

Just Policing and Mercy: Capturing the Ethical Dimension of Deadly Force Assessments

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Abstract

The *Graham v. Connor* Supreme Court decision is a foundational ruling concerning police force. While strongly supported by law enforcement practitioners, some scholars question its viability as a prudent guideline for humane societies. This article will consider this dispute between police scholars and practitioners concerning the viability of *Graham v. Connor* from a just war perspective. The just war tradition has not only promoted restraint in war but has also influenced policing. However, even though the just war tradition has offered some level of ethical influence on the humane application of force in policing, *Graham v. Connor* appears to deemphasize the ethical weight of deadly force decisions and can lead to inhumane force applications. To mitigate this problem, this article will continue to draw from the just war tradition through a focus on the emphasis on mercy in the early Christian just war tradition. The appropriation of mercy as a clear and applicable part of a formal guideline for deadly force can usher officers back to the ethical dimension of decision making to protect life; it can enable police leaders, force assessment boards, prosecutors, and courts to assess the actions of officers judiciously and promote societal peace.

Keywords: deadly force, *Graham v. Connor*, just-war tradition, just policing, Augustine, mercy

Introduction

Recent events have poignantly reminded people that societal peace can be quickly disrupted by police violence. The 2020 death of George Floyd in Minneapolis demonstrated how a viral video from a camera phone can inspire widespread national civil unrest in a matter of hours. Clearly, the exercise of deadly force is a grave matter not only for police officers and citizens encountering an officer, but all of society. The decision by an officer to either use deadly force or employ restraint has far reaching consequences that reverberates into the life

of the police officer and the community at large. If an officer chooses the former, a person is likely to die, and their parents and family members suffer the grief of losing a loved one. If the officer's actions are unjust or simply perceived as unjust, an entire community mourns, and wide scale violence and destruction can erupt. If the officer chooses the latter restraint, catastrophe can be avoided. However, if the choice for restraint is unwise given the officer's situation, it may cost them their own life, and again, parents, family members, and a community are left to mourn.

Complicating the matter, officers must make these life-or-death decisions with far reaching consequences in a matter of seconds, and under extreme stress. Ryan Geisser notes that "law enforcement officers rarely have the luxury of time . . . a police officer has approximately half a second to pull a weapon when confronted with someone perceived as dangerous and about to inflict harm" (2017:63). The officer in Cleveland, Ohio had seconds to decide how to respond when he confronted Timir Rice with what appeared to him to be a real gun. He had just seconds to decide if Timir—a twelve-year old child—would live or die. That split second decision, along with many others in the last decade, has had devastating consequences (Ruth 2016).

This is a reality every officer potentially faces, and I had been an officer for less than two years when I felt the impact. I was working night shift when I responded to a domestic violence call. The female victim was screaming so loudly the dispatchers could hear her screams through the reporting neighbor's telephone, and when I received the call, I was only one street block away from the residence. Arriving, I again immediately heard the visceral screaming. I approached knowing I was alone, and walked up the broken steps of the porch that led to the front door. I stepped into the residence and observed a younger man in his twenties with his back to the door standing over a female on a couch. They were involved in what appeared to be a violent struggle. It was dark, and because of her intense screaming and the motion of his arms, I thoroughly believed that he was stabbing her. I unholstered my gun, pointed it at him, and began to yell for him to stop and get on the ground. He immediately turned, looked at me, and walked towards me aggressively. I continued yelling for him to get on the ground as I tried to see if the knife was in his hand. It was too dark to see, and I did not have enough time to pull out my flashlight. In just seconds, he had closed the distance between us. I took the slack out of the trigger of my gun and prepared to shoot him, because I believed my life was in imminent danger.¹

¹ It is worth noting at this point that the Supreme Court decision of *Graham v. Connor* allows officers to employ deadly force when the circumstances as perceived by a reasonable officer warrant deadly force application. The officer is understood not to be omniscient and only accountable for a reasonable assessment in real time regardless of the facts that may later be revealed.

In training, I was taught about the danger of knife attacks to my life, and that the reasonable reaction to a knife wielding suspect is to use deadly force, yet I realized in the moment that I could try to grab the assailant's arm. I did not want to shoot him, but I did not want to be stabbed either, and I was not confident that grabbing his arm would prevent him from harming me, potentially lethally. Keep in mind that I had to process this information under stress in just seconds while fully convinced my life was in danger.

Fortunately, I did not pull the trigger, but instead grabbed hold of his arm. As I did, he offered no resistance. I turned him toward the wall, and once again, he offered no resistance. I then placed him in handcuffs as he complied with my directions. I turned him towards me and looked for the knife. There was no knife, and there never had been.² He still had an angry look on his face while I asked him, "Why didn't you listen to me? Why didn't you get on the ground?" With an infuriated tone, yet with complete sincerity, he yelled, "I'm tired of her, and I came out so you could take me to jail!"

I placed him in the rear of my police cruiser, and as I sat down in the driver's seat, my hands began to tremble uncontrollably. I was not trembling because I thought my life was in danger or from the stress of the incident. That was not new to me. I trembled because the reality set in that I had nearly shot and killed a man who was not a threat and meant no ill will towards me. For many years, I could not understand why I chose not to shoot him. I was fully convinced he had a knife. I was fully convinced my life was in danger. As thankful as I was and am that I did not pull the trigger, I realized my response was not consistent with my training.³

Now more than twenty years later, I believe it was my values that ultimately dictated my response. In the end, I valued that young man's life. Therefore, I chose to exercise *mercy* tipping the scale in that split-second encounter. Had I taken his life, it would have affected more than him and me. His parents, his loved ones, and our community surely would have felt the impact of my split-second decision.

This example underscores the importance of the *legal* use of force guidelines that govern officer's actions.⁴ If the guidelines encourage inhumane training and responses, the

² It turned out that the intensity of the screaming was due to the female being hearing impaired, not because she was being stabbed.

³ This anecdote is more detailed and contextualized in my forthcoming book, *Rethinking the Police: An Officer's Confession and a Pathway to Reform* (Intervarsity Press), that deals with police culture, leadership, and ethics as they relate to brutality against racial minorities.

⁴ By legal I mean guidelines codified in state law. Of course, police policy can and often does have more strict guidelines for force, yet policy is not as binding as a legal requirement. Also, a legal guideline would impact all police departments under the auspices of the guideline and not just those who implement a stricter force assessment through policy.

result can and often will be catastrophic. I believe the *Graham v. Connor* Supreme Court decision—the primary federal legal guideline that governs police force—does just that. It de-emphasizes the ethical weight of deadly force decisions. Therefore, I will argue that the concept of mercy drawn from the Christian just war tradition is a needed ethical consideration that reinforces humane responses in deadly force situations. First, I will explain the *Graham v. Connor* Supreme Court decision that governs police force, before noting the disputes surrounding the decision. Second, I will summarize the relationship between just war theory and police force, before focusing on mercy from the Christian just war tradition. Lastly, I will construct an enhanced legal guideline that could serve as a fundamental part of a state law for deadly force regulation, before explaining how it could change police training and equip officers for more humane applications of force.

I believe there is a void in the work done by scholars pertaining to just war and police force, not just concerning mercy's relationship to force guidelines, but also concerning concrete application. Despite the wonderful contributions—many of them noted in this article—often the contributions remain conceptual or philosophical. To be helpful, the philosophical must lead to practical application for a police officer in a split-second encounter with two feet planted and gun drawn. My intention is to provide a clear and applicable legal guideline enhanced by the Christian just war tradition that will inspire new police training to equip officers in the field for merciful force applications in deadly force situations.

Graham v. Connor

In 1989, the Supreme Court ruled concerning the case of *Graham v. Connor*, and it became the primary standard and legal guideline to assess force used by the police.⁵ The Court predicated their ruling upon the Fourth Amendment, establishing reasonableness as the standard for justified police force. Officers are required to use *reasonable force* based on the *objective facts* of the situation (severity of crime, threat level of the subject to officers and the

⁵ In 1984, a diabetic man, Dethorne Graham, in Charlotte, North Carolina felt his sugar was low and had a friend drive him to a nearby store to buy orange juice. Once in the store, Graham observed a long line at the counter. He, therefore, ran out of the store quickly and returned to the car so his friend could drive him to his girlfriend's house. A police officer was parked outside the store and was suspicious of Graham's behavior. He followed the car as it drove away, stopping it approximately a half mile later. Graham's friend advised the officer of Graham's condition, and the officer decided to detain Graham and his friend until he could investigate what took place at the store. With the delay, Graham's condition worsened, and he exited the car and began running around it. He then sat down on the curb and passed out. While unconscious, he was handcuffed and placed face down. He eventually gained consciousness; however, the officers on scene did not believe Graham was diabetic. Consequently, the officers denied him orange juice which a friend had brought and would not allow him to retrieve his diabetic identification card. The officers eventually carried Graham to a patrol car and pressed his face against the hood. After using the mentioned force to detain Graham, the officers learned Graham had not committed a crime at the store and decided to drive him home. Graham suffered a broken foot and other minor injuries from the incident. For a full explanation see *Graham v. Connor*, 490 U.S. 386, 389 (1989), or for a more detailed summary, see Jill I. Brown (1991).

community, level of subject's resistance), and deadly force is only warranted when "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" (*Graham v. Connor* 1989: 490 U.S. 386, 389). Put simply, force must be *objectively reasonable*.⁶

Additionally, when assessing the reasonableness of force, the officer's subjective intentions and facts discovered after the incident—hindsight—are irrelevant. Instead, reasonableness is judged "from the perspective of a reasonable officer on scene," and the reality that he or she must make complex decisions quickly (*Graham v. Connor* 1989: 490 U.S. 386, 389). Perhaps the most salient point is the emphasis on *reasonableness alone* and the sole reliance on the Fourth Amendment.

Replace the Standard

Osagie K. Obasogie and Zachary Newman (2018:1498) strenuously object to the *Graham* decision's sole reliance upon the Fourth Amendment, and warn of the dangers:

The primary constitutional mechanism used to protect citizens from excessive use of force by the police—the Fourth Amendment, as interpreted by *Graham*—actually produces racialized police violence by failing to engage the racialized group dynamics that underlie police violence in communities of color. The doctrinal insistence that excessive force exists as an isolated and individual dynamic apart from broader racial inequalities renders the Fourth Amendment relatively futile constitutional terrain from which to adjudicate these matters, allowing police excessive force to fester and reproduce without any check from the judiciary. The Fourth Amendment, as interpreted post-*Graham*, simply operates at the wrong level; its individualist nature cannot address fundamentally structural problems.

The authors believe the Fourth Amendment ultimately removes the incident from its broader context. In doing so, each incident is assessed as if it took place apart from a concerning cultural trend. Therefore, Obasogie and Newman conclude that the *Graham* decision resulted in a reductionistic assessment of excessive force incidents, and they suggest the Fourteenth amendment "and its greater conceptual sensitivity to and awareness of group dynamics. . . might be a more appropriate vehicle through which to adjudicate matters concerning excessive

⁶ It is important to note that *Tennessee v. Garner* is also an important Supreme Court decision related to police deadly force. However, it primarily concerns the use of deadly force related to a fleeing felon. This article is addressing situations where the officer is facing imminent harm to themselves and thus is employing deadly force. As a result, this article is focused on *Graham v. Connor*, which is the most applicable to the context.

police force” (2018:1497).

Obasogie and Newman certainly capture the reductionistic nature and over individualization of the *Graham* assessments. No event occurs in a vacuum, and assessing any event apart from the broader context can produce a skewed understanding. The racial tensions, the history of police brutality, and the conflicting group dynamics between white middle-class police officers and young urban African-American men unquestionably provide a deeply meaningful context for one to truly understand each incident holistically and even accurately (Holmes and Smith 2008). Nonetheless, Obasogie and Newman, while making an astute observation, have stepped onto a slippery slope with their solution. Abandoning the Fourth Amendment and allowing deadly force assessments to incorporate motives for the actions of officers based on the broader context may project false mindsets upon an officer and view normally acceptable responses as nefarious. Obasogie and Newman have plunged into a pool of subjectivity that could result in a distorted and unfair paradigm for assessment. Nonetheless, their opinion provides insight into the spectrum of views and resistance to the *Graham* decision, and although some like Obasogie and Newman want to replace *Graham* completely, others have a more moderate and helpful approach.

Enhance the Standard

Some critics of *Graham v. Connor* appreciate the ruling while recognizing it needs to be enhanced to provide a more stringent standard for police officers. Rachel A. Harmon stresses the inadequacy of relying on the Fourth Amendment, arguing that “The Supreme Court’s Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished” (2008:1). However, she does not propose abandoning the Fourth Amendment, but instead calls for enhancing the reasonableness standard through justification defenses. “Justification defenses permit force only if it is a response to an *imminent* threat to a legitimately protected interest, is *necessary* in degree to defend against a threat, and creates a risk of harm that is not grossly *disproportionate* to the interest that is being protected. Reasonable force by police should satisfy the same criteria” (Harmon 2008:48, italics added). Harmon highlights the importance of necessity, immanence, and proportionality to govern police force, and California legislation for police deadly force mirrors her perspective.

California Assembly Bill No. 392 was signed into law on August 19, 2019. It addressed the use of deadly force by police officers, and although the bill reflects much of the language and structure of *Graham v. Connor*, it stresses immanence and necessity as a requirement for force. “This bill would redefine circumstances under which a homicide by a peace officer is deemed justifiable to include when the officer reasonably believes, based on the totality of the circumstances, that deadly force is *necessary* to defend against an *imminent* threat of death or

serious bodily harm to the officer or to another person” (Assembly Bill No. 392 Chapter 170 from the California Penal Code, *italics added*). The California bill appears to be a prudent and helpful enhancement of *Graham* specifically related to deadly force.

However, the International Association of Chiefs of Police (IACP) did not see the bill as helpful or prudent, particularly the addition of necessity. “The IACP has significant concerns with any legislation or proposed bills in the United States that create an unachievable standard for the use of deadly force that is in direct conflict with the established standard of ‘objectively reasonable under the totality of the circumstances,’ set forth by the Supreme Court, *Graham v. Connor*” (2019:4). Again, much of the language in the California bill is synonymous with *Graham v. Connor*; however, for the IACP, the California bill sets forth an “unachievable standard” and is in “direct conflict” with *Graham v. Connor* (2019:4). The IACP argues the bill would create an assessment whereby the decision for justification “would then be based on the ultimate outcome of the incidents” (2019:4). One may find it difficult to accept the IACP’s conclusion given the explicit statement in section four of the California bill: “The decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances *known to or perceived by the officer at the time, rather than with the benefit of hindsight*” (Assembly Bill No. 392 Chapter 170 from the California Penal Code, *italics added*). The bill clearly does not promote a hindsight evaluation and largely reflects the spirit and language of *Graham v. Connor*, even while addressing the overly broad and arguably dangerous standard of reasonableness by simply adding necessary and imminent. The IACP’s reaction appears to be an overreaction, and certainly their overall assessment does not align with the content in the bill.

Drawing attention to the IACP’s objection is not meant as an attack on the IACP. Instead, it is meant to illustrate the potential resistance by leading law enforcement organizations and practitioners concerning any adjustment or enhancement to the current use of force guideline. It has been my experience that any criticism of *Graham* is often taken by the police as an assault against police orthodoxy, and simply unacceptable. Therefore, as the following section adds yet another emphasis, one can appreciate how radical it may seem to some law enforcement practitioners.

Just Policing and Mercy

Just war theory is best understood as a tradition that includes Christian and non-Christian thinkers who have attempted to articulate not only an ethical justification for warfare, but also to identify the ethical limitations of warfare (Clouse 2001:125). The just war tradition is not limited to the theatre of war, but also deeply connected to policing in America—particularly police force—and the criminal justice system as a whole (Hicks 2004; Kauffman 2004; Winright

2020). Edward A. Malloy, James Turner Johnson, Charles P. Lutz, Michael Walzer and others have explored the relationship of just war and policing (Winright 1995), and Christian scholar Tobias L. Winright argues that “The wealth of Christian reflection on restraint in war can be of service to the present soul-searching occurring within law enforcement circles on the use of force ... One might even conjecture that the essential ingredients that now suffuse use of force guidelines in law enforcement have their historical and philosophical roots in the tradition of thinking about just war” (1995:51). Therefore, he concludes that “the just war criteria could serve as a backdrop for law enforcement thinking about use of force” (1995:55). Simply put, the just war tradition is a helpful restraining framework that has shaped police force and remains an important consideration for use of force reform.

To appreciate the just war tradition’s influence, it is important to understand its structure. Winright notes two categories with eight criteria for the just war tradition that provide law enforcement “their historical and philosophical roots” (1995:51). He writes, “There are two categories of criteria, one governing the choice to go to war, *jus ad bellum*, and the other governing proper conduct within the midst of hostilities, *jus in bello*” (1995:43). There are six criteria for the choice to go to war, or *jus ad bellum*: “1) The authority of waging the war must be legitimate, 2) the cause fought for must be just, 3) the ultimate goal or objective intention must be peace, 4) the subjective intention or motivation must not be hatred or vengeance, 5) war must be the last resort, and 6) success must be probable” (1995:43). Additionally, there are two criteria for proper conduct in war, or *jus in bello*: “7) quantitatively, in order not to do more harm than the harm hope to be prevented (proportionality), and 8) qualitatively, in order to avoid harming innocent persons (immunity)” (1995:44). While the eight criteria represent law enforcement’s historical roots, none of the criteria clearly reflect or emphasize mercy.

Augustine’s Letter Addressing Soldiers

Augustine, a fourth century philosopher, was perhaps the greatest theologian in the first one-thousand years of Christianity. He is also known—possibly inaccurately—as the theologian of war. As Frederick H. Russell explains, “It is ironic that [Augustine] is often seen as a theologian of war, for he was more a theologian of peace. No stranger to violence, he hated war but saw it as a consequence of sin that gave rise to many lusts” (1999:875). Augustine addressed the issue of war from a perspective of peace, and his emphasis on peace suggests he is an important thinker who can provide insight into violent encounters between the police and citizens, where the ultimate end should be peace.

Just war was an evolving concept in the fourth century (Lockwood and Lockwood 1999), and while certainly not a pacifist, Augustine rejected the idea that war in the new age of

Christianity should resemble the warfare depicted in the Old Testament; the Christian era impelled an adjustment. However, Augustine was not confused about the implications of humanity and sin. He realized the current age was not the final consummation of the Christian Kingdom, and therefore, war was still a sad and necessary reality in the world of fallen humanity (Lockwood and Lockwood 1999:106). Because Augustine acknowledged the necessity of war, he concentrated on the intentions for and actions in war. He dismissed any idea of warmongering, believing war must have a just cause whereby warfare could not be separated from justice, and in some sense needed to reflect righteousness (Russel 1999).

Augustine's letter to his "noble lord"—*Letter 189* written in 417—is an important early work in the Christian just war tradition (Augustine 2004:259). In this short letter, Augustine provided clear guidance for just actions for the Christian soldier in war by emphasizing love, peace, and mercy. Love was essential to the life of a soldier, therefore, even in war, Christian soldiers must act justly. For Augustine, the call to be a Christian soldier was nothing less than a righteous calling that did not conflict with Christian love, but did require clear guidelines. A soldier's "will ought to aim at peace; only necessity requires war in order that God may set us free from necessity and preserve us in peace" (2004:261). Therefore, Augustine admonished soldiers to be "a peacemaker even in war in order that by conquering you might bring to the benefit of peace those whom you fight" (2004:261). The soldier was a peacemaker bringing peace to the civilian population and even leading the enemy back to peace. For Augustine, the soldier's heart was aimed at peace, whereby every action was directed to achieve that end, even the force exerted against the enemy (Russel 1999:875). Commenting on *Letter 189*, John Mark Mattox explains the Augustinian telos of peace which orders a soldier's purpose.

Soldiers also should be cognizant of the fact that – beyond merely safeguarding the state's territory or reclaiming that which has been wrongfully taken or recompensing other nations which have acted contrary to the demands of justice and order – these causes, although just, are merely proximate ones; the attainment of a just peace is the true cause – the true object – for which they are called upon to fight (2009:60).

Augustine provided an ethos of peacemaking where soldiers were ultimately guardians of peace and grounded in love—love for one's enemy—so that even in warfare, their desire was to bring their enemy to peace.

In the context of love and peace, force applied in a war must then be guided by important considerations. "And so, necessity and not the will be the cause of slaying the enemy in battle" (Augustine 2004:261). Force was to be used only when necessary (Langan 1984:26),

but even then Augustine warned against the human proclivity for vengeance by admonishing the soldier not to be guided by their own will. Soldiers were to be peacemakers who must only use force when necessary to maintain the peace, and the context of peace and necessity naturally dovetailed with mercy or merciful actions. He wrote, “Mercy is now owed to one who is defeated or captured, especially to one whom there is no fear for the disturbance of the peace” (2004:261).⁷ For Augustine, force in war was a function of peacekeeping to be exercised only when necessary, and tempered by mercy. Just policing also envisions police officers as peacemakers who use force as necessary for peace (Winwright 1995:43). However, Augustine’s emphasis on mercy has yet to make its way into contemporary just policing application.⁸

Of course, warfare and policing were related duties for the fourth century soldier, and therefore Augustine’s directives maintain some level of applicability for contemporary police officers. However, the concept of mercy requires a broader scope for application beyond just defeated foes to be applicable for police officers. Therefore, a general conceptual understanding of Christian mercy that can be appropriated for the police context is in order.

Mercy in Practical Application

Mercy is a fundamental concept in Christian thinking. Gregg Allison explains that mercy is “an attribute of God where “his goodness [is] expressed to those who are afflicted,” and “because God is merciful, his people are to love their enemies [and] do good” (2016:133). Mercy is an attribute that should be evident in the “character” and “conduct” of an individual in situations where merciful conduct or actions should be natural manifestations of personal character grounded in “compassion” and “forbearance” (Craigie 2001:761). Merciful actions are most meaningful when one in power exercises mercy on another under their control; mercy entails actions that reflect compassion and forbearance for someone under another’s authority.

For Augustine, the mercy of God should cultivate a merciful heart evoking merciful

⁷ The Old Testament conquest of Canaan left little to no room for the concept of mercy. The Israelites often put everyone to death, even woman and children. Augustine calls for a different posture in warfare where there is room for mercy especially for those who have surrendered or been captured. See Christopher J.H. Wright (2008) for more details on the Canaan conquest.

⁸ Although Augustine focused on mercy for the defeated or captured in war in *Letter 189*, he broadened his contextual scope on the application of mercy in just war to acts of violence in warfare in other letters, so that Frederick H. Russel commented concerning Augustine’s concept of mercy in war in general, “Regarding, licit violence in a just war, Augustine contented himself with the general advice that patience and mercy be shown” Russell (2009:876). Therefore, I am not limiting the scope of mercy to a subject who has capitulated. Obviously, police would be well beyond reasonable force if they applied any force to people who are no longer resisting. So, as we turn to policing, the focus on mercy is not most applicable to those who have been defeated, because police officers are not soldiers waging war, but rather are societal agents. Therefore, the concept of mercy for just policing is most appropriately applied to the exercise of force against citizens, which still aligns with Augustine’s broader application of mercy in just war that extended beyond just captured or surrendered combatants.

actions towards those who are the least worthy.⁹ Therefore, in the context of soldiers in war, Augustine prescribed actions by soldiers towards opposing forces that reflected compassion and forbearance (Augustine 2004:261-262) Moving from war to the police context, mercy applied by police officers thus entails acts of compassion and forbearance towards the citizens they are called to serve, and specifically mercy for police officers using deadly force entails actions reflecting *compassion* and *forbearance* for citizens potentially subject to a high level of force.

Although I have provided a general idea of mercy in the context of just war and just policing, it remains abstract, especially when we consider how it could be a helpful legal guideline for force. To be applicable, mercy must be conceptualized in actionable language. Merciful actions in the police context of force applications entail avoiding the use of force when possible (forbearance) and exercising restraint by utilizing the least amount of force necessary to accomplish the task at hand (compassion). In clear, contextualized, and applicable language, mercy concerns two actions (1) de-escalation (forbearance) and (2) employing the least life-threatening means of deadly force when de-escalation fails (compassion). Therefore, mercy as a concrete guideline for officers in the field faced with a deadly force situation can be constructed as follows: (a) when deadly force is necessary, whenever feasible, officers will demonstrate behavior and tactics aimed at de-escalation, and (b) when feasible, incapacitation of the person through the least life-threatening means available should be employed.

An Enhanced Guideline and the Implications

The concept of mercy from the just war tradition provides insight into police deadly force, highlighting the need to enhance the *Graham v. Connor* Supreme Court decision. In light of the discussion here, the following enhancement consisting of the California Assembly Bill No. 392 that requires necessity and imminence and the new guideline predicated on mercy is recommended: (a) "Homicide by a peace officer is deemed justifiable to include when the officer *reasonably* believes, based on the totality of the circumstances, that deadly force is *necessary* to defend against an *imminent* threat of death or serious bodily harm to the officer or to another person" (Assembly Bill No. 392 Chapter 170 from the California Penal Code). When deadly force is justified, (b) whenever feasible, officers will demonstrate behavior and tactics aimed at de-escalation, and (c) whenever feasible, incapacitation of the person through the least life-threatening means available should be employed.

⁹ Angelo Di Berardino writes, "Not only is there no neglect of neighbor out of love for God, but in the very act of loving the neighbor Christ is present ... In fact, Augustine cites that passage from Mathew 275 times in his work and verse 40, about what is done to "the least of my brethren," is a passage that moved him deeply" (2009:558).

The enhanced legal guideline explicitly demands reasonableness, necessity, and immanence, and conceptually supports proportionality. One aspect of proportionality requires “force should not be substantially disproportionate to the physical harm that is threatened” (The American Law Institute 2017).¹⁰ The explicit call for de-escalation and the demand for the least life-threatening means available definitely reflects proportionality. Yet it even moves beyond proportionality as officers will seek to employ a method that is not substantially disproportionate but even *less than what could have been reasonably employed*, which is mercy.¹¹ Perhaps the only disproportionality encouraged by the enhanced standard is one where officers use far less force in comparison to the threat they face. Stated simply, while just war theory in policing has consistently emphasized reasonableness, necessity, imminence, and proportionality, the new guideline moves beyond past just policing force reforms to capture mercy, thereby bolstering efforts to promote more peaceful outcomes in dangerous encounters.

Importantly, the enhanced guideline also mirrors other police reform efforts, progressive police policies, and the newly adopted use of force policy by the Department of Justice, as well as local and state statutes intended to address the problem of police brutality (US Department of Justice 2022; Foster 2020; Eagly and Schwartz 2022). It also corresponds with the JUSTICE Act (S. 3985) and Justice in Policing Act (H.R. 7120), where funding would be contingent upon states enacting enhanced use of force guidelines (Foster 2020). Thus, the enhanced legal guideline drawn from the just war tradition also aligns and bolsters efforts that have attempted to enhance *Graham* and mitigate the problem of unwarranted deadly force.

If implemented as part of a more comprehensive state law to enhance *Graham*, the enhanced guideline could help cultivate change in policing in at least four ways. First, it places the onus on the officer to think holistically about a use of force situation. Each decision cannot be reduced to a simple reasonableness assessment. In fact, that is a primary problem with *Graham v. Connor*; the assessment framework is reductionistic. Although the Supreme Court correctly understood the dynamic nature and complexity of use of force situations, reduction to a simple standard—reasonableness—has been applied by some officers with tragic precision and consequences: reasonable means license to shoot and kill. In other words, the current approach—predicated on *Graham v. Connor*—is leading to inhumane and robotic responses by police officers in dangerous situations. They do not need to make a holistic assessment; they

¹⁰ The American Law Institute, “Proportional Use of Force” <https://www.thealiadviser.org/policing/proportional-use-force/>. Rachel Harmon also notes that “Proportionality tests whether [the] means are worth it—whether the end is important enough to justify the cost of achieving it” (2008:60). Since we are considering deadly force, the cost is the life of the officer or a citizen. Hence, this aspect of proportionality is clearly met.

¹¹ Although force continuums in police policy call for the least amount of force to be used, the least amount is nonetheless based on the *Graham* standard of reasonableness. Therefore, the least reasonable force may be far above the least amount of force that is necessary tempered by mercy.

can simply respond with deadly force—generally a gunshot to the center mass or chest of the person—once the green light of reasonableness has been reached. Therefore, the public is horrified by actions that police officers believe to be completely appropriate. A firm legal guideline that stresses necessity, immanence, and proportionality through mercy will lead to a more holistic and humane assessment of and response to the situation. Officers will have to deescalate, and if de-escalation fails, they still must try to protect life while protecting their own life or that of another.

Second, police departments will be forced to train officers in de-escalation *authentically*. Of course, many have noted the need for de-escalation training in policing, and certainly many departments implement de-escalation into their policies and training curriculum. However, requiring de-escalation as a law provides a much stronger influence. Whereas policies provide some influence departmentally, courts are not bound by policy, only law. Therefore, de-escalation as a state law moves beyond departmental boundaries into the local and state courts. In other words, it is one thing to offer training that will not necessarily be relevant to use of force assessments, and quite another thing to make de-escalation a law for just applications of force. Currently, officers realize that they will not be adjudicated based on attempts to de-escalate, but based on reasonableness alone. Therefore, although many officers likely take the training seriously, when it comes to the lowest common denominator, the training can be more or less irrelevant. However, implementing de-escalation into the legal guidelines for force would likely make all officers attentive to the importance of de-escalation training. Nominal training would be transformed to authentic training as the department and the officer both have a substantial vested interest in learning and applying de-escalation techniques.

Third, since the more stringent standard carries additional and weightier liabilities, departments would be compelled to train officers in creative ways to equip them to incapacitate through the least life-threatening means. This could include targeting non-lethal areas with the officer's firearm as well as emphasizing other less lethal (deadly force applications that are less likely to cause death) options.¹² This type of training will equip and prepare officers to respond creatively and more humanely when in dangerous situations.

The 2020 Jacob Blake incident in Wisconsin is a perfect example of how training predicated on *Graham v Connor* leads officers to exercise deadly force when it could be avoided and less lethal methods that incapacitate could be employed. Blake was stretched out across the seat while reaching for a knife. The officer realized once Blake had the knife, deadly force was reasonable. Therefore, he responded by shooting Blake seven times striking him in the back

¹² By less lethal, I do not mean the tools in law enforcement such as less lethal shotgun ammunition, but using deadly force that is less likely to cause death. For instance, a baton strike to the head is classified as deadly force, but is far less likely to cause death when compared to shooting a person in the chest.

and side. Miraculously, Blake was not killed, but he was seriously injured. Given Blake's compromised posture, surely the officer could have targeted less lethal areas or responded in a more humane, creative, yet effective manner to the threat created by Blake.

For instance, given Blake's posture—fully extended with his back exposed—I believe I could have struck Blake in the head with a baton (more than once if need be). From my experience, I feel confident that I would have incapacitated him or at least stunned him to the point where I could have dragged him out of the car and away from the knife. Of course, I would have still employed deadly force—a strike to his head with a baton—yet he would have been far more likely to recover and not die when compared to shooting him in the back and side several times. I also do not believe that using a baton would have put me in any more jeopardy than shooting him. In fact, one could argue it is a safer application for the officer, as a head strike will likely render someone unconscious or at least confuse them to the point that they no longer intelligently carry out the knife attack, whereas someone who is shot may still be able to retaliate even if they later succumb to the wounds. Even shooting Blake in the back of the leg at close distance and withdrawing to see if he capitulated would have been a lesser means of incapacitation, while still a deadly force application, that would have increased Blake's survivability and recovery while not compromising the officer's safety.

However, officers do not generally train for these types of responses because the implications of *Graham v. Connor* do not require that they do, and police orthodoxy vehemently opposes it. In twenty-four years as a police officer, in deadly force scenario training, I was only taught to target the chest and head. Time and time again, I was trained to pull my gun and shoot to kill—center mass. In fact, whenever I suggested a different response, such as targeting non-life-threatening or at least less life-threatening areas that would effectively incapacitate, or suggested some other less lethal alternative, the suggestion was met with an eye roll or even hostility. The same robotic defenses and justifications were repeated—likelihood of missing, the suspect may die anyways, greater risk to officer, etc.¹³

While there are situations where this type of response truly is not feasible, clearly there are also situations where a more humane response is feasible. Categorically dismissing more humane applications is simply inhumane. Mercy has no place in police thinking and any suggestion of a merciful action seems to many officers to be simply absurd.¹⁴ The portion of the

¹³ "Police Should Just Shoot for the Leg!" Applied Ballistics, <https://applied-ballistics.com/police-should-just-shoot-for-the-leg/>

¹⁴ John Kleinig opens his chapter on the use of force with the following quote that reflects the police mentality. "I'd rather be judged by twelve than carried by six" (2012:96). I've heard this saying countless times in my time as an officer. This type of thinking makes the following statement by Kleinig extremely important. "We can see that authorizing the police use of force represents a very significant ceding of power, one that needs to be carefully regulated and monitored" (2012:98).

enhanced guideline that requires incapacitation through the least life-threatening means is likely the most novel (from the perspective of a former police officer) and controversial as it clearly contends with police orthodoxy.¹⁵

Fourth, the enhanced standard would help provide a more holistic assessment to determine when force is appropriate. In other words, it changes the analysis structure so the officer's force application can be evaluated in a way that is not reductionistic. And although it does not expand to broad and dangerous subjectivity, it does allow for a perspective that appreciates a more humane application without dismissing apparent injustice predicated on reasonableness alone. Police supervisors, force review boards, prosecutors, and courts would be able to make a fair assessment of the officer's force actions that would increase accountability and consequences for excessive force that otherwise would have been protected by the reasonableness standard.

Conclusion

I served as a police officer in an urban police department where force applications were commonplace, and even deadly force applications were not uncommon. I served on and led police use of force assessment boards and facilitated a civilian use of force board. The civilian board was comprised of community leaders who were trained to assess force according to *Graham v. Connor* and the department policy. As responsible board members, they limited their assessments to the parameters of *Graham*. Consequently, they approved force applications that they personally believed to be excessive and even morally questionable. It did not take long for some of the board members to see the ethical problem associated with *Graham*.

I believe *Graham v. Connor* only requires the officer to ask when he or she *can* use force. Once the green light of reasonableness is reached, the officer can and often will use force, even deadly force. The enhanced legal guideline provided in this article organically and methodically moves the officer beyond the threshold of *can* to ask, "Should I use force?" In other words, we move from *can* (assessment of a state of affairs for action) to *ought* (ethical considerations for action in a state of affairs). I believe the focus on mercy through de-escalation and lesser means of incapacitation pulls the officer back into the ethical dimension of decision making instead of simple, self-defensive, practical permissiveness.

This fundamental difference may explain the disparity between the assessment of

¹⁵ Force Science Institute "Why shooting to wound doesn't make sense scientifically, legally, or tactically," Police One, <https://www.police1.com/patrol-issues/articles/why-shooting-to-wound-doesnt-make-sense-scientifically-legally-or-tactically-6bOdYvNUEEctIWRI/>

deadly force situations by the public compared to law enforcement. The public organically thinks in terms of ought or the ethical dimension, while police are trained to think in terms of can (ability or legal authorization). The 2014 death of Michael Brown in Missouri illustrates this reality. For officers who process the incident through the lens of *Graham*, it was a simple matter: the officer was authorized to use deadly force and he did. Many in the public, however, are perplexed and appalled as they believe the officer *should not have* shot and killed Michael Brown: can vs. ought.

During my tenure as an officer, another officer was in his cruiser approaching a man standing in the street who seemed confused. The officer was familiar with the man who suffered from deteriorating mental health. As the officer came within approximately fifty feet of him, the man pointed a handgun at the officer in the cruiser. Is it reasonable—therefore legal—to use the cruiser as a deadly force application at this point? Most—in light of *Graham*—would certainly say yes. Is it merciful? Is it morally right? Fortunately, the officer chose not to run the man over with the cruiser but instead quickly reversed the cruiser getting out of the line of fire. In the end, we discovered the man had an empty gun and was trying to “commit suicide by cop.”¹⁶ I know the officer in this situation well, and he is a man who cares deeply about his community. Naturally, he considered the moral implications of his decision and chose mercy. Unfortunately, other officers were highly critical of his response, noting that he failed to act and use deadly force. Sadly, their conclusions are supported by *Graham*. I believe this situation illustrates how an unadulterated application of force according to *Graham* evades the ethical dimension of decision making that is paramount for police deadly force. The enhanced paradigm—through de-escalation and more humane applications—obligates officers back into the ethical dimension where deadly force decisions belong. If the trend of police violence continues, we may see more and more incidents of civil unrest. If *Graham* is not enhanced, I believe the violence will continue. Therefore, transforming the process for deadly force assessments by the police to protect lives and promote societal peace may be contingent on bolstering *Graham*.

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¹⁶ This is common expression in police work for those who do something to trigger police to kill them.

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