Legal Construction of Litigation Threat in a Correctional Organization:
A Case Study of *Sarnicola v. County of Westchester*

By Patrick Troy
Prisons and Prison Reform Seminar
Washington University School of Law
December 4, 2004

In 2001, inmates in the United States filed 22,206 lawsuits in federal district court alleging violations of their civil rights.[1] Most often the civil rights violations complained about in these lawsuits fall within one of the following four categories: assaults (either by another inmate or a corrections officer), inadequate medical care, due process violations relating to disciplinary procedures, and general living conditions within the corrections facility.[2] In most cases, the outcome of these lawsuits is not very favorable for the complaining inmate and the correctional facility need not worry about anything more than the hassle of filing a response.[3] Suits that are not resolved pre-trial in favor of the defendant generally end up being settled or proceeding to trial.[4] Between settlements and jury awards at trial, inmate plaintiffs end up winning some type of award somewhere in the range of eight to fifteen percent of the time.[5] In addition to monetary payouts, correctional facilities are often subject to court orders and injunctions mandating that they resolve whatever issue it was that originally inspired the lawsuit so as to be in compliance with the law.

---

[1] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 (2003) [hereinafter Schlanger, *Inmate Litigation*].
[2] *Id.* at 1571.
[3] *Id.* at 1594. (Stating that "eighty percent or more" of inmate civil rights cases are resolved in favor of the defendants before any trial takes place. In many cases, these pretrial resolutions occur "on the judge's own initiative, without any motions by defendants.").
[4] *Id.* at 1595-96. Approximately half of all inmate civil rights cases that are not resolved pre-trial settle. A small percentage of suits are voluntarily withdrawn. The remaining cases move forward to trial.
[5] *Id.* at 1596.

If nothing else, these facts indicate the degree of litigiousness that surrounds the daily operation of correctional institutions across the country. In fact, in 2001 for every 1000 inmates being detained in a correctional facility, 11.4 federal civil rights lawsuits were filed.[6] With nearly two million inmates in jail or prison on any given day in the

[6] *Id.* at 1583.

United States[7], this figure is not insignificant. To counter this very real legal threat, correctional institutions must have a strong legal infrastructure to anticipate and counteract potential legal liabilities, evaluate and deal with current lawsuits, and ensure compliance with court directives and the law.

For all of these reasons, the individual – or individuals – charged with handing the myriad legal responsibilities that arise in a correctional institution play a very important role. Simply put, their value to the organization cannot be understated. It seems obvious that lawyers must be responsible for much of the legal analysis in these situations. However, it is important to recognize and understand the impact of other individuals within the organization in ensuring legal compliance. Prison and jail administrators, training officials, and corrections officers all play a vital role in identifying and minimizing legal liability.

Communication between a correctional facility's lawyer and the institution's non-attorney personnel is a key component of minimizing legal risk. While training officials and corrections officers must, on a daily basis, identify potential legal issues and implement suggested solutions, it is up to the attorney to determine what the law is and how it must be followed. Effective and open lines of communication among all parties help minimize the risk. The issue of legal communication in a corrections context is interesting, therefore, because of the important role it plays in minimizing legal liability for the institution as a whole.

Inherent in any situation where communication among parties is of primary importance, is the potential for miscommunication. Parties offering information can embellish, distort, or overstate the importance of what they are saying. Likewise,

[7] *Id.* at 1557.

individuals receiving this information can misunderstand, misinterpret, or ignore what they are being told. Addressing the potential for individuals whose duty it is to communicate legal information to other personnel within an organization, academics like Lauren B. Edelman,[8] have coined the phrase "legal construction."[9]

The legal construction theory is premised upon the idea that legal systems do not have established means to disseminate information about the law to the masses.[10] Edelman notes that statutes and judicial decisions are published in bound volumes not usually – or easily – accessed by non-attorneys. Similarly, news of jury verdicts and settlement agreements are only sporadically reported.[11] As a result of this deficiency, specific individuals within an organization are often designated "legal communicators" whose responsibility it is to keep other employees abreast of changes and developments in the law while also ensuring legal compliance.[12]

Given so much discretion and leeway to convey information as they see fit, legal communicators have considerable opportunity to engage in the "construction" of the law that best serves their personal needs and the needs of the organization in which they work.[13] As information filters from their office to the rest of the organization, legal communicators have the capability to "construct not only the meaning of the law but also the magnitude of the threat posed by law and the litigiousness of the legal environment."[14] In some cases, a legal communicator's distortion of the law is

---

[8] Professor of Law and Sociology, University of California – Berkeley School of Law.
[9] *See, e.g.,* Lauren B. Edelman, Stephen E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47 (1992) [hereinafter Edelman et al., *Professional Construction*].
[10] *Id.* at 47.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 49.

intentional, while in other instances it is an innocent byproduct of the environment in which both the organization and the legal communicator sit.

This paper focuses on issues of legal construction in the context of a correctional organization. Specifically, through an examination of *Sarnicola v. County of Westchester*,[15] I assess the factors that initially allow for legal construction to occur, as well as the environmental conditions that govern how accurately legal communicators convey issues of law to other personnel within correctional facilities. Hence, for purposes of this paper, the organization is comprised of the Westchester County Department of Corrections, Westchester County Department of Public Safety, and Westchester County Attorney's office. The legal communicator within this organization is the lawyer representative from the Westchester County Attorney's office.[16]

I do not purport to make any definitive statements regarding the role of legal communicators in correctional facilities around the country. Instead, I draw general conclusions about the propensity of legal communicators in correctional organizations to accurately portray the law to non-attorney personnel, namely corrections officers. I make these conclusions while focusing on a single case and dealing with a specific issue of law, i.e. the constitutionality of strip-searching pre-trial detainees incident to booking into jail.

In Part I, I offer a general background to the *Sarnicola* litigation, providing factual details of the incident that lead to the plaintiff's arrest and subsequent strip-search as well as details of the judicial disposition of the case. I focus on the development of

[15] 229 F. Supp. 2d 259 (S.D.N.Y. 2002).
[16] Jane Hogan Felix, Westchester County Attorney.

strip-search law into well-settled legal doctrine.[17] I note previous strip-search cases[18] decided by the *Sarnicola* court and analyze their impact on the *Sarnicola* litigation. In Part II, I evaluate Westchester County's organizational response to the *Sarnicola* decision. In Part III, I critique the performance of County Attorney Jane Hogan Felix as legal communicator to the Department of Corrections. In this part, I pay particular attention to the impact of communicating the law in a corrections environment and the importance of county attorneys to their larger organization. In Part IV, I analyze the pressures that county attorneys face in trying to shield the County and its employees from legal liability. I concentrate on the importance of understanding the legal environment in which an organization operates and I support this suggestion with a specific analysis of the litigation threat in Westchester County. Part V offers my general conclusions.

Eventually, I finish my analysis with the understanding that legal communicators play a vital role in any organization that is subject to the ongoing threat of litigation. The very nature of corrections facilities as a magnet for litigation only emphasizes the importance of legal communicators within jail and prison organizations. In the corrections setting, I conclude, the role of legal communicators is fundamentally more conflicted than it is in the corporate human resources context that has previously been the subject of academic discussion.[19] Faced with the competing interests of minimizing municipal liability on the one hand and allowing corrections personnel the freedom to

---

[17] *A Searching Look at Searches, in* 13 CORRECTIONAL LAW REPORTER 1, 3 (June/July 2001) [hereinafter *A Searching Look*]. Only the Third and District of Columbia Circuits have not explicitly addressed the constitutionality of strip searches incident to arrestees booking into jail.

[18] *Murcia v. County of Orange*, 226 F.Supp. 2d 489 (S.D.N.Y. 2002); *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002).

[19] Lauren B. Edelman, Stephen Patterson, Elizabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 L. & POL'Y 73 (1991) [hereinafter Edelman et al., *Legal Ambiguity*].

manage their facility as they see fit on the other, I find that legal communicators within corrections organize must operate under a constant system of compromise. While this conclusion is, of course, only an assessment of the Westchester County corrections organization, I posit that some aspects of my analysis are equally applicable to the larger spectrum of correctional facilities.

I. The Sarnicola Litigation

On April 26, 2001, Nicole Sarnicola was arrested as part of an undercover "buy and bust" drug operation in Tarrytown, NY.[20] At the time of her arrest, Sarnicola was accompanied by her boyfriend and two other acquaintances. Narcotics officers had arranged to meet Sarnicola's acquaintance, Gabriel C-K, in order to purchase 5000 ecstasy pills.[21] Although the officers had planned only to meet C-K on this occasion, they believed that Sarnicola and/or the other two individuals in her car were C-K's drug supplier.[22] Following the drug transaction, all four individuals were taken into custody and transferred to the Westchester County Department of Public Safety Headquarters.[23]

Upon her arrival at the Headquarters, Sgt. Thomas McGurn ordered that Sarnicola be immediately strip-searched.[24] A female officer led Sarnicola to a secluded area and conducted the search.[25] Sarnicola was required to remove each item of her clothing and hand it to the officer for inspection. When she had completely disrobed, Sarnicola was

[20] *Sarnicola*, 229 F. Supp. 2d 259, 261.
[21] *Id.* at 261-262. The April 26 "buy and bust" operation was the culmination of a several week investigation involving C-K. On three prior occasions, C-K, acting alone, sold large quantities of ecstasy pills to undercover police officers. C-K drove to the transaction site in one car. Sarnicola, her boyfriend, and the other acquaintance drove to the site in a separate vehicle.
[22] *Id.* at 262. It is, apparently, not uncommon for drug suppliers to accompany their dealers to the site of large-scale drug transaction in order to guarantee receipt of their share of the proceeds.
[23] *Id.* at 264.
[24] *Id.*
[25] *Id.*

asked to turn around and bend over enabling the officer to inspect her anal area. At no point did the officer make any physical contact with Sarnicola.[26] No weapons or contraband were found. Following the search, Sarnicola was briefly questioned by detectives and subsequently detained in a room with one other officer for several hours. After consultation with the District Attorney's Office, police officers informed Sarnicola that she was free to leave. No charges were ever filed against her.[27]

On July 5, 2001, Sarnicola filed suit in federal court alleging, in pertinent part, that she was falsely arrested and subject to an unconstitutional strip search in violation of her Fourth Amendment rights.[28] Sarnicola further alleged that Westchester County's strip search policy was, prima facie, unconstitutional.[29] Westchester County's policy with respect to strip searches states:

> Members of the department shall limit strip searches of defendants to the following situations:
>
> A. When the circumstances surrounding the crime committed are such that the arresting officer has reasonable suspicion to believe that the arrestee is concealing a weapon or other contraband.
>
> B. When the arresting officer can substantiate the search based upon reasonable suspicion, which is relative to the crime charged, the particular characteristics of the arrestee and/or the circumstances of the arrest.
>
> NOTE: Reasonable suspicion is not the same as reasonable or probable cause. It is something less than probable cause but more than a mere guess. In this case, the suspicion must be that the arrestee is concealing weapons and/or other contraband.
>
> C. The arresting officer shall discuss the justification for the search with a superior officer and in doing so, state the facts that exist that lead the officer to

---

[26] *Id.*
[27] *Id.*
[28] *Id.* at 260-261. Sarnicola also alleged that she was unnecessarily and excessively detained in violation of the Fourth Amendment. This claim was dismissed on summary judgment. *Id.* at 276.
[29] *Id.*at 261.

believe that a strip or body cavity search of the defendant is necessary. The superior officer shall then either authorize or disallow the strip or cavity search.

D. Every strip/cavity search shall be documented in a written report which will be made a permanent part of the arrest records.[30]

On cross-motions for summary judgment, the court held that there was probable cause[31] to arrest Sarnicola. Noting her affirmative behavior in driving the drug supplier to the transaction site, as well as her conversation with C-K immediately preceding the sale, the court found that Sarnicola was not just physically proximate to the real criminals.[32] There was probable cause, therefore, for Sarnicola's arrest.[33]

The court addressed Sarnicola's strip search claim in much greater detail. After general discussion of Fourth Amendment[34] jurisprudence, the court analyzed Second Circuit precedent on the constitutional issue of strip searching criminal suspects. Since the mid-1980's it has been well settled law in the Second Circuit that blanket strip search policies are unconstitutional. First addressed in *Weber v. Dell,*[35] courts have repeatedly held that strip searches are unlawful unless reasonable suspicion exists that the arrestee is concealing weapons or other contraband.[36] Reasonable suspicion is based upon an

---

[30] Westchester County Department of Public Safety General Order No. 42.05. The policy was made effective on January 1, 1992.

[31] *United States v. Patrick*, 899 F.2d 169, 171 (2d Cir. 1990) ("Probable cause to arrest a person exists if the law enforcement official, on the basis of the totality of the circumstances, has sufficient knowledge or reasonably trustworthy information to justify a person of reasonable caution in believing that an offense has been or is being committed by the person to be arrested.").

[32] *Sarnicola*, 229 F.Supp. 2d 259, 265-267. Sarnicola's boyfriend was later convicted of supplying drugs to C-K. Telephone Interview with James I. Meyerson, Plaintiff's Attorney (Oct. 20, 2004) [hereinafter Meyerson Interview (Oct. 20, 2004)].

[33] *Id.* at 268.

[34] U.S. CONST. amend. IV ("The right of people to be secure in their persons…against unreasonable searches…shall not be violated…").

[35] 804 F.2d 796 (2d Cir. 1986)

[36] *See Kaufman v. Rivera*, 1999 U.S. App. LEXIS 6259 (2d Cir. 1999); *Varrone v. Bilotti*, 123 F.3d 75 (2d Cir. 1997).

officer's evaluation of "the crime charged, particular characteristics of the arrestee, and/or circumstances of the arrest."[37]

In cases where suspects are arrested for minor infractions such as misdemeanors or violations, the Second Circuit holds that officers must possess an individualized reasonable suspicion that the suspect is secreting weapons or contraband before a strip search is permissible.[38] The court indicated that several factors can lead an officer to develop this individualized reasonable suspicion including "excessive nervousness, unusual conduct, an informant's tip, information showing pertinent criminal propensities, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, discovery of incriminating matter during less intrusive searches, and evasive or contradictory answers to questions."[39]

Acknowledging that the Second Circuit has not expressly required that officers possess an individualized reasonable suspicion before strip searching a felony arrestee, the district court reasoned that presumptions of a felon being more dangerous than a misdemeanant are untenable.[40] In emphasizing this point, the court noted that in the months prior to *Sarnicola*, it had twice declared unconstitutional municipal policies permitting detainees to be strip searched simply because they had been arrested for a felony.[41] Both cases arose out of strip search policies at the Orange County Correctional Facility in Newburgh, NY.

---

[37] *Sarnicola*, 229 F. Supp. 2d 259, 269 (*quoting Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986)).
[38] *Id.* at 269-270 (*citing Shain v. Ellison,* 273 F.3d 56 (2d Cir. 2001)).
[39] *Id.* at 271 (*quoting United States v. Asbury*, 586 F.2d 973, 976-977 (2d Cir. 1978)).
[40] *Sarnicola,* 229 F. Supp. 2d at 270 (*citing Tennessee v. Garner*, 471 U.S. 1, 14 (1985).
[41] *Murcia v. County of Orange*, 226 F.Supp. 2d 489 (S.D.N.Y. 2002); *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002).

In *Dodge v. County of Orange*, Captain Joseph Ryan of the Orange County Sheriff's Office drafted a strip-search policy stating, in relevant part, "A strip search may be conducted under the following circumstances: weapons or narcotics offenses, committed for a felony."[42] Ryan testified that this policy was purposely designed to eliminate officer discretion and establish bright line rules for when strip-searches were appropriate.[43] Noting that the elimination of officer discretion blatantly violates *Weber's* requirement of individualized suspicion, the court granted a preliminary injunction preventing Orange County from continuing to follow this policy.[44] The court specifically suggested that strip-searching all felony arrestees was unconstitutional.[45]

Similarly, in *Murcia v. County of Orange* the court again struck down Orange County's strip-search policy, relying on the same rationale that blanket strip-search policies as applied to felony arrestees are unconstitutional.[46] Central to the court's reasoning was its belief that simply being arrested on a felony charge does not, in and of itself, provide compelling evidence that a suspect is concealing weapons or other contraband.[47] Without concrete proof that felony arrestees are inherently more likely to smuggle weapons and contraband into correctional facilities, the court held that a policy whereby these arrestees are systematically strip-searched procedures cannot be supported.[48] Because Orange County did not provide any such evidence of an increased

---

[42] *Dodge*, 209 F.R.D. 65, 67.
[43] *Id.* at 73.
[44] *Id.* at 72.
[45] *Id.* at 73. ("[I]t is possible that automatically strip searching everyone arrested for a felony, without having independent reasonable suspicion to believe that he is secreting contraband, is unconstitutional.").
[46] *Murcia*, 226 F.Supp. 2d 489, 494-495.
[47] *Id.* at 495 (*citing Kennedy v. Los Angeles Police Dep't.*, 901 F.2d 702 (9th Cir. 1990) "The Kennedy Court found that a felony arrest did not alter the level of cause required to justify a visual body cavity search because the distinction between felony and misdemeanor detainees failed to address the likelihood that an arrestee would be concealing drugs, weapons, or contraband.").
[48] *Id.* at 495.

threat posed by felony arrestees, the court declared the County's blanket strip search policy unconstitutional. Interestingly, despite its resounding criticism of Orange County's strip- search policy, the court granted qualified immunity to the officer who had conducted the illegal search.[49] In reaching this decision, the court noted that – despite its suspicion that the Second Circuit would require individual suspicion with respect to strip searching felony arrestees – the legal issue was unsettled at the time the plaintiff was searched.[50]

In *Sarnicola*, the court again expressed its belief that individualized reasonable suspicion was as much a necessary predicate to strip-searching felony arrestees as it is when searching misdemeanants.[51] Under this rationale, the court found that Westchester County's strip search policy was, on its face, constitutionally valid. The policy required reasonable suspicion to believe that weapons or contraband were being concealed and did not state that the policy applied differently to those suspects arrested for felonies as opposed to those detained on a misdemeanor charge.[52]

As applied, however, the court found that Sarnicola's strip search was unlawful and not in accordance with the policy's guidelines. None of the factors that may indicate a suspect is concealing a weapon or contraband existed prior to the strip search. Sarnicola had not exhibited nervous or unusual conduct, was not dressed in a manner conducive to secreting contraband, and had not been subjected to any other less intrusive search.[53] In a pre-trial deposition, Sgt. McGurn acknowledged that he ordered

---

[49] *Id.* at 497 ("A government official making a policy decision is entitled to qualified immunity if the law was not clearly established at the time the determination was made.").
[50] *Id.* at 496.
[51] *Sarnicola*, 229 F.Supp. 2d 259, 270.
[52] *Id.*
[53] *Id.* at 273.

Sarnicola's strip search without consideration of any other factor aside from her felony arrest. McGurn was asked, "Independent of the fact that this was an alleged felony transaction, did you have any particular belief that particular day that [Sarnicola] was particularly and specifically secreting drugs?" He responded, "No more than any other subject I would have arrested."[54] Accordingly, the court found that although Westchester's strip search policy was facially constitutional, it had been either misapplied or ignored, thereby resulting in the defendant's liability.[55] Because the court determined that no reasonable officer would have ordered a strip search under these circumstances, Sgt. McGurn was not entitled to qualified immunity.[56]

Following the court's decision, Westchester filed a notice of appeal.[57] Instead of continuing the litigation, however, attorneys from both sides felt it would be in the best interest of their client to settle the matter. Although the court requested submission of additional briefs on the issue of whether strip searching all felony arrestees without regard to individual circumstances was the practice of Westchester County police officers, Sarnicola was eager to end the litigation rather than pursue this larger constitutional question.[58] Likewise, the County was eager to resolve the case and shield Sgt. McGurn from potential punitive damage liability. Because the court had denied McGurn qualified immunity he could have individually been responsible for damages awarded to Sarnicola by a jury. Wanting to protect McGurn from this potential liability as well as demonstrate his support of McGurn to other officers at the jail, the Department

---

[54] *Id.* at 272.
[55] *Id.* at 274.
[56] *Id.* at 275.
[57] Telephone Interview with Jane Hogan Felix, Westchester County Attorney (Nov. 1, 2004) [hereinafter Felix Interview (Nov. 1, 2004)].
[58] Meyerson Interview (Oct. 20, 2004).

of Public Safety Commissioner encouraged the County to settle the case.[59] After negotiation, the parties agreed on a settlement of $75,000 to drop all further litigation.[60]

II. The Aftermath: Reaction to the *Sarnicola* Decision

As is often the case in compromise agreements, neither party walked away from the *Sarnicola* settlement entirely happy with the outcome. Though certainly pleased with his client's financial compensation, Sarnicola's attorney, James Meyerson,[61] felt the court had erred in finding that police officers had probable cause to arrest Sarnicola. On the unconstitutional strip search claim, however, Meyerson lauded the court's affirmation of well settled law in the second circuit as well as its criticism of strip search practice at the Westchester County jail.[62] Though policy change was not the thrust of Sarnicola's lawsuit, Meyerson hoped the court's decision would no go unrecognized by Westchester officials. In a newspaper story reporting the settlement, Meyerson stated,

> We deem the decision to be a significant statement about the conduct that transpired which, if a general practice, should be rectified by the county through this decision. So yes, we believe that this decision should have broader implications beyond Miss Sarnicola, even with the settlement. If nothing else, (we hope) that the county would instruct their officers to follow policy as written.[63]

Despite this optimism, Meyerson is generally wary of expecting litigated outcomes to translate into substantive policy change, especially when municipalities are the defendant. As he recently told me,

---

[59] Felix Interview (Nov. 1, 2004).
[60] Keith Eddings, *Westchester to Approve Strip-Search Settlement*, THE JOURNAL NEWS, Jan. 2, 2003, at 1B.
[61] Meyerson has been a civil rights attorney in New York City for more than thirty years. Many of his cases have dealt with public policy litigation in the prison and police context. Sarnicola was originally referred to his office by the attorney representing Sarnicola's boyfriend, Michael Tricardo, in his criminal case. Meyerson Interview (Oct. 20, 2004).
[62] *Id.*
[63] Keith Eddings, *Westchester to Approve Strip-Search Settlement*, THE JOURNAL NEWS, Jan. 2, 2003, at 1B.

> Litigation is only one element in making public policy change. There are very few Brown v. Board of Education's,[64] where the litigation – in and of itself – has caused a change in policy. Even in the cumulative, I don't think litigation has a huge impact on changing policy. In my opinion, the reason for this is because governments and municipalities operate philosophically using a cost of doing business analysis. Governments don't do things, including changing policy, based on moral predicates. Any changes that are made are totally devoid of public policy concerns and morals. To sum up, do I think that individual litigation leads to policy changes? Not likely. I guess I would say that my answer is less than a categorical "no" because, as a lawyer, you like to rationalize what you do.[65]

At the time of our conversation, Meyerson had not investigated whether the *Sarnicola* decision had any lasting impact on Westchester County policy. Given his pessimism about municipalities responsiveness to public policy concerns, however, Meyerson estimated that a change in policy was unlikely: "Unless Westchester officials felt their strip search policy could result in future lawsuits and damage awards, I bet that it's at least 50-50 that they did nothing."[66]

For her part, Westchester County Attorney Jane Hogan Felix[67] was confused and annoyed by the *Sarnicola* decision. Although vindicated on the probable cause claim, Felix felt that the court "rewrote what was acceptable law in the Second Circuit" with respect to police strip searches of arrestees.[68] Prior to the *Sarnicola* decision, Felix believed that the law was very clear with respect to what was required before a strip search could be conducted.

> If you're going to strip search, you need probable cause – this was the original law. The caveat was that in minor or misdemeanor cases such as possession of marijuana, you also need some other indication from the nature of the crime before you can strip search a suspect. With serious felony cases, you just

[64] 347 U.S. 483 (1954).
[65] Meyerson Interview (Oct. 20, 2004).
[66] *Id.*
[67] Felix has been employed by the Westchester County Attorney's office for twenty years. Over that period, she has defended the county against numerous lawsuits brought by inmates.
[68] Felix Interview (Nov. 1, 2004).

needed probable cause.[69]

Based on her own understanding of the law, Felix took issue with the *Sarnicola* court's requirement that all strip searches, whether following a misdemeanor or felony arrest, be predicated by some individualized suspicion that a suspect is concealing weapons or contraband. Instead, Felix believed that the nature of Sarnicola's alleged crime should have been enough to warrant the police officer's strip search.[70]

In the aftermath of Westchester County's settlement with Sarnicola, Felix engaged in a thorough review of the County's strip search policy. Whenever a county policy is called into question either by a potential lawsuit or judicial decree, it is customary for a county attorney to assess the policy in light of the most current legal standards.[71] In reviewing Westchester's strip-search policy, Felix carefully examined the court's reasoning in *Sarnicola* and ultimately determined that no substantive policy revision was necessary. As the court noted, Westchester's strip search policy was not unconstitutional, but was instead being misapplied by officers who did not understand its requirements. Felix determined that the only necessary organizational response was to communicate to corrections personnel that – after *Sarnicola* – individualized suspicion that an arrestee is concealing weapons or contraband is required before any strip search takes place.

> I wrote up my findings in a memo to the sergeant in charge of training and explained the court's rationale. I said, "You can no longer rely exclusively on the crime. Here is what [the judge] wanted to hear. Here is what you told her. Here is what you should tell her in the future if this type of situation comes up again." Basically, I just went over how they should testify. I told them not to put all their eggs in one basket and not to under-tell their story. With Sarnicola, there were

---

[69] *Id.*
[70] Felix Interview (Nov. 1, 2004) ("Sarnicola was arrested for a Class A-1 felony. You don't get any more serious than a Class A-1 felony.").
[71] *Id.*

> certainly several other things the officers could have testified to that would have satisfied the judge's need for individual suspicion.[72]

Because officers were already familiar with the need for individual suspicion prior to conducting some strip searches, Felix did not feel that there was any need for a larger training initiative beyond her memo. Rather than introducing an entirely new concept to corrections personnel, the *Sarnicola* decision simply expanded the realm of scenarios in which individualized suspicion was necessary.[73]

With respect to the potential for individual litigation to affect policy change, Felix does not explicitly dispute Meyerson's underlying premise that municipalities are primarily concerned with their checkbook. To Felix, however, such fiscal responsibility does not necessarily equate to a lack of morals or disregard for sound public policy. Instead, Felix takes a more common sense approach to litigation's affect on Westchester policy, namely if a policy is deemed legally inadequate it should be revised to limit potential liability in the future. On this topic, Felix told me:

> I absolutely feel that individual litigation can play a role in changing County policy. Based on my research if I believe that [a policy] is questionable, I will work to redraft that policy and make sure it complies with the law. It's just common sense. If we ignore the court's decision, we are only building a record for punitive damages down the road.[74]

The sum total of her analysis, however, indicated to Felix that no such revision was necessary in light of the *Sarnicola* decision. To Felix, the court's flawed ruling was less an affirmation of legal precedent than it was a product of judicial frustration. Because *Sarnicola* was the third case addressing the legality of strip-searching felony arrestees before the court in less than four months, Felix speculates that Judge McMahon was so

---

[72] *Id.*
[73] *Id.*
[74] *Id.*

"disgusted" at the apparent inability of corrections officers to comply with the law that she therefore instituted a blanket policy requiring the presence of individual suspicion as a pre-requisite for all strip searches.[75] In fact, more than two years after the *Sarnicola* decision Felix still wishes she had been given the chance to appeal to the ruling to the Second Circuit.[76]

III. County Attorney as Legal Communicator

Felix's response to the *Sarnicola* decision and her comments regarding litigation's impact on county policy are interesting because they illustrate both the expanse of her role as legal communicator and the inherent conflict that exists in the job. As a county attorney, Felix's responsibilities are numerous. Aside from the ordinary duties associated with litigating cases like taking depositions, filing motions, and appearing in court, Felix is also charged with anticipating potential liability and, in the aftermath of litigation, ensuring that county policies conform to court directives. All at once, therefore, Felix and other county attorneys serve as risk assessors, legal advisors, and compliance managers. This multitude of responsibilities necessarily inflates their importance to the Westchester County corrections organization and empowers them to filter the law as they see fit.

Simply stated, the entire purpose of a county attorney in Westchester is to limit liability exposure. They must be constantly on the lookout for instances of legal weakness and take proactive measures to quickly repair such weakness wherever it may appear. This assessment of the county attorney's role coincides with Margo

[75] *Id.*
[76] *Id.*

Schlanger's[77] analysis of how many correctional organizations have responded to inmate litigation.[78] Schlanger asserts that the increase in dedicated legal personnel working within correctional organizations has helped make response to litigation more routine as well as limited liability exposure.[79] A possible consequence of this dedicated staffing, Schlanger writes, is that some legal personnel may seek to exaggerate the threat of legal liability in order to justify their own position within the organization.[80]

My position, after examining the role of legal communicators in Westchester County is two-fold. First, I find that county attorneys as legal communicators to corrections personnel have little need to exaggerate the threat of liability; their job is already secure. Second, even in the absence of such job security, I find it implausible that county attorneys would actively seek to exaggerate the threat of strip-search litigation in their communication with corrections officers. Quite apart from this notion of rampant exaggeration, I find that legal communicators to corrections personnel are susceptible to constant – if unspoken – pressure that discourages any activity that may inhibit officers from maintaining the security of their facility.

At first look, Felix's characterization of the *Sarnicola* decision as an anomaly seems to defy my conclusion that the litigation threat in Westchester County is large. If the danger of inmate litigation is as large as I presume it to be, why – after the court called into question the behavior of corrections and police officers – would Felix's only communication to these very same officers consist only of a brief memorandum? The

[77] Professor of Law, Washington University School of Law.
[78] Schlanger, *Inmate Litigation* at 1669-1670 (arguing that, faced with rising inmate caseloads, correctional organizations have made institutional changes to dedicate staff to the issue).
[79] *Id.*
[80] *Id.* at 1670. ("Some correctional compliance personnel may exaggerate the magnitude of the threat posed by law and the litigiousness of the legal environment in order to underscore their own vital role within the organization and enhance their professional standing.").

answer to this question lies in the conflict of interests that legal communicator in correctional organizations face on a daily basis.

As I have already established, the primary responsibility of a Westchester County attorney is to shield the county from legal liability. It is important to remember, however, that the legal liability that these attorney's seek to avoid most often arises out of the acts or omissions by their fellow county employees.[81] When it is your colleague that is the source of legal liability, I suspect that legal advice is handed out in delicate fashion. When this colleague is a corrections officer, I suspect that diplomacy takes on even greater importance.[82]

The reason for this distinction between corrections officers on the one hand and ordinary colleagues on the other is that corrections officers are in a significantly more sympathetic position. In a municipal setting, whereas it is easy to criticize a recreation employee for improperly installing playground equipment, I suspect it is slightly more difficult to challenge the way corrections officers see fit to ensure the safety of their jail. This consideration is especially important in analyzing Felix's administrative response to the *Sarnicola* decision.

The whole purpose of strip searching arrestees is to prevent weapons, drugs, or other contraband from being introduced to the general jail population. If such items do find their way into the prison, they can easily be used to carry out assaults on corrections officers as well as other inmates. Aside from concern for their own safety, corrections

---

[81] Mission Statement, Department of Law, Office of the Westchester County Attorney, *available at* http://www.westchestergov.com/law. [hereinafter Mission Statement] ("The Litigation Bureau defends the County in all tort actions for personal injury or property damage that arise out of any acts or omissions of County officers or employees acting within the scope of their employment.").
[82] *See* Edelman, et al., *Professional Construction* at 62 (discussing the impact of audience on legal construction).

officers face the additional possibility of being found liable in the event that an inmate uses smuggled contraband to harm themselves or another inmate. In previous strip search litigation, corrections officers have attempted to justify blanket strip search policies by introducing evidence to substantiate their safety concerns.[83] In pre-trial deposition, Sgt. McGurn sought to justify his own blanket strip search policy by raising the issue of jail security. The testimony states:

> Q: Other than your general experience, did you have, in this particular matter, a specific belief…that she was secreting drugs independent of the fact that you were authorizing an arrest in a felony drug matter?
> A: Well, it's a felony drug matter and it deals with contraband and weapons so there is also a security issue here.[84]

Respecting correctional officers' legitimate safety concerns while at the same time performing their duty to limit liability exposure is a delicate balancing act that legal communicators undertake on a daily basis. If legal communicators insist on bureaucratizing the strip search procedure – requiring that officers engage in excessive documentation of their individualized suspicion and seek appropriate permission from commanding officers before conducting the search – they run the risk of alienating the very personnel they seek to defend. I suspect that correctional officers would view such measures as not only a threat to their safety but an affront to their authority as decision makers. To avoid this conflict, therefore, legal communicators may engage in the practice of symbolic compliance.

---

[83] *See Shain v. Ellison*, 53 F. Supp. 2d 564 (E.D.N.Y. 1999). Nassau County Correctional Officers introduced evidence that over a two year period routine strip searches had revealed six arrestees concealing weapons and eight arrestees concealing drugs. The court acknowledged that "the dangers posed by concealed weapons are indeed great," but ultimately held that safety concerns, in and of themselves, are not enough to nullify the requirement for individual suspicion; *A Searching Look* at 3.
[84] *Sarnicola*, 229 F. Supp 2d 259, 272.

Charles Epp[85] has written numerous articles on how organizations respond to the threat of legal liability. When dealing with a flawed policy that may invite litigation, Epp surmises that organizations have two primary means of response.[86] First, Epp proposes that organizations can engage in substantive policy change. Through actual revision of policy, Epp maintains that organizations can limit their liability exposure by eliminating the issue that raised liability concerns in the first place. Alternatively, however, organizations can choose to make symbolic adjustments to effectively limit liability while continuing with business as usual.[87]

Symbolic changes are generally carried out by developing a bureaucratic infrastructure designed to provide the appearance of change. Hiring of dedicated compliance officers and increased documentation requirements are representative of the symbolic changes many organizations undertake. A second component of symbolic change is to make personnel aware of judicial requirements without modifying the underlying policy that was the focus of the court's attention. By making personnel aware of the requirements, legal communicators increase the likelihood of adherence while avoiding the trouble of actually changing their policies. The symbolic response theory seems to be founded on the idea that, if you can make it look like you are addressing the problem, people outside the organization will be fooled into assuming your compliance.

In the corrections context, I conclude that legal communicators at least sometimes recommend symbolic changes as a means to limit liability exposure while still maintaining loyalty to their colleagues at the county jail. Felix's memorandum to the

---

[85] Associate Professor, Department of Public Administration, University of Kansas.
[86] Charles R. Epp, *Litigation Stories: Official Perceptions of Lawsuits Against Local Governments* (1998) (unpublished paper prepared for presentation at the 1998 Annual Meeting of the Law & Society Association, Aspen, Colorado) (on file with author) [hereinafter Epp, *Litigation Stories*]
[87] *Id*.

Department of Public Safety training officer is indicative of a typical symbolic change undertaken to reduce liability exposure. Westchester's strip search policy does not make any mention of differing pre-search requirements for misdemeanor versus felony arrestees. Although this absence of language had no bearing on the policy's constitutionality, it apparently gave officers the false impression that according arrestees differing treatment based on the nature of their crime was permissible. If Felix, as legal communicator, truly wanted to solidify *Sarnicola's* judicial intent she could have recommended that the County policy be revised to include an explicit stipulation that individualized suspicion is required prior to all strip searches. Such policy revision, though by no means major, would undoubtedly require more administrative consultation than the memorandum Felix ultimately produced.

Instead, Felix's memorandum offering instructions on how corrections personnel should testify in future depositions served the purpose of conveying the court's ruling while not overly intruding into the realm of corrections decision making. The memo suggested to the corrections sergeant in charge of training that nothing more than a brief conversation with his officers was required of him.[88] This communication, therefore, was nothing more than a symbolic act designed to limit the County's liability exposure by ensuring that officers would provide the information that courts want to hear while not affecting the underlying policy.

I attribute symbolic status to Felix's memo because of her somewhat regretful comments concerning the way Sgt. McGurn testified in his pre-trial deposition. On the issue of McGurn's testimony, Felix told me,

[88] Felix Interview (Nov. 1, 2004).

> [McGurn] really put all of his eggs in one basket in relying on Sarnicola's felony arrest as justification for conducting the strip-search. There were a lot of other [factors] he could have testified to that would have satisfied Judge McMahon on the issue of individualized reasonable suspicion. That's why I stressed the importance of testifying to every single thing they observe.[89]

Felix's comments indicate to me that she may presume individualized suspicion as a given entity when a suspect is arrested on a felony charge. At the very least, I sensed that Felix views the notion of individualized suspicion as something that can be easily manufactured for judicial consumption.[90] Rather than recommending that corrections officers be trained to identify those factors that give rise to individualized reasonable suspicion, Felix instead only suggested that officers be more verbose in their testimony.

In the study of organizational response to litigation threats, some academics propose that legal compliance officers tend to fall within one of four distinct categories: advocates, team players, professionals, and technicians.[91] Although these classifications were formulated against the backdrop of affirmative action policy, I think they apply equally well in the corrections arena. For purposes of this article, I discuss only advocates, team players, and professionals. Advocates are those compliance managers that place the interests of the potential plaintiff above the interests of the organization and favor substantive policy change as a means of curbing the litigation threat.[92] In the area of employment law and affirmative action policy, advocates are those compliance managers that place greater importance on the advancement of minorities than on the

---

[89] *Id*.
[90] It would be interesting to see if corrections officers at the Westchester County jail have the same attitude of inevitability with respect to individualized suspicion. Unfortunately, for purposes of this paper, I was unable to speak with any such officers.
[91] Lauren B. Edelman, Stephen Patterson, Elizabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 L. & POL'Y 73 (1991) [hereinafter Edelman et al., *Legal Ambiguity*].
[92] *Id.* at 79-80.

institutional goals of the organization.[93] Accordingly, in the corrections setting, inmates would take the place of minorities and the correctional facility would substitute for the employer.

Diametrically opposed to the advocate is the team player compliance manager. Individuals conforming to the team player style of management seek to resolve conflict in favor of the organization in which they work.[94] Accordingly, team players "put form over substance" and do not seek change unless there are overt violations of policy.[95] This characterization of team player behavior correlates well with the notion of symbolic change. In fact, team players seem to effectuate their organizational goals through the implementation of symbolic change. As I have already concluded, Felix's administrative response to the *Sarnicola* decision took the form of a symbolic gesture, namely the brief memorandum to the Department of Corrections training officer. Because symbolic modifications are mostly associated with compliance managers in the team player category, I necessarily conclude that Felix's behavior exhibited this pro-organization stance. My eventual determination from examining Felix's response to the *Sarnicola* decision is that legal communicators in a corrections organization have a tendency to address liability concerns by instituting symbolic changes as a means of accommodating the competing organizational interests with which they are faced.

In spite of my conclusion about the pro-organization tendencies of legal communicators in corrections settings, I find that Felix and her colleagues in the Westchester County Attorney's office have little reason to be so inclined. As I

---

[93] *Id.*
[94] *Id.* at 85. (arguing that team players view their organization as the primary client and thus place primary importance on organizational goals).
[95] *Id.*

previously suggested, one premise on which my symbolic change/team player analysis lies is the notion that legal communicators identify with corrections personnel, in part, because they all work for the same larger organization. I would imagine that feeling of allegiance is especially true in instances where the legal communicator is part of the correctional facilities' in-house staff. As Margo Schlanger points out, however, in-house legal staffing arrangements are far more likely in prison systems than individual jails.[96]

Westchester County's own legal infrastructure certainly accords with Schlanger's observation. The Westchester County Attorney's office is located in White Plains, while the Westchester County Jail is located in Valhalla. Furthermore, lawyers within the County Attorney's office are not just responsible for limiting liability exposure at the Westchester jail.[97] Inmate litigation is but one component of their job responsibilities, and this piece of their workload fluctuates according to the number of inmate lawsuits filed. In fact, Felix informed me that jail-related lawsuits tend to come in waves, causing both periods of activity and calm within the office.[98] With a multitude of legal responsibilities, therefore, the value of a County Attorney is not strictly derived from their ability to reduce liability exposure at the jail.[99] On the contrary, the Westchester Department of Law website boasts that in 1999 alone, the County Attorney's office "saved Westchester taxpayers an estimated $7,740,000 by successfully defending and settling lawsuits."[100]

---

[96] Schlanger, *Inmate Litigation* at 1669-1670 (arguing that individual jails are far less likely than prison systems to employ lawyers dedicated to inmate litigation).
[97] See *supra* note 81and accompanying text.
[98] Felix Interview (Nov. 1, 2004).
[99] Although it is certainly possible that an individual County Attorney might specialize in jail-related litigation and therefore handle a disproportionate number of inmate cases, my research did not indicate that any such specialization takes place within the Westchester County Attorney's office.
[100] Mission Statement.

My assumption, then, is that county attorneys like Jane Hogan Felix have very little to do with corrections officers other than when they are named defendants in inmate lawsuits. This assumption seems to belie my earlier conclusion that county attorneys identify with corrections officers because they are colleagues within the same larger municipal organization. However, I do not view these apparently opposite conclusions as an insurmountable contradiction in my research. Instead, I find that they give credence to the idea that organizations cannot be neatly classified based simply on the function that they serve. Drawing a bright line conclusion that legal communicators in corrections organizations tend always to resolve conflict in favor of the organization would not be accurate. Corrections organizations, like most organizations, are influenced by the myriad personalities and interests operating within their confines. Highlighting this conflict of interests – and proposing that corrections organizations are perhaps more conflicted than most – is the very purpose of this paper.

IV. Strip Search Policy and Westchester County: A Genuine Legal Threat

The third and heretofore undiscussed compliance manager personality is the "professional."[101] Compliance managers who favor this style of leadership operate from a stance of detached neutrality, emphasizing fairness in the policy implementation process.[102] It is this impartial method of communicating legal requirements that I believe legal communicators in many corrections organizations seek to achieve.[103] This lofty goal is borne simply from the fact that legal communicators in corrections organizations

[101] Edelman et al., *Legal Ambiguity* at 87.
[102] *Id*.
[103] Because Westchester County Attorneys serve so many roles (legal advisor, risk assessor, compliance manager, etc.) it is important that I distinguish between their job as municipal advocate and their job as legal communicator. While I would expect - indeed hope - that County Attorneys vigorously advocate on behalf of Westchester's interests, I believe that detached neutrality is beneficial to their task of accommodating the interests of both the County and the corrections officers.

must balance the competing interests I have previously described. My discussion of corrections officer's safety concerns and the pressure I suspect legal communicators feel to provide legal advice in a way that only minimally infringes upon the ability of corrections officers to manage their facility presents only one side of the story.

Requiring just as much attention, however, is a legal communicator's consideration of the extent to which a legal threat is real or imagined. With respect to inmate litigation in Westchester County, my analysis is twofold. First, I assess strip search policy as an area of inmate litigation especially susceptible to legal challenge. Second, I analyze Westchester County as a litigious venue in which inmate plaintiffs are likely to find receptive attorneys and potentially rich rewards.

A. Strip Search Policy

Earlier, I noted that inmate litigation most often falls into one of four categories: assaults, inadequate medical care, due process violations relating to disciplinary procedures, and general living conditions. It is possible, therefore, that a municipal attorney may not view their correctional facility's strip search policy as a potential source of legal liability. My research indicates that such an assumption would be misguided. Quite apart from the idea that strip search policy is rarely challenged, I find that these policies are – at least in Westchester County and the surrounding areas – a frequent subject of litigation.

In 1998, Bernice Tucker, a female corrections officer at the Westchester County Jail, was attacked by an inmate while conducting a routine strip search.[104] Tucker sued both the County and Department of Corrections Commissioner Rocco Pozzi alleging that

---

[104] Keith Eddings, *County Prepared to Settle Jail, Child Development Suits*, THE JOURNAL NEWS, Sept. 29, 2001, at 3B

Westchester's strip search policy placed corrections officers at risk. In 2001, a jury awarded Tucker $110,000 and the court granted an injunction requiring that two female officers be present while female inmates were being strip searched.[105] Later that year, the Westchester County Board of Legislators agreed to increase Tucker's award to $210,000 if she agreed to drop her request for the injunction.[106] Maintaining two female officers on duty at all times to satisfy the injunction's requirements had been costing the County approximately $1,300 per day in overtime costs.[107] Following the settlement, the County's strip search policy was amended to require that two female officers always be present when an inmate is strip-searched.[108] Whereas the previous policy only required two male officers be present when a male inmate was being strip searched, the policy was revised to state:

> When a strip/cavity search is required, it is always necessary to have more than one officer (Police or Correction Officers) of the same sex as the defendant present, with one officer conducting the search and one officer witnessing the search.[109]

If nothing else, Tucker's lawsuit strengthens my assumption that strip search policy can be legally challenged on several different fronts. From the perspective of an arrestee looking to file a lawsuit, I argue that strip search policy is especially vulnerable. As I have already detailed, well-settled precedent requires an officer to evaluate the individual circumstances of every arrestee before determining whether reasonable suspicion exists to warrant a strip-search. Anytime a person's civil rights are left to the discretion and judgment of another individual, there is potential for abuse or mistake.

---

[105] *Id.*
[106] *Id.*
[107] Westchester County Committee on Budget and Appropriations, *November 30, 2001 Meeting Minutes*, *at* http://www.westchestergov.com/bol/comm/ba/2001/ba011130.htm.
[108] Keith Eddings, *Jail Fight Lawsuit Settled*, THE JOURNAL NEWS, Sept. 28, 2004, at 1B.
[109] Westchester County Department of Public Safety General Order No. 42.05.

Making strip-search policy even more appealing to the eager plaintiff is the court's increased recognition of the invasive nature of strip searches,[110] and the potential for monetary awards.[111] In recent years courts have found even less intrusive search procedures to require the same standard of care as strip-searches.[112]

This judicial crack-down of sorts with respect to strip search procedures is perfectly illustrated by *Sarnicola* and the predecessor Orange County cases. Each of these cases was decided by Judge McMahon in the Southern District of New York. It is interesting to note that in *Murcia*[113] the Court granted qualified immunity to the county sheriff that presided over the unconstitutional strip search. In granting this protection, the court acknowledged that strip search law as applied to felony arrestees was, at the time, unclear.[114] Only weeks later, however, when presented with near duplicate facts in *Sarnicola*, the court denied Sgt. McGurn's qualified immunity claim.

Though puzzling[115], the court's denial of qualified immunity to Sgt. McGurn bolsters Jane Hogan Felix's assertion that Judge McMahon was simply disgusted with the

---

[110] *Duffy v. County of Bucks*, 7 F. Supp. 2d 569 (E.D.Pa. 1998)(*quoting Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) ("Strip searches involving the visual inspection of the anal and genital areas [are] demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.").

[111] *See* Anthony J. Sebok, *New York City's $50 million Strip Search Lawsuit Settlement*, (Jan. 15, 2001), *available at* http://edition.cnn.com/2001/LAW/01/columns/fl.sebok.stripsearch.01.15/. Most often strip search lawsuits are filed as a class action and damage awards, though large, result in small individual payouts to each class member. Depending on how the municipality is insured, however, these large payouts can have a significant impact on organizational budgets. As an individual plaintiff with no real injuries, Sarnicola's $75,000 settlement award appears high; Schlanger, *Inmate Litigation* at 1621-1622 (offering a discussion of the likelihood that even successful inmate lawsuits will result in only nominal damage awards).

[112] *Mason v. Village of Babylon*, 124 F.Supp. 2d 807 (E.D.N.Y. 2000) (holding procedure requiring arrestee to lift bottom edge of her bra so anything hidden inside could fall out is considered a strip search).

[113] 226 F. Supp.2d 489 (S.D.N.Y. 2002).

[114] *Id.* at 496.

[115] McGurn ordered Sarnicola's strip search in April 2001. This obviously preceded the 2002 *Dodge* and *Murcia* decision where the court clarified its position on strip search law as applied to felony arrestees. If the sheriff in *Murcia* was granted qualified immunity, it seems only fair that McGurn should have been afforded the same defense.

continued litigation arising from misapplied strip-search policy.[116] Judge McMahon's apparently increased disdain for officer misjudgment only strengthens my belief that strip- search policy has great potential for legal liability. There are only four federal judges that sit in the United States Courthouse in White Plains, NY.[117] Should a similar strip-search claim be brought against Westchester in the future, the odds of having that claim litigated before Judge McMahon are significant. Next time, I imagine the court would be even less understanding. All of these factors combined indicate that Westchester ought to take seriously the idea that – while not one of the traditional sources of inmate complaint – their strip-search policy is subject to constant legal challenge.

B. Assessing the Risk: Analyzing Westchester Legal Environment

An understanding of Westchester's legal environment is crucial in appreciating the pressure county attorney's face in shielding Westchester from legal liability. If an important function of the County Attorney's Office is to limit the threat of litigation, the county attorney must be able to distinguish between real versus imaginary legal threats. Among others, Charles Epp identifies three primary factors that may indicate an increased threat of litigation. First, Epp argues that large-scale media coverage of an organization's previous tortious conduct often results in more lawsuits being filed.[118] Second, Epp asserts that the "local support structure for legal mobilization," i.e. lawyers qualified to represent clients in lawsuits against municipal defendants, can also

---

[116] *See supra* note 75.
[117] United States District Court Southern District of New York, *Judges*, *available at* http://www.nysd.uscourts.gov/judges.htm.
[118] Charles R. Epp, *The Fear of Being Sued: Variations in Perceptions of Legal Threat Among Managers in the United States* (2001) (unpublished paper prepared for presentation at the 2001 Annual Meeting of the Law & Society Association, Budapest, Hungary) (on file with author) [hereinafter Epp, *The Fear of Being Sued*]; Schlanger, *Inmate Litigation* at 1681-1682 (discussing the negative consequences of media coverage of inmate lawsuits).

substantiate the legal threat.[119] Lastly, Epp stresses that large scale organizational experience with a specific type of litigation is a clear indicator that the threat of such litigation is real.[120] I address these concerns one at a time.

Surprisingly, my research indicated that media coverage of inmate litigation is not a major concern for the County Attorney's office. Because of its proximate location to New York City Westchester news is frequently reported in the New York Times as well as other city newspapers. Within Westchester, The Journal News serves as the major daily newspaper. County Attorney, Jane Hogan Felix acknowledged that in some cases it is common practice to request that a gag order be imposed so as not to encourage additional lawsuits.[121] In general, however, Felix indicated that the prospect of media coverage prompting more inmate litigation is not an area of great anxiety.

Felix's lack of concern is justified according to my research. After comprehensive investigation into multiple media databases, I was able to find only sporadic reporting of inmate lawsuits in Westchester County. A conversation with the Staff Writer at The Journal News who had written several of the articles I located indicated that there is no systematic methodology for reporting instances of inmate litigation and their ultimate resolution.[122] Because I conclude that infrequent media coverage of inmate litigation in Westchester County is caused less by the presence of few inmate cases than it is a lack of journalistic interest, I find that media coverage has no substantive role in assessing the litigation threat in Westchester County.

---

[119] Epp, *The Fear of Being Sued*.
[120] *Id.*
[121] Felix Interview (Nov. 1, 2004).
[122] Telephone Interview with Keith Eddings, Staff Writer, The Journal News (Nov. 5, 2004).

Epp's discussion of "the local support structure for legal mobilization" – a.k.a. lawyers – however, provides much greater insight into the genuine legal threat faced by Westchester County. Lawyers, Epp points out, play a critical role in estimating both the number, and probable success, of future lawsuits.[123] Although this conclusion may seem self-evident, Epp's theory on the connection between large populations of qualified lawyers and corresponding litigation success is quite interesting. Taking the issue of gay rights, Epp argues that gay rights litigation is more likely to occur in urban venues simply because of the probability that cities contain more gay-friendly lawyers.[124] Inmate litigation, accordingly, is more likely to occur in areas with large numbers of civil rights and personal injury attorneys.

Westchester County and the surrounding areas is perhaps one of the most legally dense regions in the entire country. A search of the Martindale-Hubbell lawyer index revealed the following information. In Westchester County there are 37 attorneys who list civil rights as a specialty and 186 attorneys who list personal injury litigation as a specialty. In New York City, 323 attorneys list civil rights litigation as a specialty while 703 attorneys list personal injury as a specialty.[125] These figures do not even include those attorneys who list only the generic "litigation" as their specialty. Nor do they include the many other personal injury and civil rights attorneys who choose not to be listed by the service.[126]

The net impact of this lawyer mass is that potential plaintiffs with a complaint against the Westchester County jail are likely to find a receptive and capable attorney to

---

[123] Epp, *The Fear of Being Sued*.
[124] *Id.*
[125] Martindale-Hubbell Lawyer Locator, *available at* http://www.martindale.com.
[126] James I. Meyerson, a "civil rights attorney with over thirty years experience" is not listed by the service.

represent them. With a daily population hovering around 900 inmates[127] and the observation that jails are inherently more dangerous than prisons as far as correctional facilities go,[128] it seems inevitable that Westchester will continue to face a steady stream of legitimate lawsuits. Indeed, Jane Hogan Felix informed me, "Inmate lawsuits are relatively common, and we tend not to get the ridiculous ones."[129]

Lastly, Epp argues that an organizations experience with legal liability over time provides a fairly solid indication of their potential liability in the future.[130] Table I

TABLE I: WESTCHESTER COUNTY JAIL LITIGATION[131]

YEAR	LITIGATION SUMMARY	RESULT
1994	Inmate lacerated hand on rusted window frame	Jury Award: $1,000 reduced 60% by comparative negligence
1996	Mentally unstable inmate committed suicide due to inadequate supervision	Settlement: $1.45 million
1998	Court stenographer alleged property damage and personal injury caused by inadequately supervised inmate at parole hearing	Initial Demand: $50,000 Initial Offer: $7,000 Jury Award: $0
1998	Inmate injured in attack by other inmates due to inadequate supervision. Injuries included multiple nasal fractures and emotional distress	Jury Award: $330,000

[127] Felix Interview (Nov. 1, 2004).
[128] Schlanger, *Inmate Litigation* at 1686.
[129] Felix Interview (Nov. 1, 2004).
[130] Epp, *The Fear of Being Sued*.
[131] *See, e.g., Arcas v. County of Weschester,* 11 New York Jury Verdict Review & Analysis 6 (May 1994); *Sarafan v. County of Westchester*, 16 VerdictSearch New York Reporter 20 (Sept. 25, 1998); *Zucker v. County of Westchester*, 16 VerdictSearch New York Reporter 19 (Oct. 8, 1998); *James v. County of Westchester and Department of Corrections*, 16 VerdictSearch New York Reporter 23 (Oct. 9, 1998); *Alstranner v. County of Westchester*, 17 VerdictSearch New York Reporter 1 (Apr. 26, 1999); Jeffrey Scott Shapiro, *Ex-convict Sues Over County Jail Conditions*, THE JOURNAL NEWS, May 30, 2001, at 2B; Keith Eddings, *Westchester Settles Jail Lawsuit*, THE JOURNAL NEWS, May 5, 2001, at 1A; Keith Eddings, *County Prepared to Settle Jail, Child Development Suits*, THE JOURNAL NEWS, Sept. 29, 2001, at 3B; *Winters v. State of New York*, 38 VerdictSearch New York Reporter 20 (Nov. 20, 2002); Keith Eddings, *Jail Fight Lawsuit Settled*, THE JOURNAL NEWS, Sept. 28, 2004, at 1B.

1998	Inmate injured in attack by other inmates due to inadequate supervision	Initial Demand: $50,000 Jury Award: $0
1999	Inmate injured in attack by other inmate due to inadequate supervision	Initial Demand: $300,000 Jury Award: $0
2001	Suspect committed suicide in jail booking area while supposed to be under a suicide watch	Jury Award: $1.15 million
2001	Inmate suffered from unsanitary prison conditions	Demand: $10 million Result: n/a
2001	Paraplegic inmate had prosthetic leg taken from him for four months	Settlement: $22,500
2001	Corrections officer injured in attack by inmate while conducting strip search	Jury Award: $110,000 Settlement: $210,000
2002	Inmate received inadequate medical care	Jury Award: $335,000
2003	Inmate forced to submit to unconstitutional strip search	Settlement: $75,000
2004	Inmate suffered broken jaw in fight with corrections officer	Settlement: $75,000

provides a summary of the litigation that has developed from incidents at the Westchester County jail over the past ten years. In just one decade, as a result of these thirteen cases, Westchester County has been found liable for nearly $3.65 million worth of jail-related damages. On its own, this figure provides pretty strong evidence of the legal threat facing Westchester County. When you consider that the information contained in Table I consists of only those cases I located in my search through the media's admittedly sporadic reporting, its significance is made even greater.

V. Conclusions

Before this paper, there were numerous scholarly articles writing on the important function served by legal communicators to the organization in which they work. This importance is amplified when, in situations like Westchester County, the legal communicator wears many hats so to speak, serving as risk assessor, legal advisor, and compliance manager. My corroboration on this aspect of previous research, therefore, does not offer any significant addition to the academic discourse.

Where my research does diverge from previous works, however, is my analysis of the role played by legal communicators in the field of correctional litigation. My assessment of Westchester County Attorney Jane Hogan Felix's organizational response to the *Sarnicola* decision illustrates the difficulties faced by legal communicators in correctional organizations. I find that that the threat of correctional litigation presents differing challenges than the threat of litigation in other employment settings.

Prior study of legal communicators has focused on affirmative action policy in the human resources setting.[132] These papers have analyzed the differing approaches legal communicators may take in transmitting the legal requirements associated with affirmative action and equal employment opportunity law. My guess is that the task of legal communicators charged with evaluating and disseminating affirmative action law is significantly less demanding than is the task of conveying legal requirements that impact corrections policy.

Certainly, legal communicators in a human resources environment may vary in their approach to limiting liability, choosing to adopt either a pro-plaintiff or pro-organization stance in response to litigation. However, I doubt very much that legal

[132] See *supra* note 19.

communicators of human resources law encounter the same level of competing interests that legal communicators of corrections law face on a regular basis. In the case of both human resources and corrections law there is a larger organization that wants to limit legal liability at all costs. With human resources this organization is a corporation or other employer and with corrections law this organization is a municipal entity. In both cases, I argue, these organizations are most concerned with maintaining explicit compliance with the law.

Where differences between the human resources and corrections arenas arise, however, is in the opposing interest that exists in correctional organizations. Jail and prison administrators, corrections officers, and police officers, I argue, are not quite as fixated on legal standards and judicial decrees as are their colleagues at the county executive's office.[133] Instead, these corrections personnel are most concerned with ensuring the safety of their facility for both their own protection and the protection of the inmates whom they oversee. In the opinion of these personnel, there should be as few restrictions as possible imposed on their authority to safeguard the facility.

Although my research did not turn up evidence of an official lobbying effort on the part of corrections officers for more relaxed legal standards, I suspect legal communicators like Jane Hogan Felix consider the dangers inherent in running a correctional facility with every legal recommendation that she makes. My inclination is that Felix and other county attorneys at the Westchester Department of Law sympathize

---

[133] E-mail from Lori Alesio, Director of Litigation, Westchester County Attorney's Office, to Patrick Troy, Law Student, Washington University School of Law (Nov. 15, 2004, 08:57:43 CST) (on file with author). In response to my inquiry as to whether jury awards or settlement payments have any specific impact on the Department of Correction's budget or operations, Alesio wrote "All monies to fund settlements and judgments come from the County. The money to settle or pay judgments does not come directly out of a department's budget."

with corrections personnel who deal with criminals on a daily basis. Indeed, criminals are an intrinsically contemptible group. This sympathy, I suspect, colors their decision making process when it comes to communicating suggestions for policy change. By contrast, I find it improbable that legal communicators of human resources law would find sympathy with anyone arguing the merits of subverting affirmative action policy.

Rather than advocate harsh procedural changes that impinge on the authority of corrections personnel, I propose that legal communicators have a tendency to temper their legal opinions and recommend symbolic change as a means of limiting legal liability. The ability of legal communicators to find this middle ground is an important factor in satisfying both municipal executives and corrections officers. At first glance, Felix's muted response to the *Sarnicola* decision – recommending only that officers be more descriptive in their testimony – seemed dubious. This is especially so because of the strong legal threat posed by strip search policy and a litigious environment such as Westchester County. Viewed in light of my analysis of the difficulties legal communicators face in managing the competing interests within correctional organizations, however, Felix's decision makes much more sense. Recognizing these competing interests is an important consideration in understanding the way in which law is communicated in a corrections setting.