held that the protections in *Morrissey* also confer some substantive protections for inmates that are mistakenly released. In both *Ellard v. Alabama Board of Pardons and Paroles* and *Kelch v. Director, Nevada Department of Prisons*, it was determined that once a state confers a right to be released, the inmate’s due process rights go beyond the contours set by *Morrissey*. Indeed, it was determined that the granting of freedom places substantive limits on a state’s power to reincarcerate an inmate that has been mistakenly released. In the *Ellard* case, it was held that a mistakenly released inmate could not be reincarcerated unless the release violated some sort of state law and this departure from state law substantially undermined that state’s penological interests (see the U.S. Supreme Court case *Turner v. Safely* for a discussion on legitimate penological interests). A similar ruling was found in the *Kelch* case as well, demonstrating a consistency among circuit court rulings and supporting the point that parolees do not have a right to parole, prior to the parole-granting decision. However, this changes when they are actually released on parole, with *Morrissey* protections affecting revocation proceedings for those legitimately on parole, and a subsequent expectation of parole surfacing when offenders are mistakenly and prematurely released from the prison environment by parole board officials.
When considering the procedural elements of the parole-granting process, it is important to remember that parole boards are given a great deal of discretion that is statutorily granted to the parole board body. Indeed, it was held in *Partee v. Lane* that parole boards enjoy absolute immunity from Section 1983 suits when processing requests for parole. In other federal cases, it is equally clear that parole boards are considered to have absolute immunity when making decisions that grant, deny, or revoke parole. For instance, in *Walker v. Prisoner Review Board*, it was found that the board did have absolute immunity for its official actions. This was despite the fact that the board had not allowed the inmate to have access to critical files relevant to his parole determination, and that the district court found this to be a violation of the inmate's civil rights. In such cases, inmates have a right to another parole board hearing or determination, and some form of injunctive determination may be imposed against the parole board, but the board members themselves cannot be held legally liable for these actions. The *Walker* case was, in actuality, only a district court–level case, but this court correctly pointed to the Seventh Circuit's precedent that has held parole board review functions to be adjudicatory in nature, and thus absolute immunity was considered to extend to board members just as it does to judges.

**PAROLE BOARD LIABILITY FOR RELEASED OFFENDERS THAT RECIDIVATE**

This issue has been partially addressed earlier in this chapter. Specifically, it is the public duty doctrine that holds that community supervision personnel (including parole board members) are not liable for failing to protect a member of the public from injuries inflicted by an offender on community supervision. As noted before, this is because general functions of public safety and security are owed to the public as a whole but not necessarily to any one individual. However, one might ask, does this change when the decision makers are tasked with protecting the entire public when making the ultimate decision to release or not to release?

The answer is both “yes” and “no.” When considering these answers, it is important that the distinction between tort cases and Section 1983 cases is kept squarely in mind. Currently, some federal circuit courts have indicated that liability can occur in cases where gross or reckless negligence is found (*Grimm v. Arizona Board of Pardons and Paroles*). While there is no concrete answer as to when members are reckless or grossly negligent in granting parole release, courts have tended to consider the standard of duty that is owed by parole boards as well as the predictability of the potential danger (del Carmen et al., 2001). This is a rather nebulous set of criteria that ultimately is decided by the circumstances of each case. Thus, it is possible for state parole boards to be found liable for their release decisions if they are shown to have committed reckless or gross negligence where the standard of duty to the public is broadened by that state's own laws to create potential liability to individuals, and where the danger that occurs is judged to be foreseeable. Despite this possibility, it is rare that such suits are ever successful.

The unlikely success of these suits is exemplified in the case of *Santangelo v. State*, where it was found that the release decision did not include a rigorous or even suitable examination of the parolee's background or character (del Carmen et al., 2001). No psychological or psychiatric reports were utilized in this release decision. Further, prior to being released, the release decision-making body never interviewed the parolee nor had he appeared before the releasing body for any reason other than to have the conditions of his release explained to him. This offender ultimately ended up raping a woman who subsequently brought suit against the state. However, it could not be proven that the releasing body would have made a different releasing determination if such precautions had been implemented, and, since liability for negligence requires that
the negligent actions must be shown to be the cause of the injury, it was found that the releasing body was not liable.

Beyond state-level parole boards, the Fifth Circuit court also found that federal agencies could be sued via tort claim (just as with state torts) through the Federal Tort Claims Act. In *Payton v. United States*, the U.S. Parole Commission was itself sued via tort claim for releasing what should have been an obviously dangerous inmate who later kidnapped, raped, and murdered three women (del Carmen et al., 2001). However, the Fifth Circuit held that the decision to release was discretionary and thus fell under the realm of judicial absolute immunity.

Another case—perhaps the most important case on this issue—was decided by the U.S. Supreme Court. The case of *Martinez v. California* involved a 15-year-old girl who was murdered by a parolee only 5 months after he was released from prison. The offender also had a history of sexual offending. The parents of the girl brought suit under Section 1983, and this case eventually reached the U.S. Supreme Court. The Court held that the parole board members were not liable under federal law because, among other things, the parole board was not aware that a particular person (remember the “special relationship” exception to the public duty doctrine), as distinguished from the larger general public, was in any special danger. Further, the parole board’s decision was not a proximate cause of the girl’s death; in other words, the girl’s death was too remote a possibility for the parole board to know that such might occur. Therefore, it was found that the parole board members could not be held directly responsible under a Section 1983 suit.

### Focus Topic 5.1

**Sex Offender Reporting Laws and Complications With Mandatory Community Notification Initiatives**

In 2006, Congress passed the Adam Walsh Act as a means of revamping sex offender supervision. This law was named after a young boy in Florida who was abducted, sexually victimized, and later murdered and dismembered. The law was created and passed due to the efforts of Adam’s father, John Walsh, who is now the host of a television show called America’s Most Wanted. Other parents of children who had been sexually victimized and murdered were also involved in establishing this law. This act was established to accomplish the following:

1. Expand the National Sex Offender Registry: This act integrates information in state sex offender registry systems and ensures that law enforcement has access to the same information across the United States, helping to prevent sex offenders from evading detection by moving from state to state. Data drawn from this comprehensive registry is made available to the public (The White House, 2006).

2. Strengthen federal penalties for crimes against children: This act imposes tough mandatory minimum penalties for the most serious crimes against children. It also provides grants to states to help them institutionalize sex offenders who have shown they cannot change their behavior and are about to be released from prison (The White House, 2006).

3. Make it harder for sexual predators to contact children on the Internet: The act authorizes new regional Internet Crimes Against Children Taskforces that will help law enforcement officials combat crimes involving the sexual exploitation of minors on the Internet (The White House, 2006).

The Adam Walsh Act has substantially broadened the scope of sex offender reporting and has increased the penalties against sex offenders. This law divides sex offenders into three tiers. The first tier, Tier One sex offenders, is for the least serious of offenses and requires 15 years of registration.
Tier Two sex offenders include those guilty of offenses that are punishable by more than 1 year in prison and include serious abusive contact, coercion and enticement, transportation with intent to commit a sexual crime, or sex trafficking. Tier Two offenders must register for 25 years. Tier Three sex offenders are those that commit aggravated forms of sexual abuse or abusive contact with a minor under the age of 13 years. These offenders must register for life due to the harshness of their offenses and/or the age of their victims. The registry process does allow for reductions in time required if offenders have clean records for a specified amount of time.

Currently, the federal law requires adults and some juveniles convicted of specified crimes that involve sexual conduct to register with law enforcement agencies. These laws have typically been referred to as "Megan’s Laws" in the United States in tribute to a child victim, Megan Kanka, who was kidnapped, raped, and murdered. The crime against this child was committed by a repeat sex offender, and it drew national attention, eventually serving as the impetus behind these laws. The laws established public access to registry information, in most cases using online registries that provide a former offender’s criminal history, current photograph, current address, and other information such as place of employment. In many states, everyone who is required to register is included on the online registry. While these laws seem to make sense on the surface, there are some challenges that exist with their implementation.

Naturally, these registration laws are intended to prevent the possibility of additional crimes by these offenders, particularly sex-based crimes. However, the incidence of stranger-based sexual assaults on children by offenders who have had prior documented sex offenses is actually quite low. Thus, the use of these laws as prevention tools for future juvenile sex offenders is actually quite limited. In fact, most sexual crimes against children occur at the hands of family members or acquaintances. Indeed, the perpetrator is known to the child in over 90 percent of the sex crimes perpetrated against children (Human Rights Watch, 2008).

Further, these laws are based on the notion that most sex offenders will commit similar crimes in the future, if the opportunity should arise. However, regardless of the media hype and political agendas of persons advocating for these laws, nearly three quarters of all sex offenders do not commit another sex offense (Human Rights Watch, 2008). For juvenile sex offenders in particular, the likelihood for recidivism is even lower. In the United States, the rationale for the registry laws is often centered on concerns with violent sex offenders; however, the laws are so poorly written in some states that a vast number of offenses may be included within the required registry (Human Rights Watch, 2008). In some cases, the offenses included may be minor and not even truly related to an actual sex assault. As an example, in some states, kids that expose themselves as a prank and people who have urinated outside are required to be reported on the sex offender registry. Even more common in many states is the reporting of teens who have had consensual sex with one another, with one being perhaps 2 or 3 years older than the other. Consider the following example:

Brandon was a senior in high school when he met a 14-year-old girl on a church youth trip. With her parents’ blessing, they began to date, and openly saw each other romantically for almost a year. When it was disclosed that consensual sexual contact had occurred, her parents pressed charges against Brandon and he was convicted of sexual assault and placed on the sex offender registry in his state. As a result, Brandon was fired from his job. He will be on the registry and publicly branded as a sex offender for the rest of his life. (Human Rights Watch, 2008, p. 5)

These types of situations have occurred in numerous U.S. states and point toward the need to be more careful and thoughtful when implementing this type of legislation. This is especially true when considering the use of online registries that make the person’s status a public affair. Further, in many cases, the narration given on such websites does not explain the context of the offense, making it impossible for website visitors to distinguish between truly dangerous juvenile sex offenders and those who may have committed an offense like the example just presented. Given that these youth are required to register for years and sometimes even for their lifetime, this issue is very important to resolve. It would seem that while sex offender reporting laws placate the desires of the public, they are in fact mired in a number of issues that make their application somewhat complicated. In such situations, one has to wonder about the civil rights of offenders such as Brandon (in the example above) and whether future judicial outcomes might modify the ability of states to enforce such liberal forms of reporting.

THE USE OF OBJECTIVE INSTRUMENTS AS A SAFEGUARD FROM LIABILITY

As has become quite clear, parole board members are largely insulated from liability when performing their discretionary acts of release determination. So long as parole board members maintain a judicial function and these discretionary acts are within the purview of this function, no liability issue will likely emerge. Indeed, any community supervision official or agent, when performing judicially related functions, is likely to be given absolute immunity. This has, of course, been made clear throughout this chapter and is one of the reasons that probation officers enjoy such immunity when completing their PSI reports. Further, the use of discretion is authorized and legally protected for parole board members due to their responsibilities reflecting a judgment or judicial function.

The use of such discretion, however, is not equally protected for probation or parole officers and the agency supervisors that must make decisions regarding the enforcement of probation or parole conditions related to revocation. It is important to point out that individual probation or parole officers do not have to worry about potential liability issues related to decisions to release. The reason for this is simple: individual officers are not tasked with this responsibility. Rather, it is the court judge that will make such decisions regarding probation, and it is the parole board/committee or other such post-incarcerative releasing body that will be given this function. All of these individuals who have such discretionary powers are granted absolute immunity.

However, probation or parole officers may make another type of discretionary decision that addresses the offender’s likelihood to be supervised in the community. This occurs when officers must make discretionary decisions to revoke an offender’s probation or parole. Though this is not necessarily a decision that the individual officer will make alone, it still requires a degree of discretion that can perhaps open up the possibility of liability for the officer. Consider, for example, a situation where the offender commits a minor infraction and the probation officer (aware that the local jail is already overcrowded and also having a general idea of the probationer’s supervision ethic) decides to provide a warning and to strengthen some of the sanctioning restrictions on the offender. If this same offender should again commit some criminal act (regardless of whether it may be similar to the previous violation), this can place the supervision officer in a position where a lawsuit or at least questioning of his or her judgment may take place from members of the general public. For the most part, as we have noted, community supervision officers will be granted qualified immunity in these circumstances (presuming that they acted in good faith within the scope of their duty).

However, the officer making such recommendations may indeed be called to task and may be denied qualified immunity in some cases where the circumstances warrant it. Though this may be a moot issue in situations where revocation automatically requires that the offender be reincarcerated, offenders are often simply given stricter conditions for their current community supervision sentence. This can be an issue in some cases where qualified immunity is concerned. This is particularly true considering that qualified immunity is extended for those cases where a discretionary act (not a mandatory act based on agency policy) is at issue and where the officer must indicate sincere belief that his or her action was correct under the circumstances.

In these specific cases, officers would be well-served to base their discretionary decisions on the results of any objective assessment tools that are available. Because the officer will have no true policy, per se, to rely upon and because a sincere belief in the correctness of his or her action will be an issue, the use of such instruments, based on the findings of other assessment professionals, can substantially bolster the officer’s determination and can add a great degree of confidence to his or her decisions. Though this is a specialized set of circumstances and limited use of these instruments, it can make a considerable difference in those instances where qualified immunity may not be assured for the officer. This can also serve as a substantial

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area of consideration for juries and judges that must make decisions regarding liability should the officer find himself or herself in court. The use of objective assessment indicators (as students should recall from their readings in Chapter 3) can provide the officer with additional protection to shield him or her from being found liable. Further, knowledge of these assessment tools and their outcomes can provide additional ammunition when supervision officers seek to have certain modifications added or required for a particularly problematic offender under their supervision. Community supervision officers should strive to become fairly conversant in the use of these tools since this knowledge can bolster their decisions regarding offender community supervision revocation. Further, even if this knowledge does not prove necessary as a means of protection from liability, this knowledge helps to improve the day-to-day competence of the officer. This in itself is a laudable goal.

PROBATIONER AND PAROLEE CASE
LAW REGARDING DUE PROCESS DURING REVOCATION

Essentially, there are two primary cases that establish due process rights for probationers and parolees. The first case to emerge was *Morrissey v. Brewer* (1972), which dealt with revocation proceedings for parolees (Clear & Cole, 2003). The second case was *Gagnon v. Scarpelli* (1973), which extended the rights afforded to parolees under *Morrissey* to offenders on probation as well (Champion, 2002; Clear & Cole, 2003). Basically, the *Morrissey* Court ruled that parolees facing revocation must be given due process through a prompt informal inquiry before an impartial hearing officer. The Court required that this be accomplished through a two-step hearing process when revoking parole. The reason for this two-step process is to first screen for the reasonableness of holding the parolee, since there is often a substantial delay between the point of arrest and the revocation hearing. This delay can be costly for both the justice system and the offender if it is based on circumstances that do not actually warrant full revocation. Specifically, the Court stated that some minimal

[i]nquiry should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. . . . Such an inquiry should be seen as in the nature of a “preliminary hearing” to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. (*Morrissey v. Brewer*, 1972, p. 485)

The Court also noted that this would need to be conducted by a neutral and detached party (a hearing officer), though the hearing officer did not necessary need to be affiliated with the judiciary and this first step did not have to be formal in nature. The hearing officer is tasked with determining whether there is sufficient probable cause to justify the continued detention of the offender.

After the initial hearing, the revocation hearing would follow. It is interesting to note that the Court was quite specific on how the revocation hearings were to be conducted (del Carmen et al., 2001). During this hearing, the parolee is entitled to contest charges and demonstrate that he or she did not, in fact, violate any of the conditions of his or her parole. If it should turn out that the parolee did, in fact, violate the parole

Photo 5.3  This photo provides a view of a law library that has been created for inmates in a large regional jail. Many times when offenders sue state agencies, they may use resources such as the law library.
requirements but that this violation was necessary due to mitigating circumstances, it may end up that the violation does not warrant full revocation. The *Morrissey* court specified additional procedures for the revocation process that include the following:

(a) Written notice of the claimed violation of parole;

(b) Disclosure to the parolee of evidence against him;

(c) An opportunity to be heard in person and to present witnesses and documentary evidence;

(d) The right to confront and cross-examine adverse witnesses;

(e) A “neutral and detached” hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers; and


The *Morrissey* case is obviously an example of judicial activism (much like *Miranda v. Arizona*) that has greatly impacted the field of community corrections. The Court’s clear and specific guidelines set forth in *Morrissey* have created standards and procedures that community supervision agencies must follow. Rather than merely ensuring that revocation proceedings include a just hearing and means of processing, the Court laid out several pointed requirements that have continued to be relevant and binding to this day. While these specific requirements have been modified to meet a variety of circumstances that may not lend themselves to the strictest observance of the above procedures, the general spirit of the above requirements has been honored. For instance, there is a great deal of variation from state to state in how offenders are provided written notice of their violation, and, when notice is not able to be given because the offender cannot be located, failure to deliver notice does not result in a violation of the offender’s constitutional rights. Likewise, the right to confront witnesses can be foregone if the hearing officer specifically finds good cause for not allowing such confrontation. Thus, a sense of pragmatism has since developed in regard to the requirements established by *Morrissey*, with the general principles outlined by the Court still being considered the gold standard of revocation proceedings, even today.

The next pivotal case dealing with revocation proceedings and community supervision is *Gagnon v. Scarpelli* (1973). In the simplest of terms, the U.S. Supreme Court ruled that all of the requirements for parole revocation proceedings noted in *Morrissey* also applied to revocation proceedings dealing with probationers. However, this case is important because it also addressed one other key issue regarding revocation proceedings. In *Gagnon v. Scarpelli*, the Court noted that offenders on community supervision do not have an absolute constitutional right to appointed counsel during revocation proceedings. Such proceedings are not considered to be true adversarial proceedings and therefore do not require official legal representation (*Champion*, 2002). Nevertheless, the Court did note that some cases may warrant such representation when and if the offender can provide a substantive claim that shows he or she did not commit the violation in question or when mitigating circumstances are involved that may impact the decision of the revocation body. Thus, the Court basically held that there is no absolute right to counsel for offenders facing revocation proceedings. But, depending upon the circumstances, such representation may be offered on a case-by-case basis as determined by the circumstances.

It should be pointed out that there is a great deal of variation from state to state as to the specific standard of proof required to revoke parole. Some jurisdictions may require only slight evidence while others require a preponderance of the evidence. Likewise, the nature of the proof necessary for revocation may also vary.
Some states rely on the community supervision officer’s testimony as the sole or primary basis of revocation while others may not allow this to be sufficient without additional corroborating evidence of violation being produced by the officer. Nevertheless, del Carmen et al. (2001) note that community supervision officers should remain cognizant of the fact that their testimony or evidence may also be useful in court as later rebuttal evidence, for the purpose of impeachment, or to demonstrate the offender’s state of mind. Further, if a community supervision officer does not have personal knowledge of a given act that might lead to revocation, it is unlikely that the officer’s testimony will be sufficient to demonstrate the commission of a violation. But prior arrests, prior criminal history, risk-prediction instruments, or clinical assessments (related to relapse) can be used to prove the likelihood of the community supervision officer’s testimony. Thus, here again objective assessment or risk-prediction data may prove useful in adding validity to an officer’s testimony when supervising a probationer.

**Cross-National Perspective**

**Extracts of the European Rules on Community Sanctions and Measures**

The following excerpt is taken from the *Handbook for Probation Services: Guidelines for Probation Practitioners and Managers*, published by the United Nations Interregional Crime and Justice Research Institute. This document provides guidelines on probation for various nations throughout the European Union. The content of this particular Cross-National Perspective consists of several rules and guidelines that are enumerated and mandated for probation agencies across the entire continent of Europe.

**Legislative Framework**

**Rule 20** There shall be no discrimination in the imposition and implementation of community sanctions and measures on grounds of race, colour, ethnic origin, nationality, gender, language, religion, political or other opinion, economic, social or other status, or physical or mental condition.

**Rule 21** No community sanction or measure restricting the civil and political rights of an offender shall be created or imposed if it is contrary to the norms accepted by the international community concerning human rights and fundamental freedoms. These rights shall not be restricted in the implementation of the community sanction or measure to a greater extent than necessarily follows from the decision imposing this sanction or measure.

**Rule 22** The nature of all community sanctions and measures and the manner of their implementation shall be in line with any internationally guaranteed human rights of the offender.

**Rule 23** The nature, content and methods of implementation of community sanctions and measures shall not jeopardise the privacy or the dignity of the offenders or their families, nor lead to their harassment. Nor shall self-respect, family relationships, links with the community and ability to function in society be jeopardised. Safeguards shall be adopted to protect the offender from insult and improper curiosity or publicity.

**Rule 24** Any instruction of the implementing authority, including in particular, those relating to control requirements shall be practical, precise and limited to what is necessary for the effective implementation of the sanction or measure.

**Rule 25** A community sanction or measure shall never involve medical or psychological treatment or procedures which are not in conformity with internationally adopted ethical standards.

**Rule 26** The nature, content and methods of implementation of a community sanction shall not involve undue risk of physical or mental injury.

**Rule 27** Community sanctions and measures shall be implemented in a way that does not aggravate their afflictive character.

**Rule 28** Rights to benefits in any existing social security system shall not be limited by the imposition or implementation of a community sanction or measure.

(Continued)
Legal Framework

Rule 30 The imposition of community sanctions and measures shall seek to develop an offender’s sense of responsibility to the community in general and the victim in particular.

Rule 31 A community sanction or measure shall only be imposed when it is known what conditions or obligations might be appropriate and whether the offender is prepared to co-operate and comply with them.

Rule 32 Any conditions to be observed by the offender subject to a community sanction or measure shall be determined taking into account both his individual needs of relevance for implementation, his possibilities and rights as well as his social responsibilities.

Rule 33 Notwithstanding the issue of the formal document conveying the decision on the community sanction or measure imposed, the offender shall be clearly informed before the start of the implementation in a language he understands and, if necessary, in writing, about the nature and purpose of the sanction or measure and the conditions or obligations that must be respected.

Rule 34 Since the implementation of a community sanction or measure shall be designed to secure the co-operation of the offender and enable him to see the sanction as a just and reasonable reaction to the offence committed, the offender should participate, as far as possible, in decision-making on matters of implementation.

Rule 35 The consent of an accused person should be obtained before the imposition of any community measure to be applied before trial or instead of a decision on a sanction.

Rule 36 Where the offender’s consent is required it shall be informed and explicit. Such consent shall never have the consequence of depriving the offender of any of his fundamental rights.

Community Service Orders

Rule 66 The kind and amount of information about offenders given to agencies which provide work placements or personal and social assistance of any kind shall be defined by, and be restricted to, the purpose of the particular action under consideration. In particular, without the explicit and informed consent of the offender, it shall exclude information about the offence and his personal background, as well as any other information likely to have unfavourable social consequences or to constitute an intrusion into private life.

Rule 67 Tasks provided for offenders doing community work shall not be pointless, but shall be socially useful and meaningful and enhance the offender’s skills as much as possible. Community work shall not be undertaken for the purpose of making profit for any enterprise.

Rule 68 Working and occupational conditions of offenders carrying out community work shall be in accordance with all current health and safety legislation. Offenders shall be insured against accident, injury and public liability arising as a result of implementation.

Rule 69 In principle, the costs of implementation shall not be borne by the offender.

Professional Staff

Rule 37 There shall be no discrimination in the recruitment, selection and promotion of professional staff on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status. Staff recruitment and selection should take into account specific policies on behalf of particular categories of persons and the diversity of offenders to be supervised.

Rule 38 The staff responsible for implementation shall be sufficiently numerous to carry out effectively the various duties incumbent upon them. They shall possess the qualities of character and the professional qualifications necessary for their functions. Norms and policies shall be developed to ensure that the quantity and quality of staff are in conformity with the amount of work and the professional skills and experience required for their work.

Rule 39 The staff responsible for implementation shall have adequate training and be given information that will enable them to have a realistic perception of their particular field of activity, their practical duties and the ethical requirements of their work. Their professional competence shall be regularly reinforced and developed through further training and performance reviews and appraisals.

Rule 40 Professional staff shall be appointed on such a legal, financial and working-hours basis, that professional and
personal continuity is ensured, that the employees’ awareness of official responsibility will be developed and that their status in relation to conditions of service is equal to that of other professional staff with comparable functions.

**Rule 41** Professional staff shall be accountable to the implementing authority set up by law. This authority shall determine the duties, rights and responsibilities of its staff and shall arrange for the supervision of such staff and assessment of the effectiveness of their work.

Note that this excerpt is a reprint of information from the source document below. This source document may be freely reprinted provided the source is acknowledged.

**Critical Thinking Questions**

1. Consider the rules listed above. How are the guidelines and expectations similar to those for agencies in the United States? How are they different? Be sure to explain your answers.

2. From reading the international rules for the implementation of probation in Europe, what do you believe is the philosophical intent behind them?

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**Applied Theory**  
**Labeling Theory and Legal Issues/Liabilities**

Lilly, Cullen, and Ball (2007) point out that it is the social reactions of the public and of state officials toward offenders that have the greatest causal effect on an offender’s further recidivism. This means that when labeling is severe enough, it can entrench persons in their criminal identity. This can especially be true for serious offenders such as sex offenders, who are given a stigma-producing label that follows them throughout society. If such labeling processes do indeed entrench these offenders in a life of criminal behavior, then the labeling process is counterproductive. However, if the labeling process is grounded in therapeutic intent, this is similar to the notions espoused by John Braithwaite in his classic work entitled *Crime, Shame, and Reintegration* (1989).

In this work, Braithwaite emphasizes that offenders must be given stakes in conformity, for otherwise they are shut off from the community and are further encouraged to maintain their association with deviant criminal subcultures. This is precisely what community corrections seeks to avoid.

As will be noted later in this chapter, *Kansas v. Hendricks* (1997) determined that extended forms of punishment are constitutional so long as their basis is in treatment. The ruling in *Kansas v. Hendricks* would also include additional terms and conditions of community corrections sentencing, such as those which shame the offender: for example, the use of sex offender registration, requiring notification signs in the offender’s front yard, or perhaps the use of special license plates that identify cars owned by sex offenders. The use of various reintegrative shaming techniques, as proposed by Braithwaite, comports perfectly with the decision made by the Supreme Court in its ruling in *Kansas v. Hendricks*. However, the question then centers on whether these additional conditions of probation or parole are grounded in therapeutic intentions.

Essentially, this again demonstrates that aside from legal considerations, the general point and purpose to corrections (including community corrections) is the reintegration of offenders. Legal liabilities are important for practitioners in the field, and that is why they are covered in this text. However, these liabilities usually exist to facilitate one of two different goals: to safeguard the constitutional rights of offenders, or to ensure public safety. Indeed, when examining most liabilities that safeguard the offender’s rights, an argument can be made that the reintegrative process would be moot without these protections. Liabilities for staff are meant to encourage a certain standard of behavior and accountability among community correctional personnel. Such standards improve the possibility of offenders desisting from crime, providing clear boundaries and expectations for those being supervised as well as those who do the supervising.

LEGAL ISSUES WITH COURT SHAMING
AND THE USE OF POLYGRAPH EXAMINATIONS

This last section seeks to examine some of the offender rights or agency liability issues associated with two specific practices used in community supervision—the use of offender shaming and the use of polygraph examinations. Regarding the use of both of these supervision techniques or conditions, a specific appeal to public safety and to reintegration can be made, though this may not be readily apparent to the student or layperson. This section is provided to demonstrate how these two competing interests (public safety and offender reintegration) can actually work hand-in-hand to justify the use of techniques that might, on the face of it, seem purely punitive. In addition, it is important to understand that these approaches have been validated by the courts as being legally permissible and constitutionally sound.

Consistent with ideas presented in Braithwaite's (1989) work entitled Crime, Shame, and Reintegration, the use of shaming techniques with offenders has been thought to shame the offender into behavioral change while also notifying the community of the offender’s particular propensity. Many of these public notification laws are implemented with various sex offenders or other violent types of offenders, and they are intended to enhance community safety. In addition, these techniques improve the likelihood that the offender will be more closely watched by the community, thereby deterring the offender from further criminal behavior and (hopefully) reducing the risk of relapse or recidivism. Thus, many jurisdictions contend that the use of shaming techniques further rehabilitation/reintegration goals of community supervision by “deterring the offender from committing future crimes of the same nature as the one for which he or she was convicted” (del Carmen et al., 2001). While most lower courts have held that the use of shaming techniques does not violate the 8th Amendment’s restriction against cruel and unusual punishments, this issue has not been ruled upon by the U.S. Supreme Court.

However, it is likely that these types of programs will, if ever examined by the High Court, be found constitutional, particularly if agencies maintain that these conditions of supervision are implemented for a treatment-related function rather than a punitive one. Indeed, the 8th Amendment prohibits cruel and unusual punishment, but it does not prohibit unusual therapeutic modalities (or even cruel therapeutic modalities, for that matter). In fact, the 8th Amendment does not (and cannot) speak to matters of treatment interventions because these are presumed to be benevolent functions that are contrary to punitive techniques. Though this may seem to be a fine-line technicality, it actually has relevant Supreme Court precedence in the case of Kansas v. Hendricks (1997), where the Court ruled that it was indeed constitutional to civilly commit a sexual predator beyond his sentence of incarceration. The rationale for this was that the civil commitment was to allow the offender additional rehabilitative services, and to protect society until the offender was cured of his mental abnormalities. The civil commitment was therefore considered a benevolent form of detention that was not construed as having a punitive element. Because of this, the 8th Amendment simply did not apply to this case.

The use of shaming conditions of parole can have a similar purpose. It is clear that the common connection between the two circumstances (the use of shaming techniques with a community supervision sentence and civil commitment of offenders beyond their sentence) is that there is both a treatment-related justification on the one hand, and a concern for public safety on the other. This common connection is important because it demonstrates a legal thread that has been a theme throughout previous chapters: the role of community corrections is geared toward both reintegration of the offender and the protection of the public.

This same line of thought has been used to legitimize the use of polygraphs (lie detectors) when supervising sex offenders. For the most part, state courts have held that either one or all of the following reasons are sufficient to justify continued use under the U.S. Constitution: (1) the instrument is used to
augment treatment processes, (2) such tests are used as tools to ensure offender compliance with supervision requirements, and/or (3) the tool is used to detect the commission of additional crimes (de Carmen et al., 2001). While there is no clear or complete consensus on each of these purposes from state to state, Hanser (2007b) notes that the use of these tools is both beneficial and necessary to ensure that treatment programs with repeat sex offenders are successful. The use of such leverage, while appearing to be grounded in punishment, is actually an effective way to monitor accountability and to circumvent potential relapse. Thus, it is the contention of this text that these instruments serve a therapeutic purpose and that they are therefore constitutionally valid.

**CONCLUSION**

As shown in this chapter, concerns with liability can be quite complicated. The types of suits that can be brought forward, both state and federal (as well as those that are either tort or civil rights based) provide avenues of redress that have numerous similarities and differences, each being suited to different circumstances that offenders may wish to bring forward. Understanding these types of suits, and the grounds upon which they may be filed, is important for all practitioners within the field of community supervision. Community supervision officers do enjoy some degree of immunity to lawsuits that may be brought forward, but this form of immunity tends not to be as certain as the absolute immunity that is afforded to judges or parole boards. The only exception to this is when community supervision officers are tasked with the completion of a PSI, in which case community supervision officers enjoy the same absolute immunity given to judges and parole board members. Because of this, it is important that community supervision officers understand issues related to liability and that they understand the parameters associated with their qualified immunity protection.

In addition, the public duty doctrine of tort law shields most all community supervision personnel from liability for recidivate acts that probationers or parolees may commit. All in all, it is clear that such actions are beyond the control of parole boards, judges, and community supervision officers. In fact, it would seem that community supervision agencies exercise a level of care for public safety that exceeds the minimal level typically required by precedent or federal law. While offenders on community supervision do have some rights that must be honored before their probation or parole may be revoked, the risk of liability for most community supervision officers that make mistakes during revocation proceedings is likely to be slight. Last of all, it has been seen that various added conditions of a community supervision sentence, such as shaming techniques or the use of polygraphs, have not been found to be unconstitutional. In fact, so long as agencies emphasize the therapeutic (rather than punitive) value of these added conditions, it is likely that these various added sanctions will survive any legal question that may arise in the future.

**Key Terms**

- Absolute immunity
- Compensatory damages
- Declaratory judgment
- Defamation
- Good faith defense
- Gross negligence
- Injunction
- Intentional tort
- Invasion of privacy
- Malicious prosecution
- Misrepresentation of facts
- Negligence
- Punitive damages
- Qualified immunity
- Slight negligence
- Tort
- Willful negligence
Jimmy Ray had been in a relationship with Jenny Kay for nearly 5 years. Both persons had chronic problems with alcoholism and led a very rough-and-tumble lifestyle. The two lived together but had not made plans to marry. Both had kids from other marriages, and Jimmy paid an exorbitant amount in child support. Jenny’s kids sometimes lived with their father and sometimes stayed with her, but usually the father kept them throughout the years because Jenny was usually either too drunk or too hungover to take care of them.

Jimmy worked construction and Jenny worked at a local diner. Aside from going to work, the two would drink a variety of beer, whiskey, and tequila beverages any time they had the chance. Both engaged in rough “play” from time to time and were seen sometimes “gently hitting” each other. One night, things got very rough and they had engaged in mutual batteries of each other’s person. However, Jenny ended up the worst off and spent the night in the hospital. Jimmy Ray spent the night in jail.

After getting out of jail, Jenny would not talk to Jimmy at first. Then she became angry with him. She began seeing another man, Bobby Dean, who told Jimmy that he would beat Jimmy to a pulp if he caught him talking to Jenny ever again.

Soon after getting out of jail, Jimmy was placed on probation. He was classified as a domestic abuser and was sentenced to 3 years of probation and community service at a local thrift shop that generated money for battered women, and he was required to attend group therapy for alcoholics twice a week as a condition of his probation.

When Jimmy found out about his community service assignment, he explained his concerns about the particular place of business. The thrift shop was one that Jenny routinely shopped at, sometimes to buy clothes for her kids (when they were with her) and sometimes just for leisure. Jimmy explained that he did not want to have inadvertent contact with Jenny and asked if he could do his community service at another location.

The probation officer, Officer Hardy, told Jimmy, “Look, she can go wherever she wants to go to shop,” and while pointing at Jimmy, he said, “There are people all around and she will not do anything. You just mind your own business and it will be fine.”

The probation officer added, “I think that you just do not want to do the community service at a ladies’ thrift store and that you are still upset about this domestic abuse case sticking to you,” and while looking into Jimmy’s eyes, Officer Hardy said, “That’s it, isn’t it? You’re too proud to do community service over there, huh?”

Jimmy explained that he was not worried so much about Jenny, but that her new boyfriend, Bobby Dean, was a really rough man and that Bobby would most likely antagonize Jimmy. In fact, he noted that Bobby would probably try to pick a fight with Jimmy and humiliate him at the thrift store.

Officer Hardy responded by saying, “Well, we can cross that bridge if we even get to it. Besides, you should have thought about this kind of stuff before you went drinking and beating on women.”

Two weeks later, Jimmy was working at the thrift store and by all accounts had been doing an adequate job. However, Jenny stopped in and on the first day said nothing. On the following day, she went in, saw Jimmy, and tried to talk with him. Jimmy told her to quit being a tease, and he went to another area of the store. Jenny got mad at his remark and left. Two witnesses, employees of the thrift store, observed the incident. After about 30 minutes, Jenny arrived back in the store with Bobby Dean. Bobby verbally assaulted Jimmy and, without any hesitation, punched Jimmy in the face. Bobby and Jimmy then got into an altercation that ended with Jimmy being taken to the hospital.

Police arrived at the scene and, based on witness testimony, arrested Bobby Dean. Jenny Kay was nowhere to be found at the time the police arrived. Jimmy was taken to the hospital and treated for moderate injuries. The police called Jimmy’s probation officer and notified him of the circumstances. The police decided not to press charges against Jimmy and did not issue him a citation because the employees of the thrift store made it clear that he was simply trying to not get beaten any worse than had already happened. In fact, the employees were now afraid to have Jenny come to the store in the future since she had brought this upon everyone.

Jimmy did not have medical insurance and was now stuck with an expensive medical bill. He also could not
work for a couple of days and lost some pay. The doctor’s information validated the extent of his injuries.

Jimmy went to a lawyer and filed suit against Officer Hardy for gross negligence and also filed a Section 1983 suit citing violation of his 8th and 14th Amendment rights.

Instructor: Note that this assignment is perfectly suited for a group activity. Students can be divided into groups and can discuss the case, providing their input and voting among themselves before providing you with their final answer.

Students: You are on the jury as Officer Hardy faces a federal suit filed by Jimmy and his attorney. Explain if Officer Hardy is actually liable and in doing so, identify the specific legal criteria that justify your determination.

What would you do?

Applied Exercise

Consider the public duty doctrine and the fact that release decision-making bodies (i.e., judges and parole boards) are not usually held legally liable for their decisions when releasing or supervising offenders in the community. In addition, consider the various constitutional rights afforded offenders through cases such as Morrissey v. Brewer and Gagnon v. Scarpelli (due process protections), United States v. Irving (equal protection), and Martinez v. California (test of the public duty doctrine under Section 1983). In addition, consider the various types of intentional and negligence-based torts that exist to protect the offender from personal damages inflicted by supervision officers or other community corrections personnel.

From the fact that community corrections personnel are not typically liable to the public (as put forth in the public duty doctrine) and given that community corrections personnel can be held liable if they violate the offender’s civil rights, rights to due process, or rights to privacy through the security of presentence investigation data, or if they commit a personal injury against the offender (i.e., they violate tort law), determine whether the current system is more in favor of offender rights or public safety. In making your argument, be sure to identify how these legal mechanisms are useful in implementing a reintegrative approach to community supervision processes. Likewise, explain how public safety may (or may not) be compromised in the current system. Students should complete this application exercise as a mini paper that is submitted to the instructor. Total word count: 1,200 to 2,000 words.