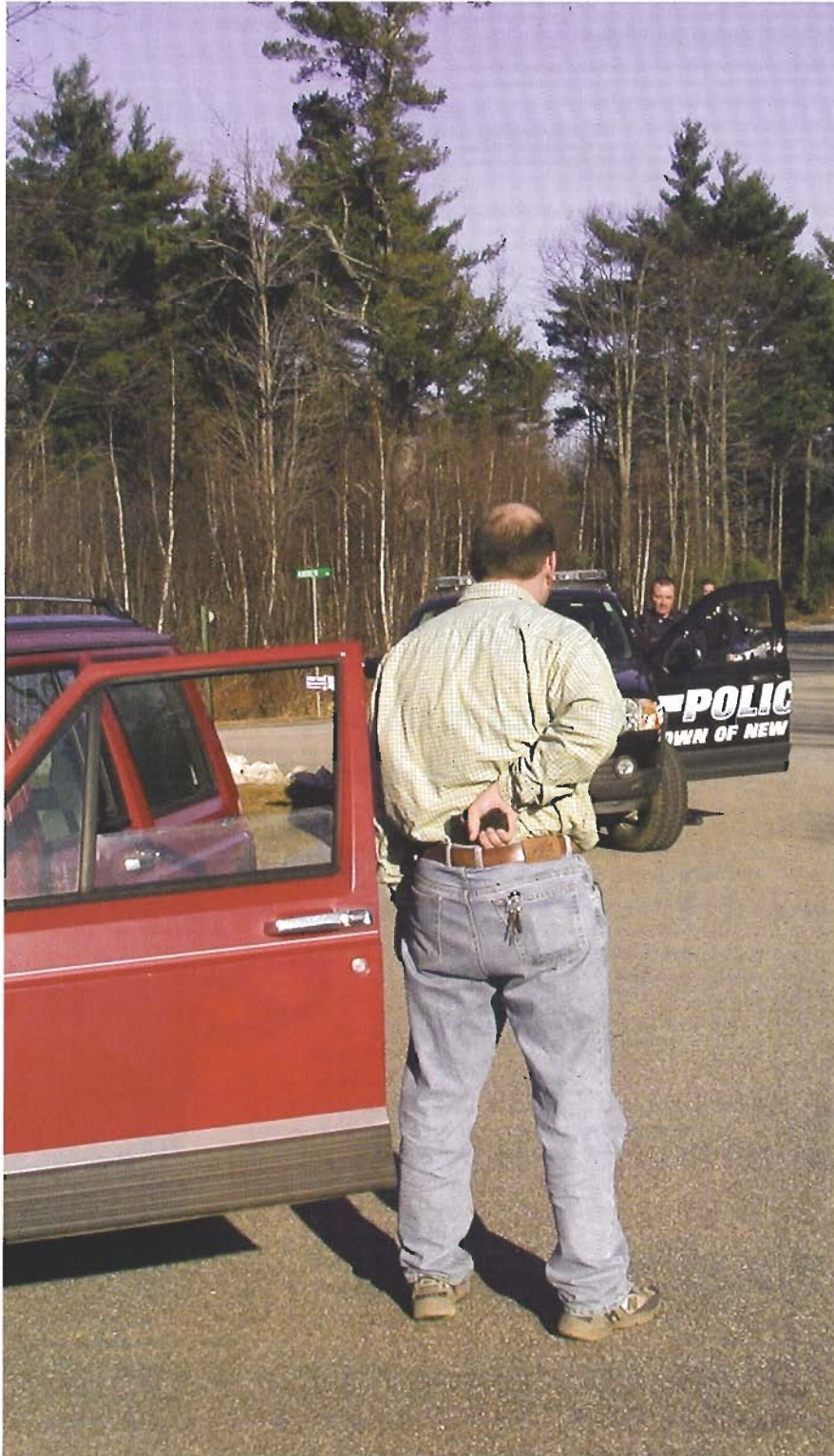


T H E “Must-Shoot vs May-Shoot” C O N T R O V E R S Y



BY THOMAS AVENI

It's been building for years. It's been one of law enforcements "dirty little secrets." Yet, every time we see a high-profile "gray area" shooting, it comes under ever greater scrutiny.

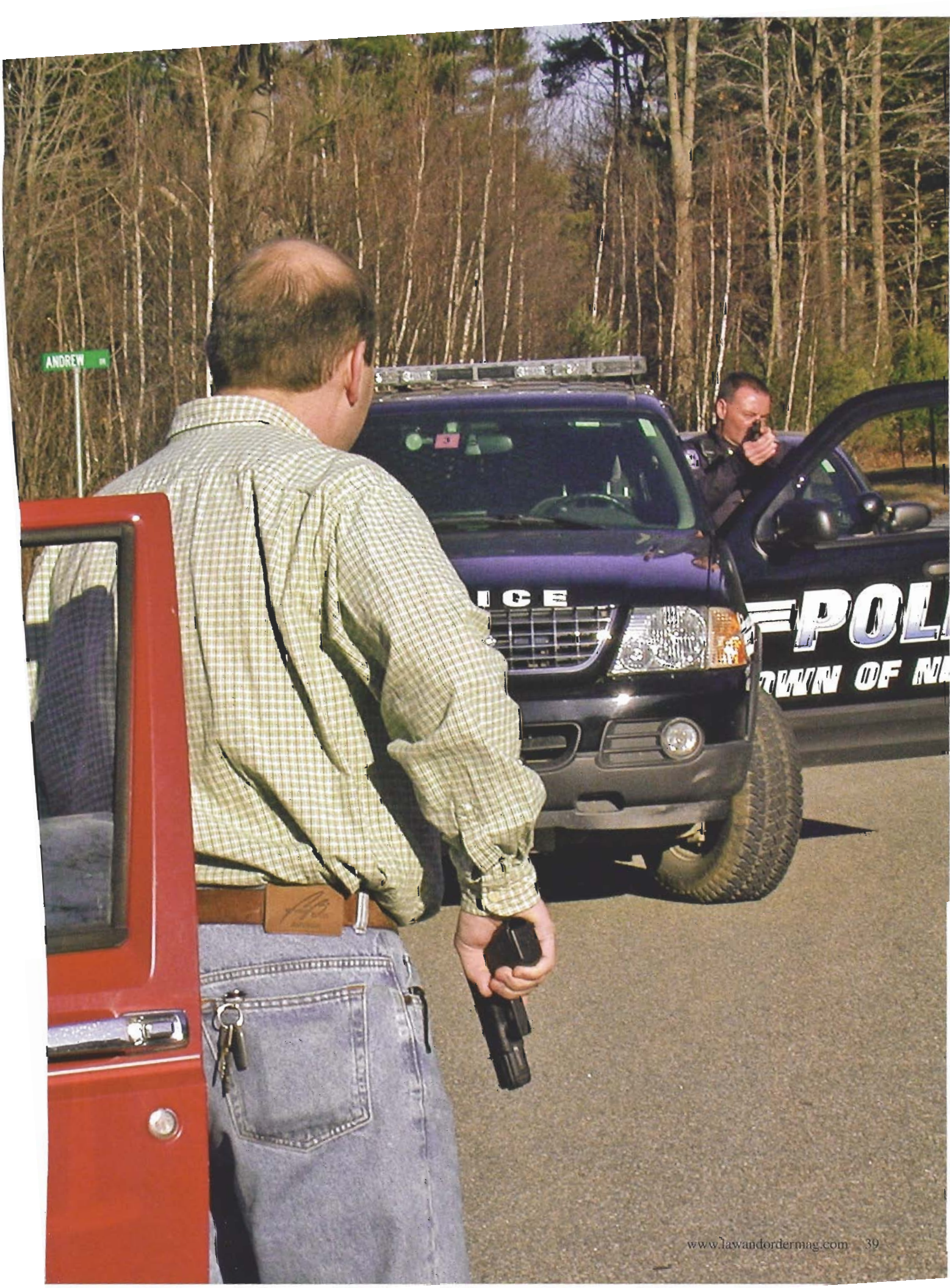
Recent hard empirical research conducted by Dr. Bill Lewinski and Dr. Bill Hudson has illustrated more compellingly than ever how a mere fraction of a second might separate the perception that a police shooting is either "in-policy" or "out of policy." It's a knife's edge that few police trainers fully understand, and that even fewer policy makers acknowledge the existence of. Nevertheless, it's a battleground of litigation and divisive political agendas.

We've all been taught from our earliest training in the police academy that there are "shoot" and "don't shoot" scenarios. Black and white. Cut and dry. This simplistic approach became doctrinal over time. Yes, over the years, we've seen people opine about the frequency of questionable "gray area" shootings. But, little of substantive value has ever evolved from these intermittent intellectual dalliances.

In the real world, the world that police are expected to safely navigate on a daily basis, deadly force parameters are increasingly delineated as: 1) "must-shoot; 2) "can't-shoot," and; 3) "may-shoot."

Must-shoot scenarios are self-explanatory. They generally involve an immediate lethal threat, but they can also involve one that is imminent. An immediate threat has the officer literally dodging bullets, knives, motor vehicles or any other assortment of instruments likely to cause death or serious bodily injury. An imminent threat is often an anticipatory perception of events that are mentally processed within the context of situational and behavioral cues.

Can't-shoot scenarios are almost self-explanatory. Contrary to conventional wisdom, shootings falling into this category aren't as statistically significant as commu-



nity activists would have us believe. Rare is the occasion when we find no justification for a police shooting when we judge that shooting from what an officer knew at the moment he pulled the trigger.

When we consider situational cues (the nature of the call for service) and suspect behavioral cues (verbal threats, suspects holding objects that appear to be weapons, furtive movements, etc.), many of what appear to be can't shoot scenarios are in actuality incidents which fall into the next category.

May-shoot scenarios are the ideological battleground. This is where decades of neglect and misunderstanding have helped fuel the fires of controversy. Within this realm, we are often separated by misunderstood concepts or terminology. And, this schism isn't just within the law enforcement community. But, it begins with us, and if we explore and fix things accordingly, the controversy might well end with us one day.

Immediate vs. Imminent Threats

Quite often, the underlying cause of misunderstanding in may-shoot scenarios is embedded within our mistaken assumption that "imminent" threats are synonymous with "immediate" threats. From a legal and policy perspective, you can drive a truck through the difference.

An immediate threat is one that is ongoing. Literally, the possibility of mortal injury is immediate. By accepted legal definition the word imminent is characterized as threatened actions or outcomes that may occur during an encounter or threatened harm does not have to be instantaneous.

An immediate threat is measured in finite terms of time. It is *now*. As imminence is defined above, it is *not* defined in terms that are clearly finite. Indeed, imminence is "elastic" in time. How important is that distinction? As was stated from the outset, we routinely see in-policy and out-of-policy shootings separated by micro measurements of time.

An imminent threat is often one that is perceived to be unfolding. Quite often, that perception is mired in ambiguity. Many may-shoot scenarios occur under low light conditions where sensory stimuli are often muddled so severely that they heighten situational uncertainty. Almost as many occur in high risk scenarios where suspects disregard verbal commands and engage in furtive movements.

Fortunately, the prevailing legal standard affords officers the ability to employ deadly force based upon a reasonable belief that an imminent threat has become manifest. A post-shooting investigation that undermines the premise upon which the officer formed his reasonable belief of an imminent threat should be irrelevant.

In legal parlance it would be expressed: 1) the reasonableness of an officer's actions depends on the information the officer possesses prior to and at the immediate time of the shooting, or; 2) the knowledge, facts and circumstances known to the officer at the time he exercised his split-second judg-

ment as to whether the use of deadly force was warranted.

If the officer fires because he reasonably believes (based on the totality of circumstances) that the suspect is in the process of deploying a deadly weapon against him/her, it should matter not if post-incident investigation suggests that the officer's perception was incorrect.

The can't-shoot analytical process gets much more complicated from here, and much of it has to do with the way in which officers have been traditionally trained. We teach police that shootings must be preceded by the suspect displaying the obligatory

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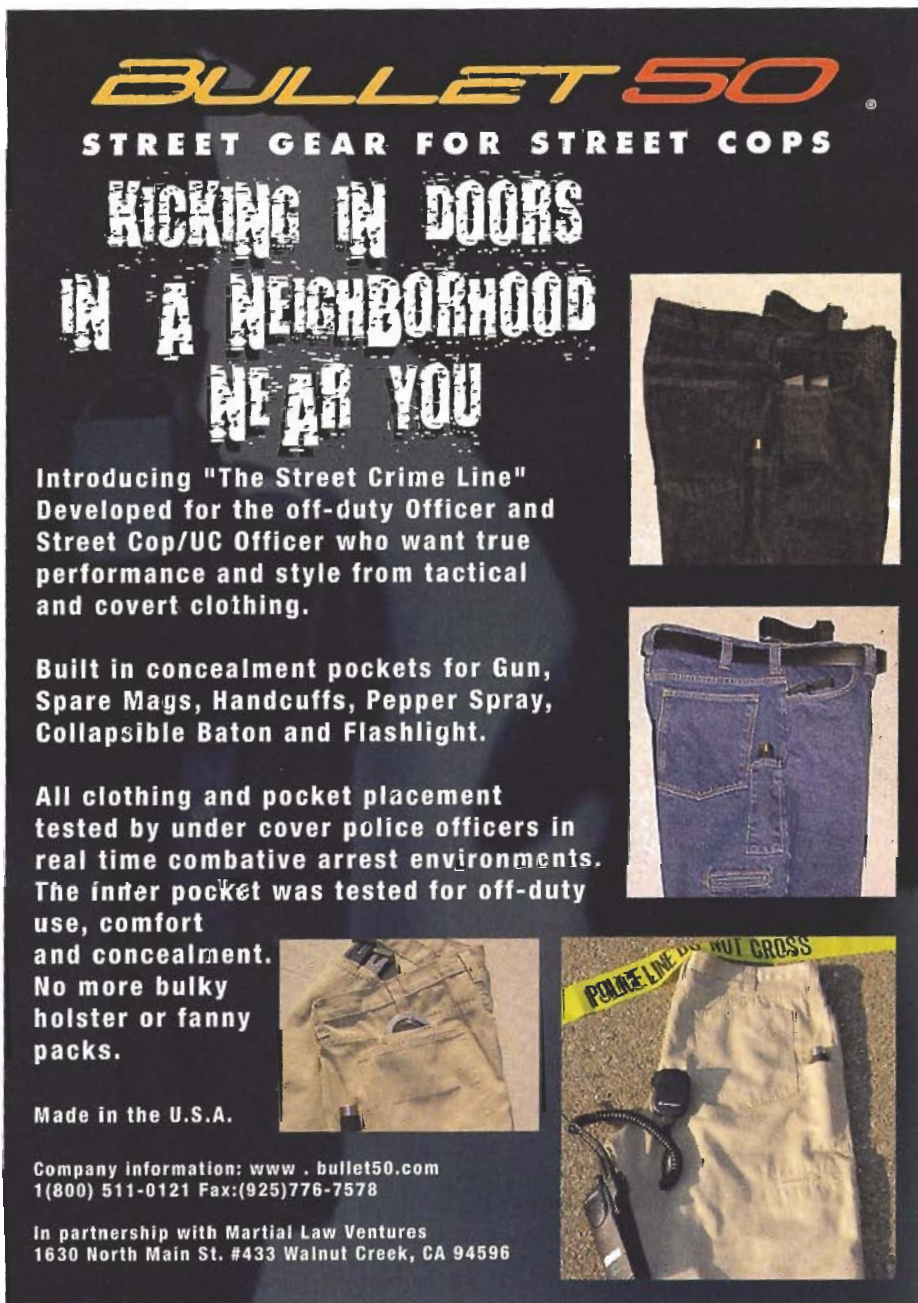
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ability, opportunity, and intent to inflict death or serious bodily injury upon the officer. That's the traditional doctrine, and quite frankly, it's extremely misleading. Why?

Under certain circumstances, ability can be reasonably assumed. If an officer has just confronted someone who fits the description of a man who just reportedly robbed a liquor store with a handgun, to assume that the suspect is *not* still armed with that handgun could be a fatal mistake. Obviously, the officer cannot shoot the suspect based solely upon that assumption alone.

Opportunity suggests that whatever potentially lethal instrument the suspect has at his immediate disposal, it must be within a distance from the officer to suggest that it could be employed effectively. Think of the old (now outdated) 21-foot rule applied to suspects armed with edged weapons. Of increasing concern is the fact that, on an operational level, officers can easily misjudge the time and/or distance necessary to employ a lethal instrument against them.

Intent is an area of extreme contention.

If police were legally compelled to wait (before using deadly force) for a suspect to display manifest intent to inflict death or serious bodily harm, we'd be losing far more officers than what we currently are. Intent can be construed from the totality of circumstances. Did the suspect disobey verbal commands to stop and show his hands? Did he engage in abrupt furtive movement while disobeying commands? Had the suspect verbalized any desire to kill or seriously injure officers?

The Police "Prey Drive"

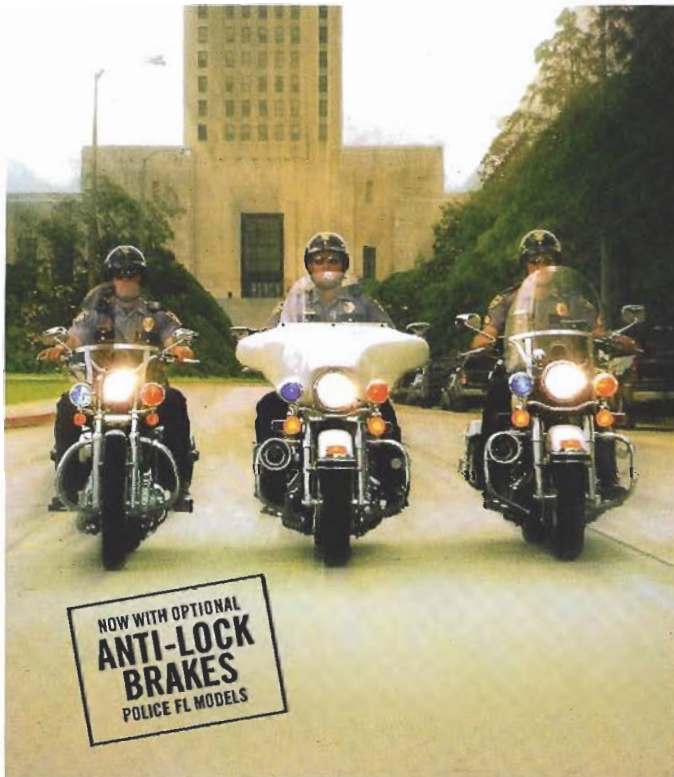
Another troublesome issue we see surfacing with regularity in police shootings lies within an officer's innate desire to apprehend and seize. The police culture often reinforces this nature. Officers who brave extreme risks to apprehend dangerous suspects are lauded, commended and sometimes promoted. There is nothing inherently wrong with that, but it must be counterbalanced for the sake of occupational safety.

We further cloud the issue in the way we train officers. From the academy level, recruits are taught that they are under no

legal obligation to retreat when attempting to effect an arrest. While this is legitimate and worthy knowledge, it must be tempered with deliberate admonitions that disengagement from high-risk, tactically untenable scenarios is the preferred force alternative.

Unless otherwise trained, officers will run obliviously into high-risk circumstances while focused on apprehension. This is often analogous to a dog chasing a stick into a busy highway. In the hundreds of police use of force policies that I've reviewed, I can recall none that ever addressed tactical disengagement as a force alternative. This also applies to virtually all US police force continuums that have omitted representation of this concept. This provides an opportune segue for a related area of procedural vulnerability in police shootings...

A significant issue that seems to surface too frequently in police shootings is a tendency for police to recklessly or knowingly place themselves in harm's way, and then use that as a pretext for employing deadly force.



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How many times have you read about police shootings that have involved officers deliberately positioning themselves in front of a suspect's automobile? Certainly, there are many requisite factors in judging all such incidents. If the suspect's vehicle engine was off, or it was parked (engine on) when he (subject) was merely wanted for questioning regarding a minor offense, one could argue that the officer wasn't reckless, and didn't knowingly subject himself to undue risk.

However, such benign circumstances aren't what we're seeing with frequency in questionable shootings. We frequently see police recklessly positioning themselves in front of irrational and/or non-compliant subjects who are wanted for a variety of offenses.

In contrast, compare the above scenario with one in which an officer is positioned to the side of a subject's vehicle, under circumstances in which he reasonably believes that the level of risk appears minimal. If that vehicle accelerates abruptly, without warning, while turning directly toward the officer, barring any other imme-

diately and viable alternatives, an officer would be justified in shooting at the suspect driving the vehicle.

There is an emerging body of evidence suggesting that many of the most controversial may-shoot scenarios are in reality subconscious Threat-Reflex Episodes (TRE). These incidents occur when an officer is tasked with high-risk situational cues, ranging from robberies-in-progress, shots fired/man with a gun calls, high-risk warrant service, etc. The elevated risk associated with these scenarios generally justifies proactive police weapon employment (in other words drawn sidearm).

Given these situational preconditions, when an officer is exposed to what he/she perceives to be an abrupt, loud or aggressive, very close proximity (within three meters) threat stimulus, the officer will routinely engage the trigger and discharge their firearm before they've made a conscious decision to do so. This phenomenon seems to occur with greater frequency under low light conditions, as environmental awareness tends to collapse toward whatever

degree of visual ability the officer has available at that time.

What is clear, beyond any reasonable doubt, is that the law enforcement community must reevaluate the manner in which it addresses training officers in the use of deadly force. Many may-shoot incidents are avoidable through the revision of police priorities and procedures. However, the remedial process mustn't end there. Prosecuting attorneys must examine police shootings with research-based data never before available to them. Many shootings previously lumped into the can't-shoot category (by prosecutor and police administrator alike) must now be viewed through an emerging body of salient and compelling research.

Thomas J. Aveni is a staff member of the Police Policy Studies Council (<http://www.theppsc.org>). Aveni was a member of the Smith & Wesson Academy staff from 1990-2001. He is also a career police officer, having served as a sworn officer in three different states, on the state and local levels. He can be e-mailed at: tom@theppsc.org.

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