

HOSTILE INTENT AND PRESENT ABILITY

By Sid Heal

There is nothing more contentious than the use of force, especially deadly force. Critics of policing practices are quick to identify shortcomings, impatience, missed opportunities, faulty judgment and overreactions, despite their lack of law enforcement experience. In fairness, however, there are all kinds of diverse factors and influences in play when deadly force is considered. The type of weapon, range, nature of the threat, viable alternatives, amount of resistance, ability to retreat, time available and risk to bystanders make meaningful comparisons difficult, if not impossible. Some valid methodology for evaluating these factors becomes critical. All of these factors and influences can be refined into one of two categories:¹ hostile intent or present ability.

Hostile intent refers to an antagonistic state of mind. Because it is an attitude, it is more often inferred than expressed. Accordingly, actions and behaviors are more revealing than statements, especially when they contradict each other. Likewise, it is a general frame of mind and so includes reckless or negligent behaviors that are likely to result in injury to someone whether that is the specific intention or not. When circumstances are so hazardous that a forceful intervention is necessary, the actual intent can be nearly impossible to deduce. Indeed, even under ideal

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clinical conditions, the most knowledgeable psychologists are frequently at a loss to explain irrational, bizarre and even self-destructive behaviors.

Present ability refers to an immediate capability of physical harm. Where hostile intent may sometimes be expressed, present ability is always inferred. Even the most emphatic threat is accompanied with a judgment for determining if the person is actually capable of carrying it out. Consider a

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man armed with only a knife threatening to kill a police officer 20 yards away. The hostile intent is both clear and expressed, but without a present ability of following through with the threat he poses no immediate danger. Consequently, the urgency to intervene is greatly diminished.

When applying these concepts in actual situations, it is important to understand that these factors don't affect everyone equally. Hostile intent, for example, lies solely in the domain of the assailant, but present ability is applicable to all combatants. The adage, "never bring a knife to a gunfight," illustrates the dangerous futility of engaging in an unwinnable confrontation.²

Hostile intent is a better determinant of danger than present ability. Armed citizens and off-duty police officers have a present ability to inflict deadly force but pose no danger without hostile intent. Likewise, hostile intent is far more persistent than present ability. An assailant who runs out of ammunition may have temporarily lost present ability but as long as hostile intent remains, it is simply a matter of reloading or finding another weapon. Thus, people with hostile intent are dangerous, per se, since even without presenting an immediate danger to the object of their enmity, they may still remain a danger to uninvolved bystanders

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and passersby. Understandably, the best time for intervention is when hostile intent can be determined but before the adversary gains present ability.

The concepts of hostile intent and present ability are intended to simplify and bring clarity to the myriad complex factors and influences involved in the use of deadly force. For police officers attempting to resolve a potentially violent situation, a person's behaviors, not mindset, are nearly always the determining factors in estimating harm and urgency. Even without discerning rationale, a person who has present ability but is acting out because of intoxication, mental instability or emotional furor is no less deadly than one incited by malevolence. Dangerous behaviors are more life-threatening than dangerous weapons.

To better understand how these concepts help to understand the use of force, consider the following examples:

One common question, often posed by defense counsel in criminal cases and plaintiff's counsel in civil cases, is whether police officers can use lethal force to prevent a nonlethal weapon from being used against them. Using these concepts as a basis for analysis, consider that the use of any weapon makes hostile intent *prima facie*. Likewise, if a suspect is capable of using the nonlethal weapon against the officer, present ability is *prima facie*. Both requirements are met and so clearly some intervention is justified. The amount and type of force become the only issues. The deciding factor

then becomes the nature of the intent. A nonlethal weapon is an inanimate object, and so is neither inherently lethal nor nonlethal. Batons, for example, have been used as a nonlethal option by police officers for at least two centuries. Nevertheless, a head strike can be lethal. A nonlethal option such as a Taser or pepper spray may allow a suspect to gain control of an officer's sidearm. Clearly then, the hostile intent is contextual. While the use of the weapon was intended to be nonlethal when used by the officer, that cannot be assumed when used by the suspect. Only foolish and dead officers cede their survival to an adversary.

Another contentious example involves the issues surrounding "shooting at a vehicle."³ Unless the shots are intended to disable the vehicle in some way, such as flattening the tires, the intention is to prevent the driver from attacking. When a vehicle is being driven by a suspect in a manner that threatens someone's life, hostile intent can be inferred. Likewise, present ability exists if the driver can use the vehicle to injure or kill someone. Be that as it may,

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no rational officer expects a 147-grain bullet to stop a two-ton vehicle, and so the intent must be to disable the driver. Even when this is achieved, the vehicle itself remains potentially lethal, albeit not as effective. Accordingly, policies that limit the circumstances that allow killing the vehicle's driver are both reasonable and appropriate because in law enforcement, justifiable lethal force is always preventative and never retaliatory.

An ability to simplify complex issues into understandable forms is of tremendous value in identifying those factors and influences that are most important to an outcome. It helps to avoid confusing factors that are collateral rather than causal. In one very real aspect, it "levels the playing field" so that even critics without credentials gain some understanding of whether sufficient cause was present for the use of deadly force in resolving a potentially lethal conflict. ■

ENDNOTES

1. Reductionism is a scientific method of analysis that advocates examining complex systems by simplifying them into their most basic components.
2. Other similar adages are, "Never fight when you can't win," "Never fight when it's not worth winning," and "Never fight for anger alone — always have something to gain."
3. Quotation marks are used for the term "shooting at a vehicle" because the vehicle itself is virtually never the target. This improper framing of the argument has led to massive mischaracterizations and misunderstandings.



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