

FBI Law Enforcement Bulletin
Vol. 46, No. 11 (Nov. 1977)

THE LEGAL DIGEST

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

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This is the conclusion of a
three-part article.

Title 42 U.S.C. 1983 Suits

The essential elements of a section 1983 case are (1) conduct of some person, (2) acting under *color of State law*, and (3) which *deprives* another of *rights, privileges, or immunities secured by the Constitution* or laws of the United States. The essence of the action is a claim to recover damages for injury wrongfully done to another person. The liability is personal.

Allegations of misconduct in 1983 suits are drawn from a broad spectrum of rights, privileges, and immunities afforded protection by the Federal Constitution and laws of the United States. The approach is for the complainant to allege a violation of the 14th amendment, section 1, which contains the following language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The key phrases, "privileges and immunities," and "due process of law," and "equal protection of the laws" are the vehicles by which 1983 protections are usually identified. For example, the guarantee against unreasonable searches and seizures contained in the fourth amendment is applicable to State officers by reason of the "due process" language of the 14th amendment. Thus, an officer acting

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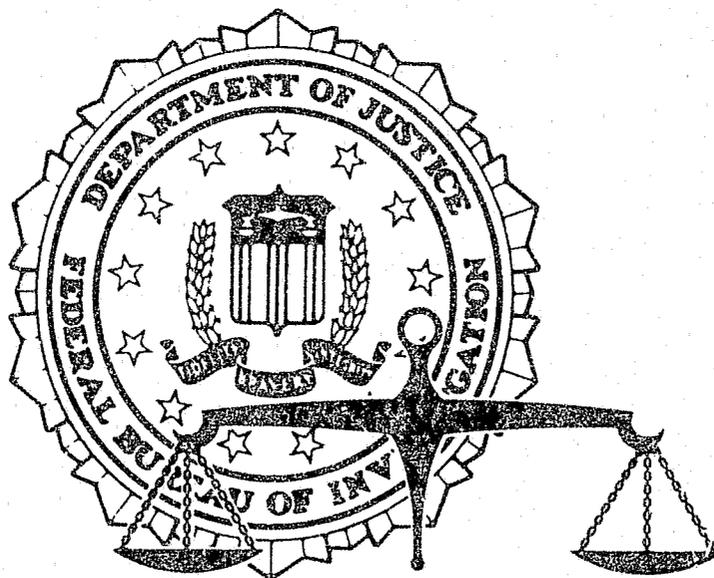
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contrary to the fourth amendment might be held liable for denying a citizen his constitutional right to due process.

Practically all routine law enforcement work has the potential of becoming the subject of complaint by an irate citizen who demands satisfaction by way of a civil suit under this statute. Therefore, one of the heavy responsibilities of each law enforcement officer is to recognize and protect the rights, privileges, and immunities of persons within the jurisdiction he serves. Section 1983 crystallizes the

officer's duty in this respect where constitutional or Federal rights are concerned. Thus, the statute implies that an officer has a specific duty to avoid depriving others of the enjoyment of these guarantees and that, by his failure to comply with that duty, he may incur personal liability for the resulting injuries.

Does this mean that an officer, who is negligent in the use of his firearm, may be sued in Federal court under 1983 for the violation of a constitutional right?

Section 1983 was not intended to be a substitute for State tort action, nor grant a Federal forum for every citizen's claim of injury by a State official. Negligence, as such, is not actionable as a civil rights complaint. The official conduct must deprive another of a constitutional right.¹² Yet, conduct that a State court would classify as negligence has formed the basis of a 1983 suit. Let us look at some examples of constitutional classifications and see how plaintiffs have fashioned their complaints so as to bring

their case into Federal court as a 1983 cause of action.

The Fourth Amendment

The fourth amendment declares in part: "The right of the people to be secure in their *persons* . . . against unreasonable searches and seizures, shall not be violated . . ." This constitutional provision has long been interpreted to embrace security from arbitrary intrusion by the police. The following case illustrates how one Federal court applied this language to facts that sound of negligence. An officer, after reporting to the scene of a disturbance, observed a young boy leave the scene. The officer pursued, thinking the boy had a gun. The boy carried a tire tool in his hand, which he dropped when the officer yelled for him to "halt." All the witnesses, including the officer, heard the tool drop. The officer testified that as he lowered his gun he accidentally pulled the trigger, putting a hole through the boy's thigh. The district judge found the officer's use of force amounted to gross or culpable negligence; however, he was of the opinion that the plaintiff could not prevail under Federal law since 1983 was not intended as a means of recoupment for injuries caused by the negligence of a State officer acting in the course of

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.

his duty. With this the appellate court disagreed. The appeals court reasoned that gross or culpable conduct was the equivalent of arbitrary action; that is, the officer's action was more than just simple negligence. "Our concern here is with the raw abuse of power by a police officer . . . and not with simple negligence on the part of a policeman or any other official."¹³ Such arbitrary action is a constitutional violation.

Cruel and Unusual Punishment—The Eighth Amendment

Plaintiffs have also contended that the use of deadly force against a non-violent fleeing felon is cruel and unusual punishment in violation of the eighth amendment. In a recent case, officers investigating a burglary attempt killed the plaintiff's son as he was fleeing from an arrest. The plaintiff contended that the State statute, which followed the common law "any felony" rule, was unconstitutional on its face and as it was applied because it permitted the administration of cruel and unusual punishment in violation of the eighth amendment. Deadly force can be constitutionally authorized only when necessary to protect "one's own life or safety, or the life and safety of others."

The three-judge court, convened to determine the constitutionality of the State statute permitting the use of deadly force to arrest any felon, held that the statute was not in violation of the eighth amendment. The amendment deals with punishment, and the short answer to the plaintiff's contention was that the State statutes simply were not dealing with punishment. An officer in effecting an arrest cannot use *any* force for the purpose of punishing a person and to do so is a crime under title 18, United States Code, section 242. It may be better as a value judgment to allow nonviolent felons to escape rather than incur the

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risk of killing them. But that is a policy question for the State legislature, not for the Federal courts to decide in the guise of constitutional adjudication, the court said. The panel went on to hold that the State statute was not unconstitutionally overbroad or vague and was not violative of the equal protection clause of the 14th amendment.¹⁴

Due Process

The fifth amendment to the U.S. Constitution provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." The 14th amendment applies the same limitation on the States: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The use of deadly force by law enforcement officers in effecting an arrest is a well-recognized ground for a 1983 case. Yet, the exact place in the Constitution of a right to be free from such force is not clear and has been the subject of disagreement in the decisions of the Federal courts of appeal. Several opinions have expressed the thought that the right arises from the due process clause of the 14th amendment; that is, the right to be secure in one's person, a right to life itself, which stands separate and apart from any specific right found in the Bill of Rights. Such a

right is fundamental and basic to an ordered society and is inherent in the Constitution. It is thus protected by the due process clause. The claim is, therefore, that the State fleeing felon statute violates the due process clause of the 14th amendment because, procedurally, it permits the arbitrary imposition of death by the officer, violates the presumption of innocence, and denies the suspect a right to trial by a jury. Of course, the arguments would apply as well to the use of deadly force against the violent, dangerous felon. Courts, in applying a due process analysis, attempt to balance the interests of society in guaranteeing the right to life of an individual against the interest of society in insuring public safety. They have not agreed on where the balance should be struck.

Two cases illustrate the conflict. Both are from States which follow the common law "any felony" rule, and perhaps best illustrate the constitutional challenge made against the rule. One case is from Connecticut; the other is from Missouri.⁴⁵

Connecticut Case

An officer, while cruising in his patrol car in the ordinary course of his duties, observed an automobile occupied by three young males. Both cars proceeded for several blocks at a lawful rate of speed. Through radio contact, the officer determined the vehicle had been reported stolen. The boys became aware they were being followed and accelerated to about 80 miles per hour. The officer followed in hot pursuit. After traveling several blocks, they reached the end of the road. Both the stolen vehicle and the patrol car slid to a stop, causing a large cloud of dust. Since the occupants of the car were not immediately visible, the officer climbed to the top of a nearby embankment. He observed two men running across a

nearby field and called for them to halt. They momentarily turned to face him, but then began to run away. The officer fired his gun at the leg of one of the fleeing suspects, but struck him in the left buttock, causing internal injuries which resulted in his death. It was stipulated that none of the occupants had threatened physical injury to the officer in any manner.

The rule in Connecticut is that an arresting officer may use deadly force if he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony.⁴⁶

Missouri Case

Two young boys entered the office of a golf driving range at night by means of an unlocked window for the purpose of stealing money. As they departed through a back window, they were intercepted by a policeman. He ordered them to stop, but rather than submit to arrest, they fled in different directions. As another officer, who had just arrived on the scene, rounded the building, he collided with one of the boys. They both fell to the pavement. The officer grabbed the boy's leg, but he broke from the officer's grasp and ran. The officer pursued, but was losing the race. He shouted: "Stop, or I'll shoot," but the boy did not stop. Believing that it was necessary to take further action to prevent escape, the officer fired a warning shot. The bullet, however, struck the youth in the head, causing his death. It was stipulated by the parties that the officer's use of his gun was "reasonably necessary under the circumstances and was authorized by the statutes of the State of Missouri."

The pertinent Missouri statutes read as follows:

"Justifiable Homicide

Homicide shall be deemed

justifiable when committed by any person in either of the following cases:

* * * * *

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully . . . keeping or preserving the peace.

Rights of Officer in Making Arrests

If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary means to effect the arrest."⁴⁷

A civil rights action was instituted in each case under title 42, United States Code, section 1983, alleging that the individual officers, acting under color of State law, deprived the fleeing persons of their lives without due process of law. The officers' answers were the same; namely, they acted in good faith plus they had a reasonable basis to believe their conduct was lawful. In each case, the arresting officer simply relied upon the validity of his State statute, which permits a law enforcement official to use deadly force in apprehending a person who has committed a felony.

The plaintiffs' contention was that such statutes as these are unconstitutional, and they should be declared so by the Federal courts. While such declarations may not affect the liability of the current defendants, it would remove the defense of good faith in future damage actions of this kind. They asked the courts in each case to fashion a constitutional standard which would restrict the use of deadly force in effecting an arrest to violent felonies or circumstances where there is substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

In the Connecticut case, the Federal

appellate court rejected the plaintiff's argument: ". . . [S]tates must be given some leeway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force. Further, in the light of the shifting history of the privilege, we cannot conclude that the Connecticut rule is fundamentally unfair."⁴⁸

In the Missouri case, the Federal district court held that a defense of good faith had been established and therefore denied an award of damages. The court concluded there was no longer a controversy between the parties which would permit the granting of declaratory relief; therefore, the court declined to rule on whether the Missouri statutes were unconstitutional. Even if the statutes were unconstitutional, the court reasoned, the defense was still available to the officer, since he reasonably believed in their constitutionality at the time. No appeal was taken from the denial of damages, but the plaintiff appealed the court's denial of declaratory relief. The Federal appellate court disagreed with the district court and remanded the case for consideration on the merits of the constitutional issue. The good faith defense cannot serve as a reason for denying equitable relief. Furthermore, the appellate court disagreed that the parties lacked sufficient adverse interest. The result of a declaratory judgment in favor of the plaintiff would be to remove the defense of good faith in future damage actions. "Those who would use a statute as a shield must be prepared to defend the constitutional validity of that shield."⁴⁹

On remand, the district court held the Missouri statutes did not violate the U.S. Constitution. To abolish the use of deadly force would deprive the State and its citizens of their rights to security, safety, and a feeling of protection. To pick and choose those

crimes warranting the application of deadly force is the duty of the legislature. "It is not the role of a federal judge to legislate for the people of a state."⁵⁰

On the second appeal, the Federal appellate court again reversed and held the Missouri statutes unconstitutional. Statutes as broad as these deny due process in that they create a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and the general public. The court reasoned:

"The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn, as well as one who kills and ravishes at will. For the reasons we have outlined, the officer is required to use a reasonable and informed professional judgment, remaining constantly aware that death is the ultimate weapon of last resort, to be employed only in situations presenting the gravest threat to either the officer or the public at large. Thus we have no alternative but to find [the statutes] unconstitutional in that they permit police officers to use deadly force to apprehend a fleeing felon who has used no violence in the commission of the felony and who does not threaten the lives of either the arresting officers or others."⁵¹

On May 16, 1977, the U.S. Supreme Court vacated the judgment of the Court of Appeals and remanded the case with instructions to dismiss the complaint. For a declaratory judgment to issue, there must be a dispute which calls for an adjudication of adverse interest. There was no such dispute in this case. The plaintiff's claim of a present interest was twofold: (1) That he would gain emotional satis-

faction from a ruling that his son's death was wrongful; and (2) he has another son, who *if* ever arrested on suspicion of a felony, *might* flee or give the appearance of fleeing, and would therefore be in danger of being killed by defendant or other police officers. As to the first claim, the Court stated that emotional involvement in a lawsuit is not enough to meet the case or controversy requirement, and were the law otherwise, few cases could ever become moot. As to the second claim, the Court stated that such speculation is insufficient to establish the existence of a present, live controversy.⁵²

In disposing of the case in the manner described above, the Supreme Court emphasized they were not considering the merits of the court of appeals' opinion. Therefore, the question whether the use of deadly force to apprehend a nondangerous fleeing felon constitutes a violation of the U.S. Constitution remains open. The Missouri case represents the only Federal appellate court opinion which, on the merits, has indicated that it does.

VII. CONCLUSIONS

Critics of the common law rule claim the use of deadly force against a nondangerous fleeing felon is an abuse of deadly force. The possible remedies against such abuse—namely, civil liability or criminal prosecution, or both—are ineffective deterrents. Where the State has a justifiable homicide statute which codifies the common law "any felony" rule, it operates to form a shield for the officer, not only against criminal liability but also against civil liability. Thus, civil courts, while not technically bound to do so, usually recognize in the State statutes a legislative policy toward which they will defer in defining tort liability. Even while doing so one court pointed out: ". . . the preferable rule would limit the privilege

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to the situation where the crime involved causes or threatens death or serious bodily harm, or where there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."⁵³

Every modern law enforcement executive knows well his duty to insure efficient and effective firearms training before an officer is assigned a weapon. Yet, the executive's responsibility does not rest there. He realizes, in addition, that the officers under his command are entitled to clear and specific instruction on the circumstances under which the use of a firearm is permissible. This takes form in written departmental policy.

One law enforcement executive has remarked that "a policy without teeth is just about as effective as a patrol car with four flat tires." Policy must be reinforced by effective instruction from recruit training at the academy through advanced inservice or firearms training throughout an officer's career.

Notwithstanding departmental policy and excellent instruction in both the skill and proper use of a sidearm, the final decision to use it must rest with the individual officer. That decision will be formed in some measure by his own moral and ethical judgment concerning the use of deadly force. The administrator should be as concerned with an officer who is afraid to use his sidearm when the situation requires its use as he is with the officer's reckless and unjustified use. He fulfills his administrative duty when he addresses both issues.

A recent Police Foundation report⁵⁴ makes the point that many departments lack adequate recordkeeping procedures designed to identify and monitor officers' conduct involving the use of excessive force and repeated involvement in shooting incidents. The authors point out ". . . the lack of systematic centralized data collection in many departments inhibits the rational development of new policies, training programs, and enforcement procedures."⁵⁵

One important misconception about deadly force that became evident in the several cases reviewed in this article is that officers think they have the ability to shoot to wound when the person shot at is fleeing the scene. In case after case, the testimony of the officer was to the effect that he actually shot at an arm or leg, but the bullet struck the head, the neck, or the back. One coroner's report stated: "Given a moving target, in a range of seventy-five yards, or less, the target will probably be hit, but not where the gun was aimed. Therefore, the police officer should not think he is going to inflict a nonfatal wound by shooting at an arm or leg. He should fully expect the shot to be fatal."⁵⁶

Contrary to the popular image of police work, a decision to use deadly force against a fleeing suspect is a rare one for most law enforcement officers. Yet, of all the decisions an officer is called upon to make in emergency arrest situations, whether to use deadly force can turn out to be the most agonizing and tormenting of all. Officer Marshall's testimony about his decision to shoot at a fleeing felon,

which led to the Connecticut case of *Jones v. Marshall*, is a powerful example of the conflicting emotions affecting an officer faced with a decision whether to use deadly force.⁵⁷ In another case, the permanent paralysis of a 15-year-old boy who was caught with a stolen car and the distressed emotions of the defendant police officer following the shooting emphasize the tragedy of the legal, but unwise, use of deadly force.⁵⁸

Law enforcement personnel everywhere have a vital interest in what constitutes the legal use of deadly force. Especially is this true of administrators. They should follow any effort to restrict its legal use, whether that restriction comes through legislative reform, their own State court decisions, or continued constitutional attack in Federal courts. Beyond this, the administrator has a more difficult responsibility. He must decide when the use of deadly force is wise and prudent and support that decision with clear policy and effective training.

FOOTNOTES

⁴² *Paul v. Davis*, 47 L. Ed. 2d 405 (1976).

⁴³ *Jenkins v. Averett*, 421 F. 2d 1228, 1232 (4th Cir. 1970). See also *Reed v. Philadelphia Housing Authority*, 372 F. Supp. 686 (E.D. Pa. 1974).

⁴⁴ *Cunningham v. Ellington*, supra note 39.

⁴⁵ *Jones v. Marshall*, supra note 10; *Mattis v. Schnarr*, supra note 6.

⁴⁶ Conn. Gen. Stat., § 53a-22.

⁴⁷ Mo. Rev. Stat., supra note 18.

⁴⁸ *Jones v. Marshall*, supra note 10, at 112. See also *Wiley v. Memphis Police Department*, 518 F. 2d 1247 (6th Cir. 1977); *Wolfer v. Thaler*, 525 F. 2d 977 (5th Cir. 1976), cert. denied 425 U.S. 975 (1976); *Hilton v. State*, 348 A. 2d 242 (Me. 1975).

⁴⁹ *Mattis v. Schnarr*, supra note 6, at 1020.

⁵⁰ *Mattis v. Schnarr*, 401 F. Supp. 643, 651 (E.D. Mo. 1975).

⁵¹ *Mattis v. Schnarr*, supra note 6, at 1020.

⁵² *Ashcroft v. Mattis*, supra note 7.

⁵³ *Jones v. Marshall*, supra note 10, at 140.

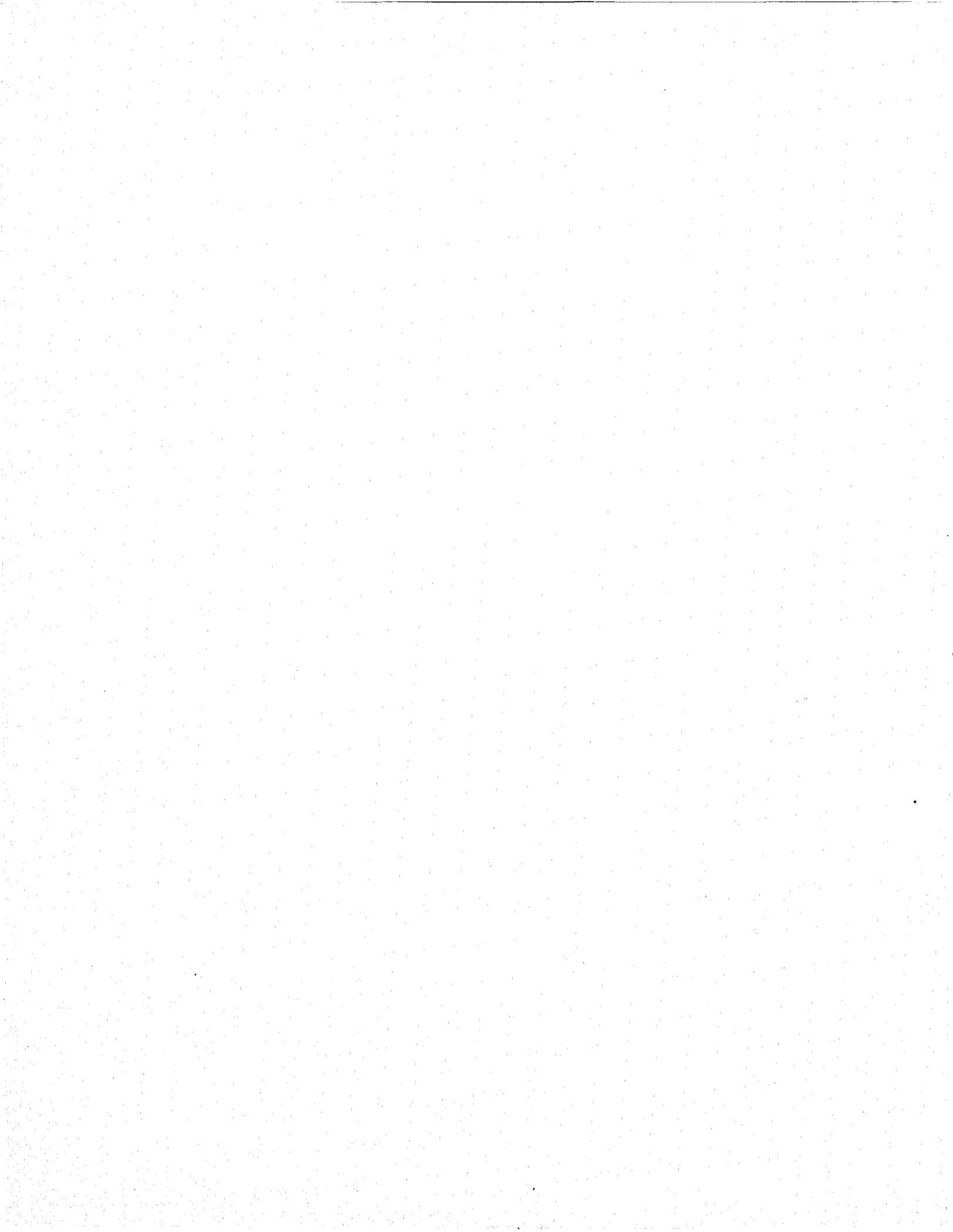
⁵⁴ Police Foundation, "Police Use of Deadly Force" (1977).

⁵⁵ *Id.* at 141.

⁵⁶ Coroner's Report in *Jones v. Marshall*, 383 F. Supp. 358 (D. Conn. 1974), *aff'd* 528 F. 2d 132 (2nd Cir. 1975), reported in Goldstein, Dershowitz, & Schwartz, *Criminal Law: Theory and Process* 331 (1974).

⁵⁷ Goldstein, Dershowitz, & Schwartz, *Criminal Law: Theory and Process* 327-30 (1974).

⁵⁸ *Schumann v. McGinn*, supra note 2, at 541.



END