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

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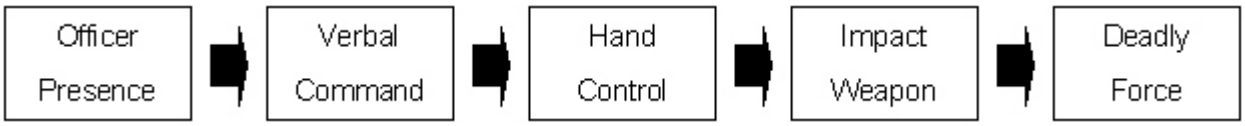
Public safety officers must occasionally use force in response to suspect behavior. The use of force may result in civil rights litigation against the officer and the employing government entity, generally under 42 U.S.C. section 1983, alleging a deprivation of constitutional rights by a state actor. 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.



Combat with a violent suspect is usually "tense, uncertain and rapidly evolving."[1] Many

critics recognize that rigid application of a force continuum is just as unsuitable to a street encounter between an officer and a violent suspect as are the Marquess of Queensbury rules. 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: identification of risks, assessment of risks, developing controls to mitigate or eliminate risks, implementing the controls, categorization of severity, frequency and consequences of the risks, 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 the 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 in Civil Rights Litigation

Prior to the landmark case of *Graham v. Connor*, the Supreme Court applied a Fourteenth Amendment substantive due process analysis to excessive force claims against police.[2] 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.[3] Twenty years later, in *Johnson v. Glick*, the Court of Appeals for the Second Circuit relied on *Rochin v. California* 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 impose liability. These 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.[4]

In *Tennessee v. Garner*, the Court held that the use of deadly force to apprehend a suspect is a seizure under the Fourth Amendment "objective reasonableness" standard.[5] In 1989, the United States Supreme Court conclusively shifted the analytical focus for excessive force civil rights claims against police officers to the Fourth Amendment. In *Graham v. O'Connor*, 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.[6] 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, eschewing judgment through the "20/20 vision of hindsight."[7] *Graham* provided the following factors for lower courts to apply when assessing the reasonableness of force by police: first, the severity of the crime at issue;[8] second, whether the suspect poses an immediate threat to the safety of the officers or others; and third, whether the suspect actively resists arrest or attempts to evade arrest by flight.[9] "These factors are not an exhaustive list because the ultimate issue is always the objective reasonableness of the force used.[10] 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 in defense of 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 on the steps of a force continuum, and was therefore *per se* excessive force. Such attempts by plaintiffs are not unusual.[11] Many courts recognize that force continua attempt to impose a "mechanical application"[12] on a "tense, uncertain, and rapidly-evolving"[13] situation. These courts rule that force continua do not control the courts' conclusions.[14] 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 of the realm of possible force responses.

The author is familiar with over a dozen force continua in use in a variety of public safety agencies. One frequent criticism of these continua is that there is not a consistent vernacular. For example, two protestors who lock arms in a steel tube to frustrate attempts to arrest and handcuff them are "actively resisting" on one continuum and are "passively resisting" on another. What constitutes "assaultive" behavior? Does it require actually throwing a punch? Or does it require striking an officer? One commentator observes that common definitions are critical to continua that attempt to match a force option with a suspect behavior.[15]

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 to hesitate to use force against another person, particularly deadly force, is well-documented by such leading scholars as Lt. Col. Dave Grossman, and needs no further exposition here.[16] Thomas Petrowski, a legal instructor at the Federal Bureau of Investigations' training academy, calls the force continuum a "strategy for hestitation."[17] Petrowski observes that the concept of a continuum "implies a sequential approach" and he suggests that officers expend precious time in mentally, and perhaps physically, escalating through the steps of a continuum before actually deploying the appropriate force option.[18]

Hesitation may not only lead to an officer's injury or death, but may well result in greater force and 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 empty hand, a TASER® or other force option would have been appropriate at an earlier moment, preventing the necessity of deadly force.

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 insert themselves between innocents and aggressors.

One common fallacy nurtured by force continua is the so-called "one-plus theory." "The use of force continuum is governed by the 'one plus one' philosophy-officers may respond to the level of force presented with force at the next highest level on the continuum."[19] This theory arises out of the philosophy that a continuum prescribes the least intrusive application of force to resolve a situation. The 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 to use a reasonable alternative.[20] The one-plus theory fails when considered with the myriad of suspect threat factors (see discussion below) and in consideration of different officers' abilities and 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 from a car in order 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 force continuum, what is really happening? An officer trained to identify, respond to, and report threat indicators might submit a much different report for 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 prepare for litigation and perhaps even persuading potential plaintiffs' counsel from filing a lawsuit in the first place.

A Practical Alternative to Force Continua

Criticism of force continua by law enforcement trainers has steadily increased in recent years.[21] 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 FBI, have implemented a similar approach.

Where did FLETC turn for a training and practical alternative? *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.[22] Trainees are mentally conditioned to be prepared to use force, learning that the proper force applied proactively often results in less force 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 or resistence 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 is used in a learning scenario.

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 observations that support 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, suspect's history, chemical/alcohol use, sex/age/body size/strength disparity, "1000 yard stare," suspect weapons/available weapons, signs of mental instability, rural/urban area, unstable/slick/steep ground, contact on roof/heights, verbal threats, muscle clenching, number of suspects/officers, bladed or combat stance, gang tattoos/dress, crowd conditions, officer injury, available force tools, inability to obtain back-up, physical exhaustion, profuse sweating, suspect removing jewelry and/or clothing, non-compliance with officer commands, scanning, 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 the 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 prepare agency use of force policy and 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 articulation of threat factors, suspect behavior and officer actions.

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Endnotes

1. *Graham v. Connor*, 490 U.S. 386, 396-397 (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. This article considers only the use of force to effect a seizure of a suspect encountered by police, and not force applied to a pre-trial or post-conviction detainee.

3. *Rochin v. California*, 342 U.S. 165, 172 (1952).

4. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973).

5. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

6. *Graham v. Connor*, 490 U.S. 386, 394 (1989).

7. *Id.* at 396.

8. 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 (3rd Cir. 1998) (officers who pointed guns at family members during civil eviction satisfied "severity of the crime" factor when dealing with 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.").

9. *Id.* 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.").

10. *Smoak v. Hall*, 460 F.3d 768, 783 (6th Cir. 2006).

11. *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 v. Hamilton County*, 13 F.Supp.2d 829, 831 (S.D. Ind. 1998) ("plaintiff's expert witness . . . described the 'force continuum. that most police officers are trained to use.").

12. *Graham v. Connor*, 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.").

13. *Graham v. Connor*, 490 U.S. at 396.

14. *See, e.g., McAtee v. Warkentin*, 2007 WL 4570834 *5 (S.D. Iowa 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. 2006) ("Of course, the Continuum itself is not controlling and is simply an indicator of whether Defendant's use of force was excessive.").

15. John Bostain, *Use of Force: Are Continuums Still Necessary?*, FLETC Journal, Fall 2006, pp. 33-34.

16. Dave Grossman, *On Killing*, pp. 29-39 (citing numerous studies), Little Brown & Co. 1995.

17. Thomas Petrowski, *Use-of-Force Policies and Training, A Reasoned Approach*, FBI Law Enforcement Bulletin, October 2002, p. 28.

18. *Id.* at 29. *See also* Robert L. Thornton & John H. Shireman, *New Approaches to Staff Safety*, National Institute of Corrections, 1993, p. 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.").

19. *Li v. Aponte*, 2008 WL 4308127 *3 (S.D.N.Y. 2008).

20. *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). *See also Carswell v. Borough of Homestead*, 381 F.3d 235, 245 (3rd Cir. 2004) ("We have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons.").

21. *See, e.g.*, George Williams, *Force Continuums: A Liability to Law Enforcement*?, FBI Law Enforcement Bulletin, June 2002, p. 14; Petrowski*, supra* n. 18; Bostain, *supra* n. 16.

22. The FLETC curriculum divides the final *Graham v. Connor* factor into two inquiries: whether the suspect actively resisted arrest/seizure (and how) and whether the suspect attempted to evade arrest/seizure by flight (and how). Thanks to FLETC Senior Instructor John Bostain for sharing FLETC training curriculum at the 2008 International Association of Chiefs of Police Legal Officers Section meeting.