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## Training video offers lesson on evidence

**O**n Jan. 13, the U.S. Justice Department released a report of its monthslong investigation into allegations of officer misconduct, racially discriminatory policing and accountability gaps within the Chicago Police Department.

The report concluded that Chicago police officers routinely use unreasonable force against suspects due in part to the department's deficiencies in training and supervising officers.

As a powerful example, the report cited the department's reliance on a video produced in 1982 as part of its program to train new officers on the use of force. The "Shoot/Don't Shoot" video features former "Columbo" star Peter Falk narrating scenarios in which officers must decide whether to open fire on would-be assailants ranging from robbers and drug runners ("shoot") to hearing-impaired citizens who cannot hear commands to desist ("don't shoot").

As the Justice Department report — perhaps generously — concludes, the decades-old video is "clearly out of date."

Specifically, police methods and techniques to apply force have evolved, either because new methods have proved safer and more effective or because technology has rendered old practices obsolete. Moreover, the law with respect to use of force has changed.

In short, the U.S. Supreme Court has largely done away with subjective standards to gauge reasonable use of force and now employs a "totality of the circumstances" test viewed from the standpoint of an objective officer.

Tellingly, Falk inverts the modern

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legal standard in "Shoot/Don't Shoot," instructing officers that use of deadly forces turns on "your perception of danger." Notwithstanding its abundant flaws, the Chicago Police Department persisted in its use of the 1982 video for almost a month after the Justice Department report. Reportedly, a police official claimed that "the scenarios in the video still apply" and could be recreated "in a more modern setting."

Finally, in mid-February, the video was permanently removed from the training protocol.

The Chicago Police Department's reluctance to shelve "Shoot/Don't Shoot" may be less attributable to its questionable training value than the removal's potential impact on "unreasonable force" lawsuits against officers.

At trial, an aggrieved party might argue the video's discontinuation reflects a tacit admission that it misrepresented the law and promoted officer misconduct.

To this end, a video with updated standards would provide similarly potent evidence of Chicago Police Department liability.

In a federal lawsuit, however, Chicago Police Department lawyers would likely find safe haven in the ban of evidence of so-called "subsequent remedial measures" to prove "culpable conduct."

According to Federal Rule of Evidence 407, the prohibition "rests on a social policy of encouraging people to take steps in furtherance of safety" without fear of

reprisal at trial.

Certainly, an updated training video on the use of reasonable force would fit squarely within the rule's protections. Even proof that the 1982 video was removed from the Chicago Police Department training regimen absent an update — while a closer call — would likely fall within the rule's broad ambit.

A lawsuit brought against the Chicago Police Department in Illinois presents a somewhat different question, if a similar outcome.

In 2010, Illinois codified evidence rules modeled after the federal version with few distinctions. Notably, due to a still-unresolved state dispute regarding product liability lawsuits, Illinois did not adopt an evidentiary rule covering subsequent remedial measures. Today, Illinois Rule of Evidence 407 remains in draft only.

Despite the absence of a codified rule, Illinois courts have consistently held that evidence of subsequent remedial measures is inadmissible to prove culpability. Indeed, a 2017 Illinois Supreme Court decision affirmed a trial court's exclusion of a training video created after a workplace accident.

Like its federal analog, Illinois allows evidence of subsequent remedial measures only when a defendant denies that improvements to a product, policy or protocol were possible.

The Chicago Police Department took a long overdue step in shelving "Shoot/Don't Shoot." Moving forward, the department's responsibility to its officers and to the city it serves demands the implementation of improved training methods and materials. The public will be protected, as will the evidence.