The 'Straight-Face' Test: Can There Be Legal Certainty in Exigent Circumstances?

by Caroline Johnson Levine

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All the greatest things are simple, and many can be expressed in a single word: freedom; justice; honor; duty; mercy; hope.—Winston Churchill[1]

After leading his nation through many years of fear, hunger, and impending death, Winston Churchill advocated for decency throughout the world. However, periods of political and cultural respite are often replaced by upheaval, which leads to uncertainty with potentially dire consequences. The current political and cultural climate of the United States appears to harken back to the volatility of the 1960s and can be somewhat distressing to the general populous. Political and legal polarization abounds. Importantly, the courts provide one of the bailiwicks to seek answers and offer indubitable solutions.

Unfortunately, the courts operate in a hindsight methodology and cannot particularly prevent humanity's frailties, which sometimes result in injurious outcomes. First responders (e.g., emergency, fire, police, and military personnel) stand on the front line and voluntarily face a daily requirement of performance perfection, in the face of rapidly evolving exigent circumstances. It must be necessarily frustrating to dedicate one's life to public service *and* be constantly criticized for potentially committing human errors in the face of adversity.

While not publicized often, the lives of first responders are routinely at risk of injury or death upon the arrival on scene of a reported incident.[2] Moreover, the use of a government issued uniform can also propagate anger and hostility from some members of the public.[3] While it is easy to perceive and condemn the actions of a first responder in hindsight analysis, this oftentimes results from a failure to extend grace to the human foibles that may be committed by public servants.

In fact, the difficulties faced by first responders creates a cogitation dilemma: In a moment of chaos and lack of compliance, should a first responder save a life by taking a life? Is the first responder's life or the life of another worth firing gunshots in order to prevent the commission of death or injury by a dangerous suspect using gunfire, stabbing, choking, or fisticuffs? Should a first responder persist in verbal negotiation in the hope of possibly exhausting the assailant and achieving compliance without loss of life? In eternally advocating for negotiation tactics with dangerous suspects, the critic of first responders may consider that "without a deep understanding of human psychology, without the acceptance that we are all crazy, irrational, emotionally driven animals, all the raw intelligence and mathematical logic in the world is little help in the fraught shifting interplay of two people negotiating."[4]

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Significantly, the slow moving process of litigation can only attempt to reconsider former emergencies as they existed in those minutes or seconds of an adrenalized maelstrom where lives were incontrovertibly threatened. Whereas compliance techniques are not as effective as some individuals may wish to believe, escalating measures are sometimes required to be deployed by officers in order to ensure the safety of victims and themselves. It may appear that anything short of possession of a firearm by a jeopardous individual requires first responders to engage in leadership techniques in order to coax the recalcitrant suspect into compliance. However, a recent violent incident in the news demonstrates that civil solutions may not always prevent fatalities when an uncoop-

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ments set out above. With the exception of the argument described under "The Purpose of the Exemption" section above, the court seemed to give equal weight to each side's arguments. As to that one exception, the court sided with the drivers, agreeing that travel time is the same whether exempt or not exempt:

> No matter what delivery drivers are paid for the journey, the trip cannot be made shorter than it is.

Taken as a whole, the opinion seemed almost to regard the textual interpretation contest as a tie. But that was good news for the drivers because, as the court saw it:

> The default rule of construction under Maine law for ambiguous provisions of the state's wage and hour laws is that "they should be liberally construed to further the beneficent purposes for which they were enacted."[13]

In effect, by fighting to a draw—by demonstrating not that the language clearly favored them but that it was ambiguous—the drivers had won.[14]

Meanwhile Back at the Legislature

Perhaps embarrassed by widespread press coverage of the litigation over a missing comma, the Maine legislature amended the statute. In the process it sided with Oakhurst, making it clear that distribution is a stand-alone activity exempt from the general overtime requirement.

Did the legislature insert a serial comma before the words "or distribution"? No. It used *semi-colons* to separate the exempt activities, the one before "or distributing" functioning as what might be termed a "serial semi-colon." And, heeding *The Chicago Manual*'s insistence on the parallel usage convention, the non-gerund term "distribution" was changed to the gerund "distributing." ⊙

Postscript

In February 2018 the press reported that Oakhurst settled the case with the drivers, paying them $5 million in back overtime pay.

Endnotes

[1]*O'Connor v. Oakhurst Dairy*, 851 F.3d 69, (1st Cir. 2017).
[2]26 M.R.S.A. § 664(3)(F).
[3]*O'Connor v. Oakhurst Dairy*, Case No. 2:14-cv-00192-NT, 2015 WL 245 2678 (D. Me. 2016).
[4]29 U.S.C. §§ 201 *et seq.*
[5]26 M.R.S.A. § 664(3).
[6]*See* Chicago Manual of Style § 6.123 (16th ed. 2010).
[7]*Id.* at § 5.212.
[8]Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 119 (2012).
[9]Note that the Chicago Manual quotation cited above employs asyndeton twice in a single sentence.
[10]*Recommended Decision on Cross-Mots. for Partial Summ. J.,* Dkt. 112, *filed* Jan. 26, 2016.
[11]*Order Affirming Recommended Decision of the Magistrate Judge*, Dkt. 123 *filed* Mar. 25, 2016.
[12]*O'Connor*, 851 F.3d 69.
[13]Citing *Dir. of Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987).
[14]Interestingly, the court looked to the purpose of the wage and hour statute as a whole rather than to the purpose of the exemption section. The district court had taken the opposite approach to reach the opposite result.

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erative suspect murders a 2-year-old child and stabs officers with a knife.[5] In that case, physical restraint techniques and tasers were applied by the officers in order to avoid additional casualties; however, these solutions were ineffective and resulted in the officers having to shoot the suspect.[6]

Whether law enforcement officers should respond to danger with escalating force is a question recently posed to and addressed by the U.S. Supreme Court in *Kisela v. Hughes*.[7] This case involved the shooting of a suspect, who had a knife, and officers believed that a potential victim was in imminent danger. Officer Andrew Kisela was called to the scene of the shooting incident "after hearing a police radio report that a woman was engaging in erratic behavior with a knife."[8] Almost immediately upon arrival, Kisela identified Amy Hughes as matching the description of the reported suspect who was seen "hacking a tree with a kitchen knife."[9] The record demonstrated that "Hughes was [seen] holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so."[10] A chain-link fence separated the officers from the suspect and potential victim, which prevented the officers from being able to engage in other compliance techniques.[11] Officer Kisela determined that the danger to the potential victim was imminent and he shot Hughes four times; Hughes later recovered from the injuries.[12]

"Hughes sued Kisela under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment."[13] The case progressed over an eight-year period as the "district court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed."[14] Ultimately, the Supreme Court determined that in this particular case, Kisela was entitled to "qualified immunity" and "the question is whether at the time of the shooting Kisela's actions violated clearly established law."[15] Importantly, "qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[16]

Supporting this proposition that qualified immunity provides an assessment of reasonableness in the actions of government employees, the Supreme Court relied upon on *Tennessee v. Garner*[17] and *Graham v. Connor.*[18] In *Garner*, "the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that 'where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.'"[19] In *Graham*, the Court determined that the facts and circumstances of each individual case must be assessed to determine whether the officer's actions are reasonable and "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."[20]

The Supreme Court found that the appellate reasoning in this case did not "pass the straight-face test" when it relied on *Harris v. Roderick*[21] in order to deny Kisela qualified immunity.[22] The Supreme Court found that *Harris* was factually distinct from this case because *Harris* involved "an FBI sniper, who was positioned safely on a hilltop, [who] used excessive force when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff."[23] The Supreme Court reasoned that the facts in *Harris* would not provide a "reasonable police officer" with "precedent [which] clearly established that Kisela used excessive force."[24]

In cases of qualified immunity, once the threat of imminent danger is dissipated, litigators may use their discretionary viewpoint to analyze whether the officer's actions appeared to be proper. While this shooting occurred in 2010, a lawsuit followed and other officers equally affected did not have certainty in their actions until the Supreme Court issued its decision in 2018. Of course, when qualified immunity is in question, it is possible that certainty may never be achieved.

It is an ongoing quandary as to whether legal practitioners can ever put themselves into the chaotic moments facing first responders. Qualified immunity attempts to consider issues of exigency and in this case, the court found that the officer's actions were reasonable under the circumstances and dismissed the lawsuit. However, first responders will still be left to ponder: What will be the legal and professional ramifications for responding to tomorrow's emergency 911 call? We can only hope that first responders overcome those concerns and continue to honorably embrace the sentiment provided by Mark Twain: "Courage is resistance to fear, mastery of fear, not absence of fear." ☉

Endnotes

[1]*See* Prime Minister Winston Churchill, Address at United Europe Meeting, Albert Hall, London (May 14, 1947).
[2]*See* Mark Berman & Kevin Uhrmacher, *Ambushes and Fatal Shootings Fuel Increase in Police Death Toll This Year*, Wash. Post (Dec. 29, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/12/29/ambushes-and-fatal-shootings-fuel-increase-in-police-death-toll-this-year/?utm_term=.553fa187e485.
[3]*See* Keith McMillan & Mark Berman, *Two Florida Sheriff's Deputies Shot to Death Through Restaurant Window*, Wash. Post (Apr. 19, 2018), https://www.washingtonpost.com/amphtml/news/post-nation/wp/2018/04/19/two-florida-sheriffs-deputies-shot-to-death-through-restaurant-window/?noredirect=on.
[4]Chris Voss, Never Split the Difference: Negotiating As If Your Life Depended On It 8 (2016).
[5]*See Lawyer: Cops Failed to Enforce Court Order Night Before Toddler Died*, CBS N.Y. (Apr. 30, 2018), http://newyork.cbslocal.com/2018/04/30/mamaroneck-police-child-gabriella-maria-boyd.
[6]*Id.*
[7]*Kisela v. Hughes*, 138 S. Ct. 1148 (2018).
[8]*Id.* at 1150.
[9]*Id.*
[10]*Id.*
[11]*Id.* at 1151.
[12]*Id.*
[13]*Id.*
[14]*Id.*; *see also Hughes v. Kisela*, 862 F.3d 775 (9th Cir. 2017).
[15]*Kisela,* 138 S. Ct. at 1150.
[16]*White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citing *Mullenix v. Luna*, 1365 S. Ct at 308).
[17]*Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985).
[18]*Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989).
[19]*Kisela*, 138 S. Ct. at 1153 (quoting *Garner*, 471 U.S. at 11).
[20]*Graham*, 490 U.S. at 396-397.
[21]*Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997).
[22]*Kisela*, 138 S. Ct. at 1154; *see also Hughes*, 862 F.3d at 797.
[23]*Id.*; *see also Harris*, 126 F.3d at 1202-1203.
[24]*Id.*