The Risky Continuum: Abandoning the Use of Force Continuum to Enhance Risk Management

— by Ken Wallentine —



Public safety officers must occasionally use force in response to a suspect's behavior. The use of force may result in civil rights litigation against the officer and the employing government entity, generally under 42 U.S.C. section 1983, alleging a deprivation of constitutional rights by a state actor. Proper police training in the constitutional parameters of permissible force will prepare officers to make immediate decisions about force options and, consequently, reduce liability for civil rights violations.

Public safety agencies frequently employ a force continuum to train officers in the lawful use of force and to measure an officer's use of force. A force continuum is a model or scale documenting an officer's range of force options in response to a suspect's actions. Though there are many various articulations of force continua, a typical continuum usually progresses from "officer presence" to "deadly force" in rigid steps, as illustrated below:

OFFICER PRESENCE → **VERBAL COMMAND** → **HAND CONTROL** → **IMPACT WEAPON** → **DEADLY FORCE**

Combat with a violent suspect is usually "tense, uncertain and rapidly evolving."[1] Many critics recognize that a rigid application of a force continuum is just as unsuitable to a street encounter between an officer and a violent suspect as are the Queensbury rules.[2] Courts rarely pay much attention to the agency's force continuum, instead applying a constitutional yardstick to an officer's use of force.

This article examines the standards that courts use to analyze the propriety of force by a police officer when a civil rights action arises from the officer's use of force. The article posits that force continua are unworkable and unnecessary in that analytical process, and critiques force continua. The author offers an alternative approach to guiding an officer's use of force, grounded in tested and stable civil rights litigation principles.

The Municipal Attorney's Role in Civil Rights Risk Management

Municipal attorneys may not fully recognize their key role in civil rights risk management. They can provide effective law enforcement legal training and help draft best practice policies. Classical risk management practice involves these basic steps: the identification and assessment of risks, and categorization of severity, frequency and consequences of the risks; developing controls to mitigate or eliminate risks and implementing the controls; and evaluating the process. Attorneys' work is often reactionary; risk management is anticipatory. Risk management skills should be part of a successful municipal attorney's toolbox.

Risks inherent in police use of force include civil rights liability, suspect and officer injuries, diminished public safety, and loss of confidence in the police agency. As discussed below, the best tool for police use of force decision-making is a solid understanding of the law of force, coupled with sound threat assessment skills. Who better to provide officers with this legal understanding, and to identify, assess and mitigate the risks of deficiencies in policy and in-service training, than the agency's legal counsel?

Judicial Analysis of Force Claims

Prior to the landmark case of *Graham v. Connor*, the U.S. Supreme Court applied a Fourteenth Amendment substantive due process analysis to excessive force claims against police.[3] In a 1952 decision, *Rochin v. California*, the Supreme Court held that police conduct that "shocks the conscience" violates the Fourteenth Amendment and subjects an officer to liability for a constitutional violation.[4] Twenty years later, in *Johnson v. Glick*, the U.S. Court of Appeals for the Second Circuit relied on *Rochin* to establish a four-part substantive due process test of whether an officer's use of force would "shock the conscience of the court" and lead to liability. The factors included: the objective need for the force, the relationship between the need for the force and the amount of force actually used, the extent of any injury proximately caused by the force, and a subjective inquiry into the officer's state of mind to determine whether the force was applied in a good-faith effort to restore or preserve order, or whether the force was applied maliciously and sadistically for the purpose of causing injury.[5]

In *Tennessee v. Garner*, the United States Supreme Court held that the use of deadly force to apprehend a suspect was a seizure under the Fourth Amendment's "objective reasonableness" standard.[6] Four years later, in its 1989 ruling of *Graham v. Connor*, the Supreme Court conclusively shifted the analytical focus in excessive force civil rights claims against police officers to the Fourth Amendment. In *Graham*, the Court reversed the Fourth Circuit Court of Appeals' application of the *Johnson v. Glick* substantive due process analysis to a seizure effected by police officers.[7] The Court held that the reasonableness of a seizure by police must be analyzed by the objective reasonableness of the seizure, viewed through the perspective of an officer at the scene and eschewing judgment through the "20/20 vision of hindsight."[8] *Graham* provided the following factors for lower courts to apply when assessing the reasonableness of the use of force: first, the severity of the crime at issue;[9] second, whether the suspect posed an immediate threat to the safety of the officers or others; and third, whether the suspect actively resisted arrest or

attempted to evade arrest by flight.[10] "These factors are not an exhaustive list because the ultimate issue is always the objective reasonableness of the force used."[11] Courts have applied the *Graham* analysis for two decades, developing a fairly clear body of law that can form the basis of effective police training on the proper application of force.

Criticisms of Force Continua

Force continua present significant practical, tactical, and legal defects. The topic of this article was prompted by the author's involvement as an expert witness, assisting the defense in civil rights litigation in two cases filed within the past year, in which plaintiffs' counsel asserted that the defendant officers' conduct did not neatly fit within the steps of a force continuum, and was, therefore, per se excessive force. Such attempts by plaintiffs are not unusual.[12] Many courts recognize that force continua attempt to impose a "mechanical application"[13] on a "tense, uncertain, and rapidly evolving"[14] situation. These courts rule that force continua do not control their conclusions.[15] Precisely because an officer cannot reliably predict the nature, level, and duration of force that will be necessary to resolve a particular situation, public safety agency policies should not artificially impose a mechanical framework in the realm of possible force responses.

The author is familiar with over a dozen force continua in use by a variety of public safety agencies. One frequent criticism of these continua is they lack a consistent vernacular. For example, two protesters who lock arms in a steel tube to frustrate attempts to arrest and handcuff them are "actively resisting" on one continuum, but are "passively resisting" on another. What constitutes "assaultive" behavior? Does it require throwing a punch, or does it require actually striking an officer? One commentator observes that common definitions are critical to continua that attempt to match a force option with a suspect's behavior.[16]

Perhaps the most frightening tactical defect of force continua is the inherent tendency for hesitation when not seconds, but fractions of seconds, may determine whether an officer lives or dies. The natural human tendency of hesitating to use force – particularly deadly force – against another person is well-documented by such leading scholars as Lt. Col. Dave Grossman, and needs no further exposition here.[17] Thomas Petrowski, a legal instructor at the Federal Bureau of Investigation's training academy, calls the force continuum a "strategy for hesitation."[18] Petrowski observes that the concept of a continuum "implies a sequential approach," and that officers expend precious time in mentally, and perhaps physically, escalating through the steps of a continuum before actually deploying the appropriate force option.[19]

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Hesitation may not only lead to an officer's injury or death, but may well result in greater force being applied and greater injuries to a suspect. For example, an officer responding to a noise complaint may encounter a suspect with a sheathed knife. Because the knife is sheathed, the officer may not immediately act to control and secure the suspect. As the situation deteriorates and the suspect reaches for the knife, the officer will likely resort to deadly force. Perhaps an empty hand, a TASER®, or other force option would have been appropriate at an earlier moment, preventing the necessity of deadly force. Also, the hesitation inherent in force continuum decision-making may permit a suspect to close the distance between the suspect and the officer. This diminishes the officer's safety and may limit the officer's force options. Officers often must deal with suspects at unsafe distances, sometimes because they must position themselves between "innocents" and the aggressors.

One common fallacy nurtured by force continua is the so-called "one-plus theory" or "the 'one plus one' philosophy – officers may respond to the level of force presented with force at the next highest level on the continuum."[20] This arises out of the philosophy that a continuum prescribes the least intrusive application of force needed to resolve a situation. However, the U.S. Constitution requires that officers use reasonable force, not simply force that is one step above the perceived force offered by the suspect. The Constitution *does not* require "law enforcement officers to use all feasible alternatives" or any particular alternative; only the use of a reasonable alternative.[21] The one-plus theory fails when considered with the myriad of suspect threat factors (discussed *infra*), and in consideration of different officers' abilities and the availability of different force options.

One of the most evident practical failings of force continua is the tendency to correlate a police incident report to the steps in an agency's continuum. For example, consider an officer who orders a driver to get out of a car in order for the officer to administer field sobriety tests. The officer reports: "When I asked the suspect, twice, to get out of the car, he refused, becoming actively non-compliant." Although "active non-compliance" may be a ladder rung on the agency's

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Ken Wallentine (kenwallentine@utah.gov) is the Chief of Law Enforcement for the Utah Attorney General. He is a certified firearms instructor and TASER® instructor, and a practicing attorney. He frequently serves as an expert witness in use of force litigation involving TASER, firearms, or police-dog bites. His pretrial criminal procedure deskbook, *Street Legal: A Guide for Police, Prosecutors & Defenders,* was published by the American Bar Association in 2007. His most recent book, *The K9 Officer's Legal Handbook,* was published by Lexis/Nexis in December 2008. Chief Wallentine edits and publishes *Xiphos,* a free criminal procedure/use of force newsletter, available at www.kenwallentine.com.

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force continuum, what is really happening? An officer trained to identify, respond to, and report threat indicators might submit a much different report in respect of the same incident:

> When I asked the suspect to get out of the car, he firmly gripped the steering wheel, so that his knuckles turned white. He did not respond verbally or acknowledge my requests. He stared straight ahead, though he briefly scanned from side-to-side. He put his foot on the accelerator pedal, and he briefly accelerated the engine with the transmission in the "park" position. This subject had previously been involved in a pursuit with the Happy Valley Police Department. The stop was in a residential neighborhood at 2025 hours on a July evening and there were several pedestrians and bicyclists on the street and sidewalks.

The first recitation of facts correlates well to the agency's force continuum. The second recitation gives a much clearer picture of the situation and the necessity for force. This level of detail in a police report is a valuable risk management tool, helping to prepare for litigation and, perhaps, even dissuading a potential plaintiff's counsel from filing a lawsuit in the first place.

A Practical Alternative

Criticism of force continua by law enforcement trainers has steadily increased in recent years.[22] However, few have met the challenge of implementing an alternative to the mechanical force continuum. Some critics have merely proposed yet another model, perhaps more flexible, but barely more responsive to the criticisms described above. One notable exception is the bold movement by the Federal Law Enforcement Training Center (FLETC) to discontinue teaching from a force continuum, and to remove all references to a continuum from its training curriculum. A few other agencies, including the Federal Bureau of Investigation, have implemented a similar approach.

Where did FLETC turn to for a training and practical alternative? The ruling in *Graham v. Connor*. The FLETC curriculum bases use of force legal training on the force assessment factors established by the Supreme Court two decades ago.[23] Trainees are mentally conditioned to be prepared to use force, learning that the proper force applied proactively often results in less force overall, and fewer suspect and officer injuries. Through classroom legal and practical training and scenario examples, trainees learn when it is appropriate to use particular force options, such as a baton, chemical spray, TASER, or firearm. Trainees participate in multiple learning scenarios in which they face role-playing suspects presenting various levels of cooperation, resistance and aggression. They choose the appropriate force response to each situation, and learn to complete a detailed incident report documenting the suspect's behavior, statements, and other characteristics, as well as the officer's actions any time that force was used.

FLETC trainees learn how to identify and report threat assessment factors, and the actions and statements of the officer and suspect, in a statement/action and response sequence. The essential question in every police use of force lawsuit is whether the officer's force was premised on a reasonable perception of a threat. An officer must articulate his observations supporting a reasonable belief that the suspect had both the intent and capacity to do harm. Failing an express verbal threat, it is difficult to conclusively discern a suspect's intent to do harm. However, certain "threat factors" can telegraph that intent. Threat factors go far beyond the superficial consideration of whether the suspect is armed or behaving aggressively. They include such factors as: the type of crime involved, the suspect's history, his drug or alcohol use, the sex/age/body size/strength disparity between the officer and suspect, the suspect's weapons or available weapons, verbal threats, non-compliance with the officer's commands; the suspect's appearance and demeanor (any signs of mental instability; profuse sweating; muscle-clenching; whether the suspect displays a "bladed" or combat stance; gang tattoos or dress; removing jewelry and/or clothing; scanning or the "1,000 yard stare"), geographical and terrain factors (rural or urban area; unstable, slick or steep ground; or contact on a roof or heights), the number of suspects and officers, crowd conditions, any existing officer injury, the available force tools, the inability to obtain backup, physical exhaustion, and others.

Officers who learn to observe and interpret threat factors are able to use force proactively, thus remaining safer and likely reducing the amount of force required to control a suspect and the situation. That simply amounts to good practical risk management.

Conclusion

Force continua do not promote effective use of force practices, training or reporting, and, consequently, do not support an effective risk management program. A municipal attorney can enhance risk management by helping to prepare an agency use of force policy and agency training premised on the principles of *Graham v. Connor*. Policy implementation should be augmented by supervisory and training staff review of use of force incident reports, critiquing for proper force option selection, and the articulation of threat factors, suspect behavior and officer actions.

Notes

1. Graham v. Connor, 490 U.S.386, 396-97 (1989) ("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").
2. The Queensbury Rules are a code of rules for the sport of boxing, published by the 9th Marquis of Queensbury in 1867. These prohibit, for example, wrestling or hugging holds; seconds or any other person in the ring during the rounds; and the contestants' wearing of shoes or boots containing springs.
3. This article considers only the use of force to effect a seizure of a suspect encountered by police, and not the use of force as applied to a pre-trial or post-conviction detainee.
4. Rochin v. California, 342 U.S. 165, 172 (1952).
5. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

6. Tennessee v. Garner, 471 U.S. 1, 7 (1985).
7. Graham v. Connor, 490 U.S. 386, 394 (1989).
8. *Id.* at 396.
9. Though the *Graham* Court stated this factor as "severity of the offense," courts generally look beyond the degree of an offense to consider the character of the offense, i.e., whether the offense involved violence or threats of violence. *See* Mellott v. Heemer, 161 F.3d 117, 122 (3d Cir. 1998) (officers who pointed guns at family members during a civil eviction satisfied "severity of the crime" factor when dealing with a mentally unstable man known to possess firearms), *cert. denied*, 526 U.S. 1160 (1999). The "dichotomy between felonies and misdemeanors does not control the Fourth Amendment analysis." Mason v. Hamilton County, 13 F. Supp.2d 829, 833 (S.D. Ind. 1998). *But see* Miller v. Clark County, 340 F.3d 959, 964 (9th Cir. 2003) (where the underlying crime is a felony, this "factor strongly favors the government").
10. 490 U.S. at 395-96 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard").
11. Smoak v. Hall, 460 F.3d 768, 783 (6th Cir. 2006).
12. *See, e.g.,* Jennings v. Jones, 499 F.3d 2, 15 (1st Cir. 2007) ("expert testimony about the Use of Force Continuum actually supports a finding that the force Jones used was excessive"), *cert. denied*, ___ U.S. ___, 128 S. Ct. 1125 (U.S. 2008); *Mason*, 13 F. Supp.2d at 831 ("plaintiff's expert witness . . . described the 'force continuum' that most police officers are trained to use").
13. *Graham*, 490 U.S. at 396, quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application").
14. *Id.*
15. *See, e.g.,* McAtee v. Warkentin, 2007 WL 4570834 *5 (S.D. Iowa, Dec. 31, 2007) ("These guidelines are relevant to the extent that they reflect the informed experience of the occupation or profession. They do not, in any way, supplant standards provided for by the law"); Newlove v. Watson, 2006 WL 322488 *3 (W.D. Mich. Feb. 10, 2006) ("Of course, the Continuum itself is not controlling and is simply an indicator of whether Defendant's use of force was excessive").
16. John Bostain, *Use of Force: Are Continuums Still Necessary?* FLETC JOURNAL, Fall 2006, at 33-34.
17. DAVE GROSSMAN, ON KILLING, 29-39 (Little Brown & Co. 1995) (citing numerous studies).
18. Thomas Petrowski, *Use-of-Force Policies and Training, A Reasoned Approach*, FBI LAW ENFORCEMENT BULLETIN, Oct. 2002, at 28.
19. *Id.* at 29. *See also* Robert L. Thornton & John H. Shireman, *New Approaches to Staff Safety*, National Institute of Corrections, 1993, at 3 ("force continuums [are presented] in a stair-step fashion that some feel implies that the officer must apply one technique before attempting the next level. The obvious problem is that this does not consider other factors that affect the process. It may be necessary to respond at a higher level should the situation warrant it").
20. Li v. Aponte, 2008 WL 4308127 *3 (S.D.N.Y. Sept. 16, 2008).
21. Plakas v. Drinski, 19 F.3d 1143, 1148 (7th Cir. 1994); *see also* Carswell v. Borough of Homestead, 381 F.3d 235, 245 (3d Cir. 2004) ("We have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons").
22. *See, e.g.*, George Williams, *Force Continuums: A Liability to Law Enforcement?* FBI Law Enforcement Bulletin, June 2002, at 14; *see also* Bostain, *supra* n.16, Petrowski, *supra* n.18.
23. The FLETC curriculum divides the final *Graham v. Connor* factor into two inquiries. First, whether the suspect actively resisted arrest or seizure, and how; second, whether the suspect attempted to evade arrest or seizure by flight, and how. Thanks to FLETC Senior Instructor John Bostain for sharing the FLETC training curriculum at the 2008 International Association of Chiefs of Police Legal Officers Section meeting. **ML**

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