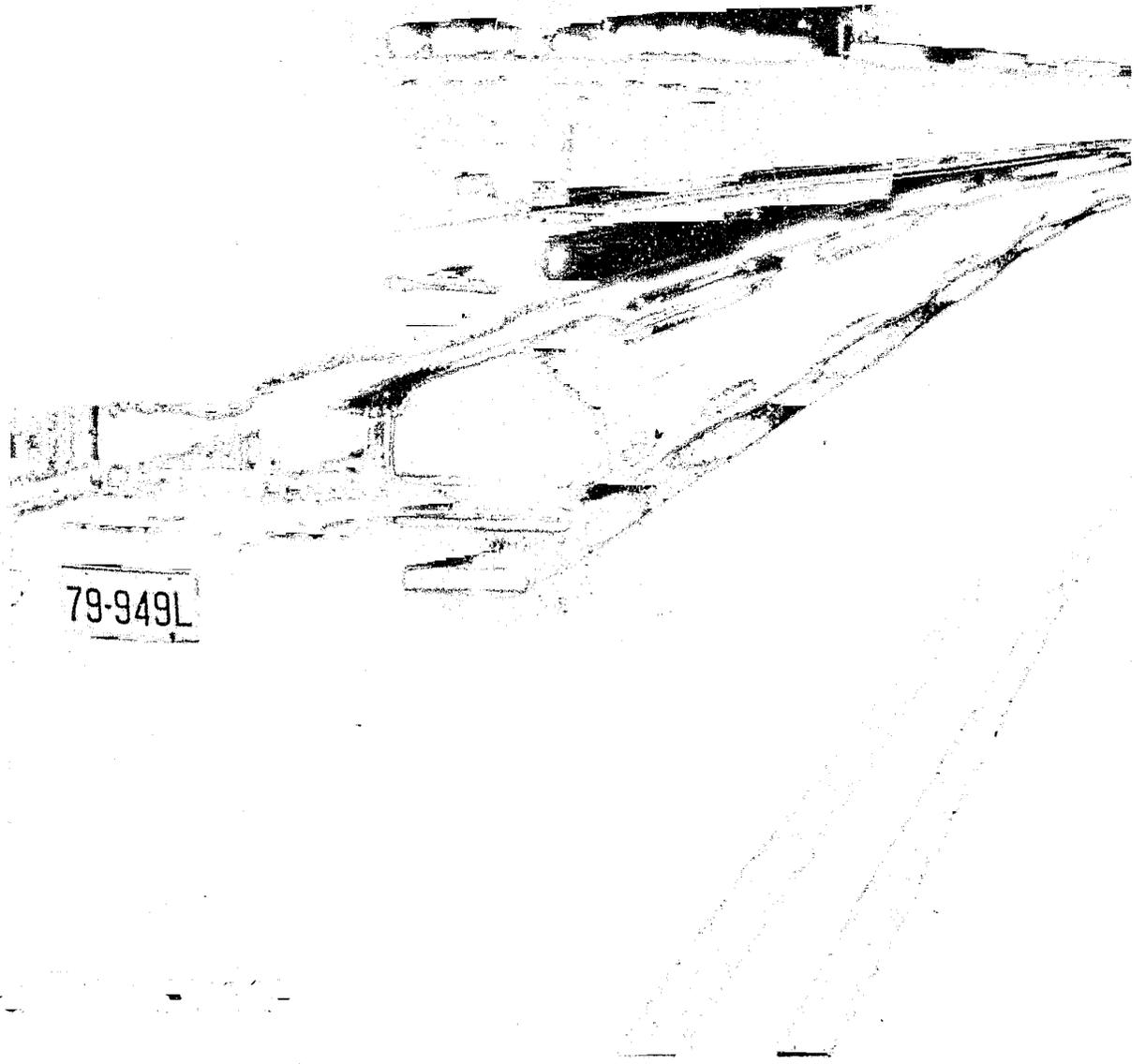




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January 1993
Volume 62
Number 1

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

William S. Sessions,
Director

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The Attorney General has
determined that the
publication of this periodical
is necessary in the
transaction of the public
business required by law.
Use of funds for printing this
periodical has been
approved by the Director of
the Office of Management
and Budget.

The *FBI Law Enforcement
Bulletin* (ISSN-0014-5688) is
published monthly by the
Federal Bureau of
Investigation, 10th and
Pennsylvania Avenue, N.W.,
Washington, D.C. 20535.
Second-Class postage paid
at Washington, D.C., and
additional mailing offices.
Postmaster: Send address
changes to *FBI Law
Enforcement Bulletin*,
Federal Bureau of
Investigation, Washington,
D.C. 20535.

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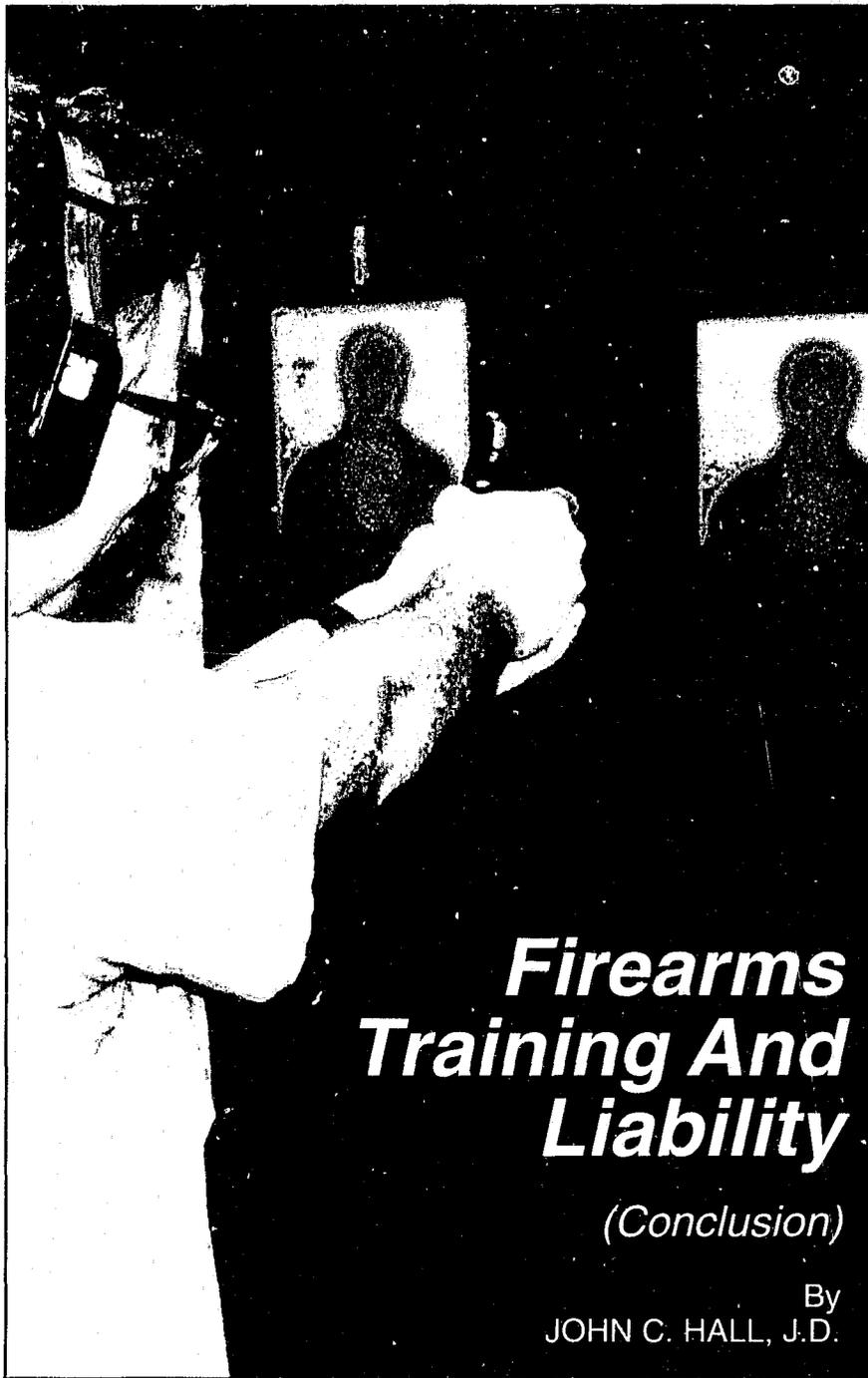
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Firearms Training And Liability

(Conclusion)

By
JOHN C. HALL, J.D.

Part I of this article discussed the circumstances under which a local governmental entity's "failure to train" can result in liability under 42 U.S.C. 1983. The conclusion, which focuses on

law enforcement firearms training, considers the manner in which suits challenging firearms training programs are most likely to arise and suggests some approaches in design and implementation of firearms

training programs to minimize the risks of liability.

FOCUS ON FIREARMS TRAINING

The general principles discussed thus far relate to training of whatever kind, including firearms training. However, the one aspect of firearms training that sets it apart from others and justifies its separate treatment is its critical purpose.

It requires little imagination to recognize that a firearm is an inherently dangerous tool that poses numerous risks in the hands of unskilled persons. Accordingly, it is a relatively simple matter to establish that the need for training is "so obvious" that a policy of providing *no* firearms training to police officers who are to be armed with them demonstrates a "deliberate indifference" to the safety of the community. However, a policy to provide *some* firearms training requires a plaintiff to demonstrate that the kind and quantity of training is so deficient as to constitute "deliberate indifference."

Perhaps reflecting and reinforcing the Supreme Court's view that courts are "ill-suited" to prescribe training programs for police, the cases lack specific instructions on the subject. This leaves the task to those who have some expertise and understanding of the practical issues that must be balanced. Thus, the development of appropriate training programs can focus on, and be guided by, legitimate law enforcement needs, rather than a standardize but possibly irrelevant court-mandated formula. Viewed realistically, if departments design



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themselves.**”

*Special Agent Hall is a legal instructor
at the FBI Academy.*

and implement firearms training programs with practical and realistic objectives in mind, the legal issues will care for themselves.

The latitude and flexibility left to law enforcement agencies in the design and implementation of firearms training programs implicitly recognizes that there is no “standard” program required by the Constitution or guaranteed to satisfy the varied needs of all law enforcement agencies. Given the rather broad framework within which firearms training programs may be developed, the following discussion of common issues is intended only to provide some general guidance.

Kind of Firearms Training

In *City of Canton v. Harris*,³¹ the Supreme Court observed that the liability issue must focus on “adequacy of the training program *in relation to the tasks* the particular officers must perform.”³² It is hardly novel to suggest that training should be logically related to the job. With firearms training, this encompasses

two general areas—proficiency and judgment. Each of these is important and should be included in any firearms program.

Proficiency—How to Shoot

Proficiency relates to an officer’s skill in using a firearm, handling it safely, and firing it accurately. This training should be tailored to the weapon’s characteristics and potential and to the typical circumstances in which police officers will likely use it. These three issues (safety, weapon potential, and circumstances for use) are distinct and should be carefully considered.

Safety

Because courts view firearms as inherently dangerous instrumentalities, the need to train officers in their safe use and handling surely requires no supporting argument. However, while the majority of departments require some firearms training for their officers, the issue takes on new significance as the transition from revolvers to semiau-

tomatic pistols continues in many police agencies. The skills needed to operate one type of weapon safely do not necessarily carry over to another. Without question, safety should be the foundation of any firearms training program and should be a thread that runs throughout all aspects of the training program for the duration of an officer’s career.

Weapon potential

In addition to the safety issue, firearms training should provide trainees with a sense of the weapon’s capability and confidence in their ability to use it effectively within the range of that capability. Because the focus of this training is to establish shooter’s and weapon’s potential, it should not be limited by reference to the statistical probability that a particular circumstance will arise “on the street.”

Indeed, it may well be argued that if statistical probability served as the primary basis for justifying every component of a firearms program, there would be no firearms training at all, because the statistical probability of an officer becoming involved in a gunfight is relatively small. Obviously, this approach is unacceptable.

It has been wisely observed that statistics are sometimes like a swimsuit; what they reveal may be interesting, but what they conceal is vital. An officer involved in a shooting incident has already violated the statistical norm, and survival will most likely depend on the officer’s ability to respond to a situation that was statistically improbable from the outset. Therefore, the critical nature of shooting inci-

dents—not the statistical probability of their occurrence—makes firearms training important, for legal as well as practical reasons.

Circumstances/conditions for use

Once officers are trained to use a firearm safely and to fire it with a reasonable degree of accuracy within the range of its capabilities, training should focus on applying the acquired skills to reasonably foreseeable circumstances and conditions. Here, reference to actual events and statistical probabilities can be most useful.

Designing a department's firearms training program "in relation to the tasks the particular officers must perform" suggests the need to take note of actual occurrences within the experience of that department, as well as the conditions under which officers can be expected to operate. For example, weather and lighting conditions and area characteristics (rural, residential, densely populated, etc.) become relevant. Also, an officer's ability to hit partially concealed or moving targets takes on more importance, because that typifies a shooting incident more than firing at a stationary target.

One of the first Federal court decisions to discuss this issue was *City of Margate v. Popow*.³³ This case has sometimes been misconstrued to mandate specific types of firearms training when, in fact, it only suggests relevant issues for a jury to consider when assessing the adequacy of a firearms program. For that reason alone, it is instructive.

In *Popow*, an officer pursuing a fleeing suspect fired a shot that struck an innocent bystander. The ensuing lawsuit named the municipality as a defendant, alleging inadequate firearms training. The municipality countered with a motion for summary judgment, supported by evidence that the officer had received firearms training.

In denying the motion, the district court noted that there were factual issues relating to the adequacy of the firearms training still in dispute. For example, the court observed that the jury might legitimately question whether the officer received any firearms training beyond that provided at the entry level 10 years before. Or, considering that the officer worked a night shift in a

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”

densely populated area, did the training include night-firing at moving targets, with appropriate emphasis on potential risks to third parties? The court in *Popow* essentially anticipated the language of the Supreme Court in *Canton* that the training should take into account the tasks that officers will most likely be required to perform.

Judgment —When to Shoot

Of equal, if not greater, importance to training that imparts mechanical skills in the use of a firearm is training that enhances an officer's ability to judge when it is appropriate to use a firearm. When litigation results from the use of firearms by law enforcement officers, the issue is more likely to be one of judgment rather than accuracy.

Although there are cases where innocent bystanders were inadvertently struck by police bullets that missed the intended target, they are relatively rare and require artful pleadings and proof to establish a constitutional violation. On the other hand, if an officer fires accurately and succeeds in striking the intended target, there may yet be a lawsuit to challenge the officer's judgment. Training programs devoid of instruction regarding the standards for using deadly force are seriously deficient, regardless of the levels of proficiency attained.

In *Canton*, the Supreme Court discussed a circumstance where a municipality's failure to train could be construed as a "policy" by noting that "in light of the duties assigned to specific officers...the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."³⁴ To illustrate this point, the Court cited the specific issue of judgmental training:

"...city policy makers know to a moral certainty that their police officers will be required

to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish that task. Thus, the need to train officers in the constitutional limitations on the use of deadly force...can be said to be 'so obvious,' that a failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."³⁵

Accordingly, police firearms training should include, or be complemented by, judgmental training in the use of deadly force. This training should incorporate legal and policy guidelines on the use of force, as well as practical instruction in how to apply them.

Ignorance or misunderstanding of the legal limitations can result in an unconstitutional use of force; ignorance or misunderstanding of the practical realities can expose an officer to unnecessary risks. Deficient judgment in either circumstance can result in tragedy.

Making judgments regarding the appropriateness of force in a given situation probably presents the greatest challenge to a police officer. The Supreme Court has observed that such judgments are often made "in circumstances that are tense, uncertain, and rapidly evolving."³⁶ Not only can training provide a frame of reference for such decisions, but it can also condition the mind of the officer to assess relevant information quickly and accurately and to choose a reasonable response.

Training cannot replace the ability or responsibility of an officer to exercise discretion on the street,

and efforts to do so by attempting to anticipate and account for every conceivable situation that may arise will most likely be counterproductive. Excess mental baggage can result in error (the wrong judgment) or inertia (the inability to act). Neither is desirable.

One suggested approach is to instruct officers in the general guidelines provided by the law and policy and then use practical exercises or scenarios to illustrate their proper application. Practical application should, at the very least, incorporate such subject areas as threat recognition, action-reaction limitations, and wound ballistics.

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Undoubtedly, there are many other relevant topics to consider in a firearms training program, but these suggest themselves for a number of reasons. First, officers who do not recognize the nature and level of a threat may act precipitately or tardily, with possible tragic consequences. Second, officers who do not comprehend the edge that action has over reaction fail to take appropriate safety precautions. And finally, officers who do not have

some basic understanding of wound ballistics, i.e., the manner in which bullets inflict wounds, may have exaggerated expectations of their ability to achieve timely incapacitation of opponents or to survive wounds they sustain. Ongoing, repetitive exposure to this kind of training assists officers in developing and honing their judgmental, as well as their survival, skills.

Quantity/Frequency of Training

The mechanical skills involved in firing a weapon—particularly a handgun—can deteriorate. Courts, as well as those who engage in firearms training, recognize this concept, which supports the principle that law enforcement training must be sustained throughout an officer's career. But how much is necessary? And at what intervals? No one knows.

Experience indicates that not only do the skills diminish but also the rate of deterioration varies from person to person. How much or how frequently training must be given to counter the deterioration remains highly subjective. Consequently, in reality, budgetary, logistical, and other practical considerations drive firearms training more than objective data regarding need.

Such cases as *Popow*, which raises the issue of continued training, offer no guidance apart from indicating that it is important. In all likelihood, the content and frequency of the training probably hold more importance than quantity. Furthermore, it should be emphasized that the Constitution does not require perfection.

In *Mateyko v. Felix*,³⁷ the plaintiff challenged the use of a Tazar gun

by the police, alleging that the entire training program for the officers using this weapon lasted only 4 hours and that it contained no instruction regarding voltage and potential effects on the human body. The court held that the plaintiff failed to establish that the alleged deficiencies in the training amounted to "deliberate indifference."

FIREARMS QUALIFICATION

"Qualification," as the term is used in the context of firearms training, may refer to an officer demonstrating the ability to handle a firearm safely and fire it with reasonable accuracy on a prescribed course of fire. Likewise, it may refer to an officer's performance during combat and judgmental shooting. To say that an officer is "qualified" conveys the notion that the officer attained a minimal standard of performance, as demonstrated by successful completion of some test.

As with the content and quantity/frequency of firearms training, caselaw is devoid of guidance to establish precise standards for firearms qualification. Accordingly, departments should adopt courses and standards that are reasonable and likely to be effective for their circumstances.

Because no "standard" exists, as such, courts often rely upon the testimony of "experts." However, those who actually possess expertise in firearms and firearms training are sometimes unable or unwilling to distinguish between

"imperfections" and constitutional deficiencies.

Any training program can be "critiqued," and indeed, none exists that should not be critiqued regularly. However, a distinction lies between identifying areas of a training program that need improvement



or refinement and concluding that the program is so deficient that it exhibits "deliberate indifference." The latter, after all, is the appropriate legal standard. In *Canton*, the Supreme Court noted:

"In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a...plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."³⁸

Law enforcement officers and agencies must have the liberty to scrutinize and critique their programs continuously if law enforce-

ment policies and procedures are to remain lawful, effective, and up-to-date. They should be encouraged to recognize and correct perceived weaknesses, unhampered by the misperception that every flaw is of a constitutional dimension.

GENERAL PRINCIPLES OF FIREARMS TRAINING

Trying to establish fixed, universal standards for firearms training and qualification is both futile and undesirable. Nevertheless, the following philosophical principles may serve to guide the process:

PRINCIPLE #1: Notwithstanding the potential for "failure to train" lawsuits under 42 U.S.C. 1983, the design and implementation of firearms training programs should not be motivated by the sole purpose of avoiding legal liability.

PRINCIPLE #2: Firearms training should be designed to prepare officers to protect themselves and their communities from dangerous individuals, when necessary. To attain that objective, the program should logically take into consideration the nature and conditions of the job and should be tailored accordingly.

PRINCIPLE #3: The standards for the second principle are higher than those of the first. Consequently, a training program designed to safeguard the rights of citizens in the community, while at the same time ensuring the safety of police officers during the performance of their tasks, will amply satisfy any legal standard.

CONCLUSION

Because of the inherently dangerous nature of firearms and the critical circumstances that require their use by law enforcement officers, the significance of firearms training can hardly be overstated. As this article indicates, a failure to train officers adequately in the appropriate use of firearms can result in liability.

It is clear, however, that the law grants considerable latitude to law enforcement agencies in the development of relevant training programs to meet their needs. The law also imposes a relatively high standard for plaintiffs to attain if they are to challenge the adequacy of a firearms training program successfully.

Any deficiency must evidence a "deliberate indifference" to the safety of the community and must cause a constitutional violation before a plaintiff can prevail. Firearms training programs designed to prepare officers for the practical purpose of performing their tasks safely and effectively minimize the potential for liability. ♦

Footnotes

³¹ 489 U.S. 378 (1989).

³² *Id.*

³³ 476 F. Supp. 1237 (D.N.J. 1979).

³⁴ 489 U.S. at 390.

³⁵ *Id.*, footnote 10.

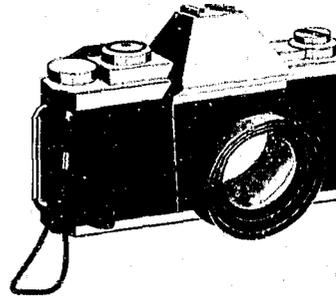
³⁶ 490 U.S. at 396.

³⁷ 924 F.2d 824 (9th Cir. 1990).

³⁸ 489 U.S. at 392.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

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The *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in our magazine. We are interested in photos that depict the many aspects of the law enforcement profession and illustrate the numerous tasks law enforcement personnel perform.

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