

Use of Deadly Force to Arrest a Fleeing Felon— *A Constitutional Challenge*

By

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This is the second part of a three-part article. The conclusion will appear in next month's issue.

RESTRICTIONS UPON USE OF DEADLY FORCE THROUGH DEPARTMENT POLICY

A most significant effort toward reform of the common law rule has come through law enforcement administrators. Whether in response to persuasive police commentary,²⁶ national study commissions,²⁷ or because of tragic incidents in the community,²⁸ many executives of law enforcement agencies have prepared written policy detailing restrictions on the use of deadly force for purpose of making an arrest. In many in-

stances, the policy is more restrictive than the State statutory standard. This is understandable. The fact that deadly force is legally justified does not mean that it is always wisely uti-

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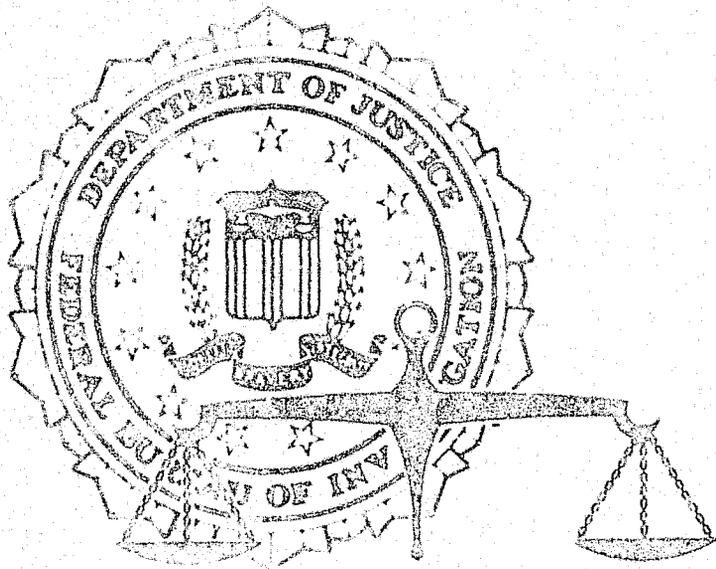
lized. Riots, for example, have been attributed to an officer's legal, but unwise, use of deadly force.²⁹ The legislature determines the legal use of deadly force; the administrator promotes its wise use.

Many law enforcement administra-

tors are concerned that if an officer is sued, the department's firearms regulation will be admitted into evidence, and where more restrictive

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. 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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than State law, will create liability where none might otherwise exist. This is not necessarily the case. To begin with, States differ on admissibility of departmental policy. Decisions in California and Florida illustrate the different responses. For example, in a California case, a police officer shot at and killed a fleeing felon. The shooting was a justifiable use of deadly force under State law. The police tactical manual pertaining to the use of firearms, however, justified the use of deadly force only if necessary to save the officer, a citizen, a brother officer, or a prisoner from death or grave bodily harm. The Supreme Court of California held the manual was admissible on the ground that an employee's failure to follow a safety rule promulgated by his employer, regardless of its substance, serves as evidence of negligence.³⁰

On the other hand, in the State of Florida, at least two district courts of appeal have reached an opposite result. In one case, officers covering a rock concert observed from a rooftop two teenagers trying the doors of a number of vehicles in the parking lot and finally entering a van. The rooftop officers directed officers on the ground to arrest them. As an officer attempted to arrest one of the boys, a struggle ensued and the officer fell to the ground after receiving a blow to the face. The youth ran, and the officer shot the plaintiff in the leg. Florida has codified the common law rule. Over the officer's objection in a civil suit, the court admitted into evidence a departmental order on the use of firearms, which was in effect at the time of the shooting. The order authorized the officers to use firearms to apprehend a fleeing felon, but only

when the officer reasonably believes the fleeing person has committed either (1) a violent crime to the person of another, or (2) a crime against property that clearly demonstrates a wanton and reckless disregard for human life. On appeal, the officer contended that the trial court erred in admitting this order. The appeals court agreed. While the departmental regulation may be applicable for departmental discipline of its own members, the regulation would not affect the standard by which the officer's criminal or civil liability was measured. To admit the public safety order constituted reversible error.³¹

Whether departmental regulations will create liability where none might otherwise exist is more difficult. Americans for Effective Law Enforcement (AELE)³² makes the following points: (1) Police chiefs and other administrators should not be dissuaded from promulgating safety rules and policy directives due to the threat of civil liability; (2) it is inconsistent with modern management to leave unfettered discretion (as to when an officer may use his firearm) to the lowest ranks—this is not to suggest that any particular restrictive policy is meritorious, only that planning and policymaking should be centralized at the highest administrative levels; and (3) written directives which restrict a police officer's action beyond the requirements of State law should contain an explanation of their intended purpose. Suggested wording is as follows:

"This directive is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of this directive, if proven, can only form the

basis of a complaint by this department, and then only in a nonjudicial administrative setting."³³

The wise administrator, concerned about potential liability problems with regard to the use of deadly force, will discuss this topic with a legal adviser. He certainly wants to know what effect his policy might have on his officers' potential liability. He needs to be clear as to who will pay the civil judgment, if one is awarded, arising out of a deadly force case.³⁴

THE INTERPLAY BETWEEN A STATE'S JUSTIFIABLE HOMICIDE STATUTE AND CIVIL LIABILITY

A State legislature defines what constitutes justification for an act otherwise criminal.³⁵ A State civil court defines what constitutes privilege for conduct otherwise tortious.³⁶ Query: Can a State civil court adopt a definition of an officer's privilege in the use of deadly force, that is more restrictive than the State's legislative standard, expressed through its justifiable homicide statute?

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The question underscores the distinction between the two areas of the law—criminal and civil. The legislature of the State has the legitimate authority to define crimes and defenses, and generally the civil courts retain the common law authority to define torts and their defenses. So the simple answer to the question is yes; civil courts may adopt a definition of privileged conduct that is more re-

strictive than the State's justifiable homicide statute. It should be emphasized, however, that most courts have refused to do so.

A recent Minnesota case illustrates the point. Early one morning, an off-duty officer, dressed in civilian clothes but who carried his .38-caliber snub-nose revolver, drove a marked police department "take-home" squad car, which he was authorized to use, to pick up the morning newspaper. On his return, he observed a station wagon traveling at an excessive rate of speed collide with a parked car. Two boys got out, yelled something into the station wagon, and then ran. As the officer stopped his squad car, another person alighted from the driver's side of the wagon and ran. The officer jumped out of the squad car and shouted "Stop, police." As he chased one boy, he repeatedly shouted similar warnings, finally calling out, "Stop, or I'll shoot." The plaintiff ignored the warnings and continued to run. The officer fired a warning shot into the ground, but the plaintiff only ran faster. The officer again yelled, "Stop, or I'll shoot." When this warning failed to produce results, the officer aimed and fired a shot, intending to hit the plaintiff in the lower part of his body. Instead of striking the plaintiff in the legs, the bullet struck the plaintiff in the nape of the neck, permanently crippling him.

In his complaint, the plaintiff alleged defendant's liability on two theories—battery and negligence. The trial court submitted the case to the jury on the theory of negligence alone. The jury found for the officer. They found also that the plaintiff's negligence was the proximate cause of his own injury. The plaintiff appealed. He argued that it was error for the trial court to leave out the issue of battery. In addition, the plaintiff sought to have the Supreme Court of Minnesota adopt a civil liability standard for privileged conduct, a standard that

would be more restrictive than the State's justifiable homicide statute. Minnesota's justifiable homicide statute follows the common law rule.

The Supreme Court of Minnesota held that the trial court had improperly framed the issue in the case in terms of negligence rather than battery and remanded the case for a new trial. The court wrote that while they were not technically bound to follow the statutory formulation of the justifiable homicide statutes, they would nevertheless do so and defer to the legislative policy in defining tort liability. The police officer contemplating the use of force under emergency conditions should not be held to conflicting standards of conduct by the civil and criminal law. The confusion which would be engendered by such a situation can only produce unfair and inequitable results. The Court wrote:

"It is in the legislative forum that the deterrent effect of the traditional rule may be evaluated and the law-enforcement policies of this state may be fully debated and determined. . . . The legislature, and not this court, is the proper decision maker."³⁷

In order for a police officer to raise an affirmative defense of privileged use of his firearm in a suit alleging battery, the officer must bear the burden of proving: (1) That he had probable cause to believe that the person sought to be arrested either committed or was committing a felony, and (2) that he reasonably believed the arrest could not be effected without the use of a firearm.

CONSTITUTIONAL ANALYSIS OF THE USE OF DEADLY FORCE TO ARREST A FLEEING FELON

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violent, fleeing felon. Such a challenge may be made by a plaintiff seeking either declaratory or injunctive relief.³⁸ Most frequently, however, the plaintiff merely files a claim under title 42, United States Code, section 1983,³⁹ alleging the violation of a constitutional right. This legislation was enacted April 20, 1871, with the purpose of providing a remedy for the wrongs allegedly being perpetrated under color of State law. Thus, 1983, as it is often called, creates a right to sue law enforcement officers personally for depriving another of ". . . any right, privileges, or immunities secured by the Constitution and laws. . ." (of the United States). Such suits may be filed in the U.S. district courts under the provisions of title 28, United States Code, section 1343.

Prior to 1961, it was thought the plaintiff had to exhaust possibilities that local or State remedies would give relief before coming to the Federal court. In a 1961 landmark decision, the U.S. Supreme Court established the principle that the right to sue police officers under 1983 was completely independent of any State remedies that might be available. The Court stated, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought

and refused before the federal one is invoked." An officer could no longer regard abstention or exhaustion of local remedies as useful in defending an action under 1983.⁴⁰

Thus, a plaintiff may commence a section 1983 action against an officer in Federal court, or he may file a civil suit in State court. It is sometimes asked how a State civil lawsuit brought in a State court and arising out of the same set of facts differs from a 1983 suit. Some general observations on the nature of a State law suit are useful before discussing some of the recent 1983 cases.

State Tort Action Distinguished

State civil lawsuits arising out of an officer's use of his firearm are not unusual. A suit may develop from its negligent use as well as from its intentional use. In the latter case, the distinction between justifiable force and excessive force is important.

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Negligence

Probably the most widely recognized duty of a law enforcement officer is that of requiring him to avoid negligence in his work. Our society imposes a duty upon each individual to conduct his affairs in a manner which will avoid subjecting others to an unreasonable risk of harm. This, of course, also applies to law enforcement officers. If his conduct creates a danger recognizable as such by a reasonable officer in like circumstances, he will be held accountable to others injured as a proximate result of his conduct and who have not con-

tributed to their own harm. These general principles are well-known concepts in the law of negligence.

They mean that actions taken by officers in apprehending criminals must not create an unreasonable risk of injury or death to innocent persons. The creation of risk is not in and of itself negligence; however, the law does require a reasonable assessment of harm's likelihood and regards as negligent any act which creates a risk of such magnitude as to outweigh the utility of the act itself.

Under the civil court system, if the police officer owed no duty to the complainant, he will not be penalized even if the plaintiff in fact suffered some injury. An officer will be liable only where it is shown that (1) he was obliged to do or refrain from doing something, and (2) the plaintiff was injured because of the officer's failure to comply with this obligation or duty.

Assume that Officer A shoots at B, a felon fleeing in a congested downtown area, but misses B and hits C, an innocent bystander. C, in a civil suit against Officer A in State court, will allege that Officer A was negligent in the discharge of his firearm. The gist of C's suit is that Officer A has breached his duty to C.

Intentional Torts

Another category of torts is termed intentional torts. In a negligence suit, the officer will not be liable unless he foresaw, or should have anticipated, that his acts or omissions would result in injury to another. An intentional tort is the voluntary doing of an act which to a substantial certainty will injure another. It does not have to be performed negligently to be actionable. Examples of such torts are false arrest and assault and battery. Assume Officer A intentionally shoots and seriously injures B, a fleeing felon. B may bring a civil suit in State court alleg-

ing that he has been battered, an intentional tort. The gist of B's action is that Officer A used excessive force in his effort to apprehend him and the use of his firearm was not justified under the circumstances. It is not alleged that Officer A was negligent—he did what he intended to do—namely, shoot B. The essential elements of the tort of battery are intent and contact. Privilege, however, is an affirmative defense to the tort of battery. Usually the officer must bear the burden of proving the essential elements of the defense. A few jurisdictions reach a contrary result, adopting the rule that a police officer's act is presumed lawful.⁴¹ In final analysis, the reasonable-

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FOOTNOTES

³⁸ Chapman, "Police Policy on the Use of Firearms," *Police Chief*, July 1967, at 16, 26-27; McGreedy & Hague, "Administrative and Legal Aspects of a Policy to Limit the Use of Firearms by Police Officers," 42 *Police Chief*, January 1975, at 48.

³⁷ President's Comm'n. on Law Enforcement and Administration of Justice, Report: The Challenge of Crime in a Free Society 119 (1967); Task Force

Survivors' Benefits Awarded

The Law Enforcement Assistance Administration (LEAA) recently announced the award of \$1,250,000 in benefit payments to survivors of 25 public safety officers and firefighters killed in the line of duty. These payments will be the first made under the Public Safety Officer's Benefits Act of 1976. The survivors of each officer will receive \$50,000.

The act covers men and

women serving State and local public agencies in official capacities, with or without pay, as law enforcement officers or firefighters. Included are persons working in police and corrections agencies, probation and parole, and in court positions. It also covers volunteer firefighters, if they are members of legally organized volunteer fire departments.

Report: The Police 189-90 (1967); 1 Nat'l. Comm'n. on Reform of Fed. Crim. Laws, Working Papers 269 (1970).

³⁵ Bart, "Inquest Lightens Tension in Watts," *New York Times*, May 21, 1966, p. 13, col. 1.

³⁶ The San Francisco riot of 1966 was said to have started after a juvenile was shot and killed while fleeing from a stolen car. Davis, "Calm is Restored in San Francisco," *New York Times*, Sept. 30, 1966, p. 1, col. 5.

³⁹ *Grady v. City of Los Angeles*, 468 P. 2d 825 (Cal. 1970).

⁴⁰ *City of St. Petersburg v. Reed*, 330 So. 2d 25 (Fla. App. 1976). See also, *Chastin v. Civil Service Board of Orlando*, 327 So. 2d 230 (Fla. App. 1976).

⁴² Americans for Effective Law Enforcement, Inc. (AELE) is a national, not for profit organization whose purpose is to provide a voice for the law-abiding citizens through responsible support for professional law enforcement. As a citizen-supported research and action organization employing three attorneys and three legal assistants, all of whom have law enforcement backgrounds, AELE also publishes the *Legal Liability Reporter*, and the staff has sponsored workshops across the country on civil liability.

⁴³ AELE Legal Defense Manual, "Admissibility of Police Written Directives in Litigation," Brief No. 76-5, p. 14 (October 1976).

⁴⁴ A.B.A. Standards for Criminal Justice, The Urban Police Function (approved draft, 1973) § 5.5, provides: "In order to strengthen the effectiveness of the tort remedy for improper police activities, municipal tort immunity, where it still exists, should be repealed and municipalities should be fully liable for the actions of police who are acting within the scope of their employment as municipal employees."

⁴⁵ Justification is based on a determination that an act is legal because circumstances negate the validity of the normal rules of criminal liability. Such defenses recognize that under such circumstances the value protected by law is eclipsed by a superseding value. Note, *Statutory Reform*, 75 *Colum. L. Rev.* 914 (1975).

⁴⁶ Privilege in the law of torts is a defense to what might have been an actionable wrong. It excuses such conduct, hence no liability occurs. Comment, 11 *Harv. Civ. Rights—Civ. Lib. L. Rev.* 361.

⁴⁷ *Schumann v. McGinn*, *supra* note 1, at 537. The dissenting opinion of Justice Rogosheske is instructive.

He pointed out that the criminal statute distinguishes between the killing of felony and misdemeanor suspects, whereas sound policy dictates that tort law should distinguish between the killing of dangerous and nondangerous criminal suspects: "Surely a police officer should not be imprisoned if he mistakes a nondangerous for a dangerous felony suspect and uses his firearm against the former. However, unless he is in violation of specific instructions (emphasis added) his employer ought to bear financial responsibility for mistakes committed in the line of duty. Viewed in this way, it does not follow, as the majority declares, that under the rule urged a police officer contemplating the use of force under emergency conditions would be held to conflicting standards of conduct by the civil and criminal law. A police officer who makes a mistake and uses deadly force against a nondangerous felon would know unequivocally that he is committing a civil wrong. The legislature and the courts of this state, out of awareness of his difficult job in these emergency circumstances, will not jail him for his mistake, but in no way can that justify granting immunity for a civil wrong. . . . Rather, and hopefully, it would lead all police officers in Minnesota to do what some, if not most, well-trained and experienced police officers already practice, which is to follow the rule that the use of deadly force is not a proper arrest procedure for nondangerous, nonthreatening felons."

⁴⁸ Generally, the way to challenge the constitutionality of a State statute is to seek injunctive relief under 28 U.S.C. § 2281. Upon proper application, a three-judge court will be convened to hear and determine the constitutionality of the challenged status. See, *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971).

⁴⁹ 42 U.S.C. § 1983 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

⁵⁰ *Monroe v. Pape*, 365 U.S. 167 (1961).

⁵¹ *West v. Nantz*, 101 S.W. 2d 673 (Ky. 1937); *Wall v. Zeeb*, 153 N.W. 2d 779 (N.D. 1967); *Molesett v. Emmons*, 292 S.W. 855 (Tex. Com. App. 1927).

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