Case Law and Decision-Making

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Introduction

Mastering the basic legal principles governing use of force is a critical preliminary to streamlining decision-making in the field. Immersion in the concrete narratives that form the essential core of case law, coupled with the legal lessons to be gleaned from them, builds and enriches experience—vicarious to be sure but pertinent and meaningful nonetheless. Experience, in turn, feeds solid decision-making. Mere procedural mandates, undefined and unexplained, steeped in negatives, too often serve as a pale substitute for the richness of established case law, engendering a low-grade uncertainty wrapped in tacit fear of repercussion—legal and otherwise. Fear breeds hesitation. In the street, hesitation can be lethal.

Solid understanding of when, how and to what extent force has been and can be employed and the legal reasoning that grounds it both empowers, in the proper sense, and limits, in the proper sense. This legal reasoning through case histories thus defines, in practice, a sphere of action—action that answers the rapidly evolving dynamics inherent to policing.

Fundamentals

Legally, use of force by police is evaluated under standards established in the Fourth Amendment to the Constitution which states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The practice of policing, from arrests and investigatory stops to handcuffing, restraining and, at times, shooting—involves at its core "seizures" of persons. In *Terry v. Ohio*, the court summed it neatly: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[1] To comport with the standards established in the Constitution, police officers must be reasonable in their "seizures," that is, centrally, in their use of force.

"Reasonable" is a forgiving term in the sense that it can apply to a range of actions under any given set of circumstances. In struggling to place a resisting criminal under arrest, I may strike or tackle; another may use pepper spray. Both may be reasonable courses of action given the range of variables that govern the context in our respective cases (size, age, exhaustion, crime, etc.). The point is important because *procedural* mandates governing use of force fashioned by particular agencies often contravene the *constitutional* mandates in practice. Imposing and ill-defined language about "minimum

[1] *Terry v. Ohio,* 392 U.S. 1 (1968).

necessary" and "least intrusive" force that finds no voice in existing law is both confusing and unforgiving. Contrast the range of actions that may find expression under the general concept of "reasonableness" with the cramped action entailed by "minimum" and "least." Logically, the superlative "least" can refer to only one thing in the same way and for the same reason that "tallest" or "fastest" can refer to only one thing. More to the point, legally and conceptually, to determine what constitutes the "least" under threat of violence requires a calculation that is unreasonable under circumstances that are, by nature, volatile and unpredictable; the calculation would be, in any case, "inherently subjective" as the ninth circuit noted in *Scott v. Henrich*[2] (For incisive analysis of what it would mean to require police officers to effect this calculation under real world violence, see also *Plakas v. Drinski*.[3]).

An essential corollary worth noting is that the courts do not raise questions about whether the actions of a police officer are grounded in an assessment of the circumstances confronted that is, in some ultimate sense, correct or incorrect. They rather set themselves the task of determining whether the assessment and subsequent actions are reasonable or unreasonable given the circumstances confronted. This principle is best illustrated in *Graham v. Connor.*

Case Law: Illustration and Value

Graham v. Connor was decided on May 15, 1989 by the United States Supreme Court. The core facts of the case follow.

The Plaintiff, Graham, a diabetic, asked a friend, Berry, to drive him to a convenience store for Orange Juice to counteract the onset of an insulin reaction. Berry stopped in front of the store and remained in the vehicle with the engine running. Graham rushed into the store. Once inside, seeing a long line, Graham rushed out of the store and back into Berry's car. He asked Berry to drive him to a friend's house, at which point Berry sped away. Police Officer Connor, seeing Berry pull up to the store, remain in the driver's side seat with the vehicle running, Graham rush in and out of the store quickly, and the car then speed away became suspicious and followed the car. Connor initiated an

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[2] "Plaintiff initially argues that the officers should have used alternative measures before approaching and knocking on the door where Scott was located. But, as the text of the Fourth Amendment indicates, the appropriate inquiry is whether the officers acted reasonably, not whether they had less intrusive alternatives available to them. *See, e.g., Illinois v. Lafayette,* 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983); *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-57 n. 12, 96 S.Ct. 3074, 3082-83 n. 12, 49 L.Ed.2d 1116 (1976). 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." *Scott v. Henrich,* 978 F.2d 481 (1992).

[3] The pertinent passage follows: "The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officer actually did was reasonable." Applying the principle to the particulars of the case under consideration, the Seventh Circuit noted: "[w]e recognize that the decision to shoot can only be made after the briefest reflection, so brief that 'reflection' is the wrong word. As Plakas moved toward Drinski, was he supposed to think of an attack dog, of Perras's 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." *Plakas v. Drinski,* 19 F.3d 1143 (1994).

investigatory stop of the vehicle, ordering the pair to wait while he ascertained what happened at the store. Back-up officers arrived and secured the suspects with handcuffs, rejecting explanations from Graham about his condition. As Connor sought to ascertain what had happened at the store, Graham suffered a diabetic attack. As is commonly the case with diabetic attacks, Graham started to engage in eccentric behavior, running around the police vehicle and babbling incoherently. Police officers tackled him, and he lapsed into unconsciousness. After ascertaining that nothing had happened, Connor returned from the store and released Graham.

Graham filed suit, alleging that Police used excessive force in effecting the stop.

In one obvious sense, Officer Connor made a mistake. He misinterpreted the facts confronting him. But his misinterpretation, in itself, is not the decisive factor in the case legally (or tactically, I would add). The courts do not require "correctness." To do so would be to demand omniscience without naming it. The courts demand "reasonableness." So, what do the Courts mean by "reasonable?"

"Reasonableness" must be judged according to an "objective standard." In part, this means that police officers may *not* use "inarticulate hunches" or "subjective good faith," however well-intentioned. Reasonableness is rather a function of "specific and articulable facts" and rational inferences from those facts.

The Supreme Court has held that "objectively reasonable" means reasonable in light of *facts* and *circumstances* confronting law enforcement *at the time* (*not* in hindsight) without regard to underlying intent or motivation.[4] What confronted Connor at the time of the incident? A car pulls in front of a store. The driver remains in the vehicle with the engine running. The passenger rushes in and out of the store and the car races off. Given what he knew at the time, was it reasonable for Connor to conclude that a larceny might have occurred? Denial seems tendentious. As the Court noted, if Connor had failed to investigate the actions observed and a larceny *had* been committed, he would have been accused of dereliction.

At the time is a crucial phrase. Referencing a second circuit court decision, *Johnson v. Glick*, the Court noted: "Not every push or shove, even if it may later seem unnecessary in the peace of a Judge's chambers" violates the Fourth Amendment.[5]

In the *Graham* case, the Court specified a general framework for assessing whether force applied by police officers is reasonable in particular circumstances: "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."[6]

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[4] In light of some of the flamboyant and combustible rhetoric hissed at law enforcement of late, advancing charges of racism from the spleen without a scintilla of evidence to support the accusation in the individual cases supposedly of concern, this point bears repeating. The charge is arbitrary, of course, but, even if it were true in some case or other, it is entirely irrelevant legally. Critics might chew on that point awhile after apprising themselves of the actual legal principles underwriting use of force by police.

[5] *Graham v. Connor*, 490 U.S. 386 (1989)

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The description of policing is rich with insight and the concept of reasonableness developed in its telling is tethered to over two centuries of (legal) history, centered in a network of mutually related case narratives finding a burgeoning refinement over time. That network provides stable, consistent, broad-ranging and positive guidance to police—illustrated concretely across an array of seminal cases—when and to the extent that it is taught systematically rather than as a perfunctory footnote to internal procedural orthodoxies that enshrine an alternative standard *ex nihilo,* discrete from rather than continuous with established law.

Decision-Making under Stress

How does a vibrant knowledge of case law facilitate decision-making?

Let me tender a refinement. The question raised here is about a certain kind of decision-making—the kind of high stakes, time-compressed decision-making that is an essential (though not exclusive) feature of policing rather than about decision-making as such.

Under controlled settings in which time and safety are not immanent concerns, decision-making may function by way of comparative analysis. One might outline a series of possible options, filter those options through a set of analytics, draw inferential projections about likely outcomes and elect the option that best meets the desired end. This model of decision-making is sensible when contemplating prospects for employment, reckoning where to pursue a degree or weighing factors in purchasing a home (although in *Sources of Power: How People Make Decisions,* Gary Klein argues that we employ this model far less than we tend to think). We do not and cannot employ this model of decision-making under urgent circumstances swimming in pandemonium. As someone attacks with fists, a knife, a club, a gun, one does not, in the nature of the case, define a series of options, tease out the virtues and vices of each, compare the relative advantages according to a prescribed analytic and select the "best" option in light of the analysis. The idea that the psychophysiological dynamics of real world violence, teeming with adrenaline, perceptual narrowing, cognitive deterioration, impeded motor skill and much else, accommodate meaningful comparative analysis is a dangerous illusion. Under urgent circumstances demanding immediate action, that kind of analysis would be a police officer's (indeed, anyone's) undoing. This is why tactical instruction that vomits a clump of options onto trainees—options swimming in fine and complex motor skill—so often fails in practice. Such instruction labors under an unrealistic and dysfunctional model of what is possible in a real world, violent encounter.

High stakes, time-compressed decision-making is, in Klein's phrase, recognition-primed rather than comparative. It is intuitive rather than analytical. It is steeped in and driven by experience rather than by syllogism. The flow of recognition-primed decision-making is, roughly (and not necessarily consciously): "What is happening here and now is something *like* what I, or someone else that I know of, has encountered in the past. I (or someone) tried this before in these circumstances and it worked. I will try it here."

Klein has noted that identifying precisely in what expertise consists is an elusive endeavor. Experts "see" the world—or the part of it in which they are expert—differently

than the novice. Experts are sensitive to features and patterns of the environments in which they work that novices miss. Though difficult to describe this "seeing" in detail, experience feeds it. Building expertise means in substantial part building experience. Experience can be direct or vicarious. Case law provides vicarious experience (this is particularly important for novices who, in the nature of the case, have little direct experience on which to draw). The narratives of case law involve events that have, in fact, happened to police officers—and might just as well happen to any police officer. They carry an additional value: a binding assessment by the courts attached to the factual detail that serves to guide officers going forward. The guidance can generally be captured in simple principles. The upshot of *Graham v. Connor* may be summarized as: "You do not always have to be right but you do always have to be reasonable."[7]

The kind of experience captured in concrete narratives of real world events wedded to clear guidance moving forward lifts a cognitive burden—a burden neurotically joined to fretting over "what ifs." "What if I am wrong? If I am wrong, what is going to happen to me? What if I make a mistake? Will I be supported? Will I face trial? Imprisonment?" No good comes of decision-making overladen with hand-wringing hypotheticals during dynamically evolving encounters. If police officers were steeped in and embraced the knowledge that comes with case law, including the knowledge that they need not achieve an all-knowing perfection in action but simply reasonableness given what they see, hear and know at the moment, they would be free to focus on tactical concerns and swift resolution without the neurotic fear of repercussion that too often culminates in questionable decisions.

About the Author

Lieutenant Daniel Modell is a twenty-year veteran of the New York City Police Department. He has served as Coordinator of the Tactical Training Unit and Training Coordinator for the Firearms and Tactics Section. Lieutenant Modell is also Adjunct Professor at the State University of New York-FIT where he inaugurated and taught its self-defense program. In addition, he serves as Chief Executive Officer of Ares Tactical and Emergency Management Solutions. Lieutenant Modell secured a Bachelor of Arts Degree, Philosophy, New York University, 1989 and a Master of Arts Degree, Philosophy, University of Texas-Austin, 1994. He studied under Fellowship, Fordham University, 1994-1995.

[7] There is of course much else to be gleaned from the case.