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Deadly Force
A Question of Necessity

By
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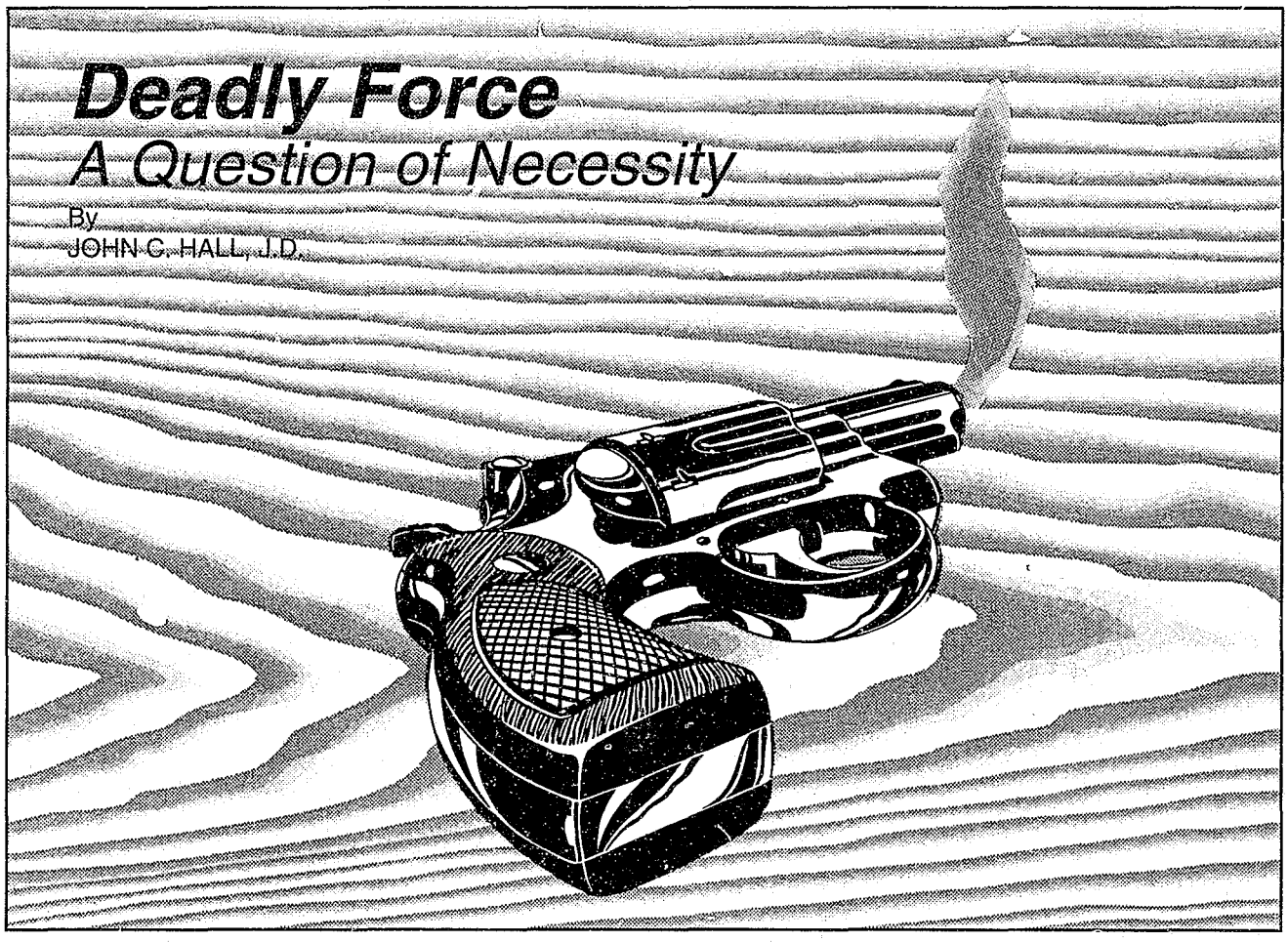

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."

—*Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989)

Federal constitutional standards permit law enforcement officers to use deadly force to apprehend criminal suspects when there is "probable cause to believe that the suspect poses a threat of serious physical harm...to the officer or to others..." and if deadly force "is necessary" to effect the apprehension.[1] This formulation of the constitutional rule by the Supreme Court suggests two factors—dangerousness and necessity—as relevant to the question whether deadly force is constitutionally permissible.

With respect to "dangerousness," the Court has suggested that "...if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm...,"[2] the officer reasonably could conclude that the suspect is dangerous. However, the absence of comparable guidance on the issue of "necessity" has invited serious legal challenges on this issue alone. These challenges generally may be described as follows:

1) Deadly force was not necessary because less intrusive alternatives were available, or

2) If deadly force was necessary, the officer's prior actions created the necessity.

Both arguments concede the reasonableness of an officer's threat assessment, and both seek to deflect the attention—and the responsibility—from the suspect's actions to the officer's judgment. The first would impose a duty on an officer confronted with a lethal threat to consider other options before using deadly force; the second would impose a duty on an officer to anticipate and prevent actions of a suspect that might make the use of deadly force necessary.

Whether the Constitution imposes these duties on police officers is a question that must be answered if officers and the courts are to understand and to apply properly the constitutional standards governing the use of deadly force. The logical starting point is the Supreme Court's interpretation of the fourth amendment.

In its 1989 landmark decision of *Graham* v. *Connor*,[3] the Supreme Court established the fourth amendment standard of "objective reasonableness" as the appropriate one for assessing a police officer's use of force in the context of making an arrest or other seizure of a person. Noting that the standard is "not capable of precise definition or mechanical application," the Court emphasized that the issue is one of "*reasonableness at the moment....*"[4] (emphasis added)

Equally important, the Court held that the inquiry must be limited to "the facts and circumstances confronting them [the officers]...judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...."[5] It is within this context and from this perspective that the reasonableness of an officer's judgment of the "necessity" to use deadly force must be viewed.

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> ***"...the fourth amendment does not require police officers 'to choose the least intrusive alternative, only a reasonable one.'"***

Less Intrusive Alternatives

The facts in *Bradford* v. *City of Los Angeles*[6] illustrate a plaintiff's contention that an officer was not justified in using deadly force because less intrusive alternatives were available. In *Bradford*, an officer used a police car to strike a kidnaping suspect who was fleeing from the ransom drop site. The officer had learned from a radio report that the suspect had arrived by car at the ransom drop site, had picked up a ransom package, had tossed the package into a waiting car when approached by a police officer, and then had fled on foot when commanded by other officers to stop. The suspect suffered serious injuries in the incident, for which he sued the officer and his department under Title 42 U.S.C. Section 1983. A jury returned a verdict for the plaintiff.

On appeal, the defendant did not dispute the point that using a car to strike a suspect constitutes the use of deadly force. Furthermore, the appellate court agreed that the officer had probable cause to believe that the plaintiff was committing a crime involving the threatened infliction of serious physical harm, i.e., the constitutional standard announced by the Supreme Court in *Tennessee* v. *Garner* as justifying a reasonable belief that a suspect is dangerous. However, in defining the question before the jury as "whether the amount of force used by [the officer] was necessary to prevent [plaintiff's] escape," the court ruled that "the jury could conclude that [the officer's] use of a car as a weapon

was unnecessary because [he] had more reasonable alternatives."[7]

The court reasoned that the presence of other officers at the drop site and the available option of driving past the plaintiff to block his path would support the jury's determination that the officer's "unorthodox actions" of striking him with the car were unreasonable. The court rejected the defense argument that the "availability of alternative measures 'is irrelevant' " and held that when the plaintiff presents "substantial evidence that less intrusive means were available, it is up to the jury to determine if those means were reasonable."[8]

While the plaintiff's claims in *Bradford* are typical of assertions made in other cases that deadly force was not necessary because less intrusive alternatives were available, the appellate court's decision is not typical of those reached by most other Federal courts confronting the same issue. In addition, *Bradford* seems inconsistent with the Supreme Court's views of the manner in which the reasonableness standard of the fourth amendment is to be applied.

In a 1973 case[9] involving the decision of police officers to inventory the contents of an arrestee's shoulder bag, the Supreme Court addressed a defense argument that the police could have accomplished their purposes by the less intrusive means of simply inventorying the shoulder bag as a unit and that the availability of this less intrusive alternative made their more intrusive action unreasonable. Conceding the availability of the less intrusive option, the Court nevertheless held that the fourth amendment does not require officers to choose "the least intrusive alternative, only a reasonable one."[10] Although the Court in that case was considering the reasonableness of a fourth amendment search, a number of Federal courts have adopted the same view with respect to seizures.

In *Plakas* v. *Drinski*,[11] a police officer shot and killed a handcuffed subject who attacked the officer with a fireplace poker. In a lawsuit against the police officer and the county, the plaintiff did not dispute that at the moment the officer fired the fatal shot, the suspect was attacking the officer with the poker. Nor was it disputed that shortly before attacking the officer, the subject pointed the poker at the officer and said, "Either you're going to die here, or I'm going to die here."

> ***'...there is no constitutional duty to use non-deadly alternatives first.'***

The primary argument was that the officer could have and should have used alternative methods short of deadly force to resolve the situation. It was suggested, for example, that one of the officers on the scene had a canister of CS gas on his belt and that there was a K-9 unit in the vicinity that could have been called to the scene to subdue the subject.

The U.S. district court granted summary judgment for the police. The appellate court affirmed with the following explanation:

> "There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first."[12]

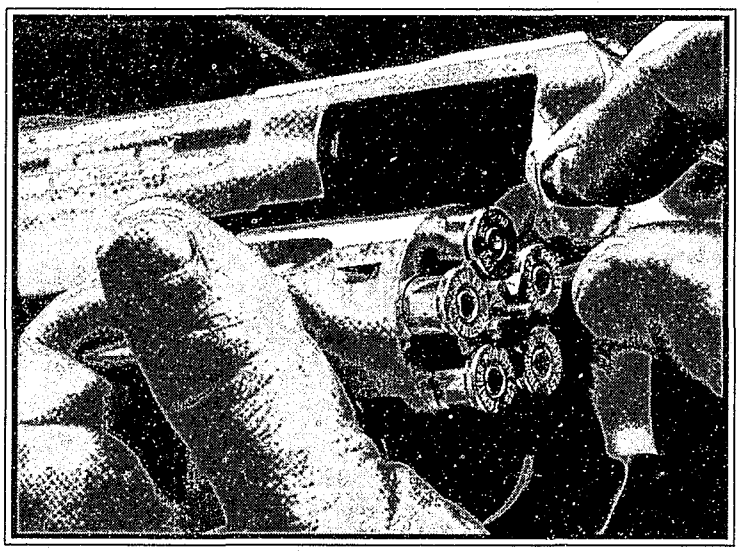
The court observed that there were essentially three alternatives open to the officers: 1) Maintain distance from the suspect and try to keep some barrier between him and them; 2) use some kind of disabling spray; or 3) use a dog to disarm the suspect. The court also considered that a decision by an officer under these circumstances must be made after the briefest reflection:

> "As [the suspect] moved toward [the officer], was he supposed to think of an attack dog, of...CS gas, of how fast he could run backwards? Our answer is, and has been, no, because there is too little time for the officer to do so and too much opportunity to second-guess that officer."[13]

A related issue in *Plakas* was the plaintiff's contention that the officer's employer—notwithstanding the reasonableness of the officer's decision—should be held liable for not making more choices

available. The court rejected as unwise a policy that would permit juries to hold municipalities liable for failing to provide different equipment or more police officers based on some expert's testimony that an arrestee would have been uninjured had they done so. The court concluded: "There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list."[14]

The plaintiffs in cases like *Bradford* and *Plakas* focus on availability of other options at the moment an officer made the decision to use deadly force. A second line of attack seeks to shift the focus away from the encounter itself to the events that preceded it.



Officer Caused or Contributed to the Necessity

The essence of this argument is that if officers had performed their duties differently, the suspects would have been denied the opportunity, or ability, to commit the threatening acts that justified the use of deadly force. There are at least three problems with this line of argument. First, it is inconsistent with the Supreme Court's insistence in *Graham* v. *Connor* that the relevant facts and circumstances are those "confronting them [the officers]...*at the moment*...."[15] (emphasis added) Second, it extends the application of the fourth amendment to actions and events that precede either a search or a seizure. And, third, it significantly expands the breadth of legal duties owed by the police to suspects, effectively making the police responsible for a suspect's actions as well as for their own.

The court in *Plakas* declined plaintiff's invitation to review the actions of the officers preceding the deadly confrontation to determine if the officers' decisions were correct. The court responded that such reviews would "nearly always reveal that something different could have been done if the officer knew the future before it occurred."[16] In rejecting these efforts to shift responsibility for the suspect's actions onto the police, the court said:

> "Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept within constitutional limits, society praises the officer for causing."[17]

Scott v. *Henrich*[18] clearly illustrates the second line of attack on the necessity of an officer's use of deadly force. In this case, two police officers went to an apartment in response to a "shots fired" call. A witness told them that "he had seen a man fire a shot or a couple of shots...and that [the man] was acting strange or crazy and he was staggering...." A second witness directed the officers to a nearby apartment building where the gunman was seen entering.

When the officers knocked on the street-level door of the apartment building and identifed themselves, a man confronted them with a "long gun." One of the officers then fired a shot, missing the subject; the second officer, believing the subject had fired, shot and killed the subject.

In a lawsuit against the officers, plaintiff claimed that the officers

should have used alternative measures before approaching and knocking on the door. Through the testimony of an expert witness, plaintiff asserted that the officers' conduct created an unreasonable risk of armed confrontation. Citing the department's internal guidelines, the expert opined that the officers should not have tried to flush out the suspect immediately, but instead, should have developed a tactical plan, sealed possible escape paths, called for back up, and tried to coax him into surrendering.

The appellate court was not impressed. Observing that "the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them,"[19] the court stated:

> "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment."[20]

Other courts likewise have refused to accept the argument that police officers caused a confrontation by not displaying a badge, by failing to wait for backup, or by allegedly violating some other "police procedure."[21] Perhaps the most bizarre illustration of the argument is found in *Carter* v. *Buscher*,[22] where police officers devised a plan to arrest a man who had contracted to have his wife killed. The arrest plan went awry, and the suspect opened fire on the police, killing one officer and wounding another before being killed himself. The deceased suspect's wife (the intended victim of the murder plot) then filed a lawsuit against the police, alleging that "by reason of their ill conceived plan...the [officers]... provoked a situation whereby unreasonable deadly force was used in the attempt to seize [the suspect]...."[23] Observing that "pre-seizure conduct is not subject to Fourth Amendment scrutiny," and that no seizure occurred until the suspect was shot, the court held: "Even if [the officers] concocted a dubious scheme to bring about [the suspect's] arrest, it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment."[24]

> ***'...it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment.'***

Conclusion

The U.S. Supreme Court has held that reasonableness under the fourth amendment does not require police officers to choose the least intrusive alternative, only a reasonable one. Following that principle, most courts have rejected arguments that the use of deadly force was not necessary because officers had less intrusive options available or it was made necessary by the actions of the officers themselves.

These decisions limiting potential liability claims should encourage law enforcement policymakers to continue to develop appropriate policies and procedures to guide officers in the use of deadly force without undue concern that those initiatives will become weapons in the hands of litigants. The training and equipping of a police department should be governed by the positive goals of providing effective and efficient law enforcement services to the community. This includes giving proper weight to the safety of the community and its police officers. Training programs and procedural guidelines designed to effect these general purposes are not intended to create new and broader legal duties that police officers owe to their potential assailants.✦

Endnotes

[1] *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985).

[2] *Id.*

[3] 490 U.S. 386 (1989).

[4] *Id.* at 396.

[5] *Id.* 396-397.

[6] 21 F.3d 1111 (Unpublished) Nos. 92-56173 and 93-55051 (9th Cir.[Cal.])(1994 WL 118091).

[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *Illinois* v. *Lafayette*, 462 U.S. 640 (1983).

[10] *Id.* at 647. *See also, United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1983).

[11] 19 F.3d 1143 (7th Cir.), *cert. denied*, 115 S. Ct. 81 (1994).

[12] *Id.* at 1148. *See also, Forrester* v. *City of San Diego*, 25 F.3d 804 (9th Cir. 1994); *Collins* v. *Nagle*, 892 F.2d 496 (6th Cir. 1989); and *Ford* v. *Childers*, 855 F.2d 1271 (7th Cir. 1988).

[13] *Id.* at 1149. Regarding the plaintiff's argument that the police could have used a dog to subdue the suspect, the court observed: "It is unusual to hear a lawyer argue that the police ought to have caused a dog to attack his client, but he is right that such an attack *might* have led to a better result for his client (and would, in our view, have led to a different sort of lawsuit)."

[14] *Id.*

[15] *Graham*, 490 U.S., at 396.

[16] *Plakas*, 19 F.3d, at 1150.

[17] *Id.*

[18] 978 F.2d 481 (9th Cir. 1992); withdrawn and reissued, Nov. 2, 1994, ____F.3d_____ (9th Cir. [Mont.]); 1994 WL 596643.

[19] *Id.* at 3.

[20] *Id.*

[21] *See, e.g., Drewitt* v. *Pratt*, 999 F.2d 744 (4th Cir.1993); *Fraire* v. *City of Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, 113 S.Ct. 462 (1992); and *Greenridge* v. *Ruffin*, 927 789 (4th Cir. 1991).

[22] 973 F.2d 1328 (7th Cir. 1993).

[23] *Id.* at 1330.

[24] *Id.* at 1333.

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.