The use of deadly force is one of the most important issues facing the profession, for no court can correct a deadly mistake once it has been made. The current status of the law on deadly force and how it developed from the English common law are considered in the Legal Digest. This area of law is in a state of flux, as the courts consider various issues, including the adequacy of firearms training and the supervision of their use.

An article by Professor Shenkman of the University of Florida explains how one Florida department approached this issue and the author makes several cogent points. He notes that a department's policy concerning the use of deadly force must be clearly understood by all and personnel must be provided with the skill to carry out the department's policy.

Professor Shenkman, like the Federal Bureau of Investigation, argues for police firearms advanced training with service ammunition. Wedcutters should be restricted to beginning firearms training. In author Shenkman's words, "We should not allow officers with marginal firearms ability to have the power of life or death."

The Firearms Training Unit at the FBI Academy has outlined the current FBI firearms training program in an article in this issue. Adoption of the Weaver stance in 1981, additional judgmental/reactive shooting training, and adoption of the double tap (two quick shots) to increase the stopping power of the service round without the added recoil of the magnum are recent changes in FBI training. These could be, or have been, adopted by police departments with the assistance of the more than 500 FBI firearms instructors around the country.

An article from Alaska shows that a pistol competition by the State troopers with the Royal Canadian Mounted Police was inspired by the RCMP to foster informal liaison at the working level of both organizations, a side benefit of this increased firearms training. A Champaign, IL, police sergeant suggests some guidelines for the selection of countersnipers within special weapons and tactics units.

Ideas for improving firearms training, for the protection of your citizens and officers, are readily available from a myriad of competent authorities—the police administrator needs to consider the department's policies and practices and then choose, but choose he must. I think it is regrettable that as this issue goes to press, there is still no nonlethal alternative weapon available to police officers on the street which will permit them to stop a fleeing suspect without running the risk of causing his death in less than life-threatening situations. Surely a Nation that can put a man on the moon can provide this additional weapon to police officers. Our citizens are entitled to this alternative choice and so are we.
Deadly Force

The Common Law and the Constitution

"In the absence of a clearly defined constitutional standard, the rules governing the use of deadly force by police have been determined by the State themselves, either by statute or by State court decision."

By

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult legal advice. Some police procedures varied permissible under Federal law; others under State law. The common law is generally limited to areas not covered by statute.

The past 2 decades have witnessed a veritable revolution in law enforcement. The two most significant factors in this revolution—1980, the law enforcement activity of individual police officers. The Common Law is a body of case law governing the use of force by police officers. It is generally limited to areas not covered by statute or by Federal law. In many cases, the Common Law has been expanded by modern, organized law enforcement activity. The term "Common Law" is often used to describe laws and practices that have evolved over time, rather than being codified by legislative action. The Common Law is generally limited to areas not covered by statute or by Federal law.
“Whatever departmental policies are developed, reasonable care should be taken to provide adequate training and supervision to assure proper implementation.”

held that the term “person” as used in § 1983 was not intended to encompass a municipal corporation, thus limiting the scope of § 1983 to suits against individual governmental officials. And third, the Court held in a subsequent case, Penson v. Ray, that a police officer sued under § 1983 enjoys a qualified immunity from such suits if it can be established that the officer was acting in “good faith” with a reasonable belief in the lawfulness of his actions.

Taken together, these three factors meant that neither the State which enacted a fleeing felon statute nor the municipality which hired and trained the police officer who applied it could be held liable. As long as the officer was acting within the parameters of the State law, he was effectively shielded by the good faith defense from liability. Efforts to reach the merits of the fleeing felon rule were thus thwarted.

On the first point, in Malloy v. Hogan, in which a Memphis police officer shot and killed an 18-year-old fleeing burglary suspect pursuant to a State statute tracking the common law rule, the deceased’s father filed a suit in Federal court under § 1983 alleging violations of the 4th amendment protection against unreasonable searches and seizures, the 14th amendment guarantee against cruel and unusual punishment, and the 14th amendment due process and equal protection clauses. The trial court initially dismissed the suit on the grounds that the plaintiff did not have standing to sue, and further, that the officers had acted in good faith to prevent a crime.

The Federal appellate court reversed and remanded the case for further consideration, holding that the plaintiff had standing, but agreeing with the lower court that the officers had available to them the defenses of good faith and probable cause.

On remand, the trial court again dismissed the case and upheld the constitutionality of the Missouri statute. On the second appeal to the appellate court, it was held that the State statute violated the “fundamental right to life” as set forth in the 14th amendment due process clause of the Constitution.

However, the U.S. Supreme Court set aside the appellate court’s decision on the procedural ground that because the officers (defendants) were not liable due to the good faith defense, there was no “case or controversy” as required by the Constitution before a judgment can issue. The effect of the decision was to suggest that as long as the only viable defendant (the officer) is shielded by the good faith defense, the chances of Federal courts reaching the merits, i.e., constitutionality, of the fleeing felon rule were remote. Two subsequent Supreme Court decisions, however, changed the picture dramatically.

The New Constitutional Challenge—Suits Against Municipalities

In the 1980s, the Supreme Court decided several cases in which a fleeing felon statute was declared unconstitutional on its face, or as applied in that case. Because the court concluded that the statute was unconstitutional on its face, or as applied, it could not be used to bar the plaintiff’s suit under § 1983. The Court emphasized that municipal liability cannot rest on the doctrine of respondeat superior, in other words, simply because the municipality employs a wrongdoer. The Court stated: “... a local government may not be sued under § 1983 for an injury inflicted by a single agent. Instead, it is when execution of a governmental policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”

In 1980, in Owen v. City of Independence, the Court held that government entities sued under § 1983 could not assert a good faith defense. These two decisions paved the way for a constitutional challenge to the fleeing felon rule.

In Garner v. Memphis Police Department, the U.S. Circuit Court of Appeals for the Sixth Circuit again considered the constitutionality of a fleeing felon statute. On the night of October 3, 1974, a 15-year-old was shot and killed by a Memphis, Tenn., police officer who was attempting to arrest a fleeing burglary suspect. The defendant (the officer) is shielded by the good faith defense from liability. Efforts to reach the merits of the fleeing felon rule were thus thwarted.

On remand, the district court concluded that the State statute was unconstitutional on its face, or as applied in this case. Because the court concluded that the statute was unconstitutional on its face, or as applied, it could not be used to bar the plaintiff’s suit under § 1983. The court stated: “The statute is unconstitutional on its face, or as applied in this case. Because the court concluded that the statute was unconstitutional on its face, or as applied, it could not be used to bar the plaintiff’s suit under § 1983.

As to the latter point, the district court was undoubtedly relying, in part, on the sixth circuit’s 1977 decision in Willey v. Memphis Police Department, which had raised the same constitutional challenge to the Tennessee fleeing felon statute. In the Willey case, the appellate court criticized the original decision of the eighth circuit in Garber v. Memphis Police Department, which had declared an identical Missouri statute unconstitutional. The court stated: “The Eighth Circuit is the only Court to our knowledge which has ever held that such a statute, which is so necessary even to elementary law enforcement, is unconstitutional. It extends to the felon unwarranted protection, at the expense of the unprotected public.”

Nonetheless, in the second appeal of the Garber case in June 1983, the Sixth Circuit held that the Tennessee fleeing felon statute was constitutionally permissible under the 4th, 6th, 8th, and 14th amendments; (3) whether the municipality’s use of a hollow point bullet was constitutional; and (4) if the municipal conduct in any of these respects was unconstitutional, did it flow from a “policy or custom” for which the city was liable under § 1983.

The Court ruled that a municipality is not a “person” as used in § 1983. The court held that a municipality enjoys a qualified immunity from such suits if it can be established that the municipality was effectively shielded by the good faith defense from liability. The Court concluded that the statute had been brought under the “court and unusual punishment” clause of the 8th amendment or under the 14th amendment as a matter of substantive due process, and not—as in Garber—under the 4th amendment.

Having ruled the statute unconstitutional, the court went on to reject the district court’s application of the good faith defense and held that pursuant to the Supreme Court’s decision in Owen, there is no good faith immunity for municipalities when sued under § 1983. The court explained: “A rule imposing liability despite good faith reliance inauspicious if it governmental officials or, they will have a strong incentive to act rashly and unreasonably to protect constitutional rights. It also serves
the desirable goal of spreading the cost of unconstitutional governmental conduct among the taxpayers who are ultimately responsible for it.17

The significance of the Giambo decision is difficult to measure. It is of interest to note that as of the time of this writing, the Giambo decision has been appealed to the U.S. Supreme Court, pursuant to Title 28 U.S.C. § 1254(2) which authorizes an appeal of any decision by a Federal court which declares a State statute unconstitutional.

Alternatives to the Common Law Rule

Without attempting to speculate as to what the Supreme Court will do, it may be useful to consider some of the alternatives to the common law rule.

There are basically two different statutory schemes to be found in the States which have rejected the common law rule—that has been adopted by 12 States.18 It has been described as the "modified" common law rule. Essentially, this rule would abandon the "any felony" aspect of the common law and restrict the use of deadly force to those felonies defined as "dangerous" or "forcible" felonies or to situations where there is some threat to the officer or other apprehension is not made probable.

Presumably modified statutory rules would meet the constitutional test of the U.S. Constitution as the felonies defined as forcible or dangerous are "violent" or if the officers attempting to arrest a suspect "have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured."19 A second alternative, and one favored by the court in Giambo, is found in the Model Penal Code as modified by the American Law Institute in 1962.20 This rule would permit the use of deadly force against fleeing felons under the following conditions:

1. The arrest is for a felony;
2. The person effecting the arrest is a peace officer or is assisting a peace officer;
3. The actor believes such force creates no substantial risk of injury to innocent persons; and
4. The actor believes that the felony included the use of threatened use of deadly force or there is a substantial risk that the suspect will cause death or serious bodily harm if apprehension is delayed. To date, seven States have adopted the Model Penal Code standard.21

Apart from statutory modification of deadly force rules, consideration may also be given by police administrators to adoption of departmental policies which are more restrictive and provide more specific guidance to officers than the common law standard. Although there is limited case-specifically in California—which holds that a more restrictive departmental policy cannot be used in a lawsuit as a measure of an officer's conduct,22 there are also decisions to the contrary.23 Clearly, the better rule is to allow—indeed, to encourage—police administrators to manage their department by developing and enforcing reasonable rules of conduct for their employees. To allow the use of such internal policies to heighten the risk of liability in a civil suit will have the result of discouraging and discouraging, such initiatives.

The dilemma for the police administrator is that on the one hand a reliance upon a State statute may not protect him from a § 1983 suit and that to provide a defense of gross negligence or "recklessness" to an apparent requirement of intent.24 A suit against the supervisor under § 1983 would, of course, have to overcome the good faith defense generally available to the individual defendant.

One, in order to establish a cause of action under § 1983, the plaintiff must show that the alleged failure to adequately train and/or supervise was so pervasive as to be a policy or custom of the municipality. As one Federal appellate court noted, "The high premium placed on the plaintiff's constitutional rights must show that the alleged failure to adequately train and/or supervise was so pervasive as to reach the level of 'gross negligence' or 'deliberate indifference' to the deprivation of plaintiff's constitutional rights."25

Conclusion

The high premium placed on human life by our society ensures that mistakes in the conduct of police against fleeing suspects will continue to be a highly sensitive and closely scrutinized issue. The recent developments in the law discussed in this article clearly indicate two points: First, it is now a question of constitutional importance, subject to challenge in Federal courts; and second, the focus of the challenge has shifted from the officer on the street to the upper echelons of local government and police administration. Those developments are most likely to compel change in an area of the law which has remained remarkably intact for a long time.

20 / FBI Law Enforcement Bulletin

April 1983 / 91

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