



By John G. Peters, Jr., Ph.D.  
and Michael A. Brave, J.D.

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There are growing concerns among many defense lawyers, criminal justice administrators, and trainers that use-of-force continuums create a *faux* escalation of liability exposures which may hurt officers who are accused of using excessive force. Force continuums, it is argued, create an unnecessary escalation of liability for government entities and their administrators. Some of these concerns have merit. For example, juries and, in some cases, judges have been persuaded by plaintiffs' lawyers and/or expert witnesses that agencies' force continuums, which are often

contained in the use-of-force policies, were not followed by those accused of using excessive force. Also, these same "standards" are often used by internal affairs investigators during administrative and/or criminal investigations of officer misconduct which often involve allegations of using excessive force on a member of the public.

This can, and has, resulted in officers being wrongly prosecuted when the prosecutor attempts, using the agency's or an external force continuum, to explain to a judge and/or a jury why the officer's use of force was excessive because (s)he failed to follow the force continuum as diagrammed. Hence, force continuums, it is argued by their detractors, confuse jurors and, in some cases, judges about the appropriate legal force standard(s). Opponents to force continuums explain that some judges have even interpreted use-of-force standards to equate to the Fourth Amendment's constitutional standard. Police unions and their memberships are often quick to note that, administratively, some officers have received inappropriate discipline, including career ending termination, when a use-of-force continuum standard was inappropriately substituted for the applicable legal standard(s).

These claims have generated a national groundswell of discussion (oftentimes bellicose) among trainers, defense lawyers, judges, criminal justice administrators, and even some state agencies (e.g., California Peace Officers Standards and Training) regarding whether force continuums should be included in an agency's use-of-force policy and possibly, more importantly, about the continued need for force continuums. Prior to objectively presenting both sides of these issues which often polarize opinions as sharply as a debate about *Darwinism v. Intelligent Design*, first we'll look at a short history of how and why force continuums were developed.

### Force Continuums: A Historical Perspective

Many police officers and administrators can recall during the 1960s and 1970s when defensive tactics trainers wore martial arts uniforms and taught karate, judo, jiu-jitsu, boxing, and other fighting arts. Most of these trainers were large males with former military training. They were often at odds with baton and firearms instructors because they often viewed the other disciplines with disdain, rather than viewing them as a system which complements rather than competes.

Officers often carried blackjacks or saps; used destructive choke holds; and simply kicked butt to get the job done, often with little thought about legal or administrative sanctions. Today's officers

have pepper spray, electronic control devices, expandable batons, sophisticated defensive tactics and restraint equipment – in contrast to the 1960s firearm, “stick,” and bare hand – and must think about civil and criminal liability issues. Unlike the past, when there were few well documented and well researched formal police training programs which “required” force training, force training has evolved into a requirement, based upon continuously evolving judicial guidance.

Historically, the United States judiciary failed to provide clear direction about how much force an officer could use – deadly or nondeadly – or when that force could be used. This dearth of operational guidance created a *grey area* about an officer’s use of force well into the 1980s. Prior to 1961, although the Ku Klux Klan Act of 1871 (the Federal Civil Rights Act of 1871) was in effect, it was not recognized to hold law enforcement officers accountable for constitutional deprivations. That changed in 1961 when the U. S. Supreme Court held that state and local law enforcement officers (not government employers) could be held accountable for violations (including excessive force) under the federal constitutional standards (*Monroe v. Pape*, 365 U.S. 167 [1961]).

Accountability under the Federal Civil Rights Act (FCRA) was further expanded to include local (not state) government entities in 1978 (*Monell v. New York Department of Social Services*, 436 U.S. 658 [1978]). As court decisions clarified who was accountable for constitutional violations, there continued to be little judicial guidance regarding how much force an officer could use. Early force continuums were attempts, usually by those responsible for training officers in force, to fill this historical force/guidance void, and also to serve as a visual representation of the intangible called *force*. Articles such as “Use of Force: Making the Intangible, Tangible!” (*Police and Security News*, 1989) focused on how continuums aided in this process.

According to G.T. Williams<sup>2</sup>, concerned law enforcement trainers developed force continuums in the late 1960s to assist in teaching force subjects. An example of one early force continuum is found in the May 1978, Los Angeles (CA) Police Department (LAPD) *Training Bulletin*<sup>3</sup> depicting force choices on a diagram resembling a barometer (Figure 1). Titled *Use of Force Part I*, its language emphasizes *escalation* and *de-escalation* of force concepts. In *Part II*, the focus is on deadly force applications which most force continuums concentrated on during these “early” days. Since the 1960s, several force continuums have been developed by well respected and experienced trainers and law enforcement agencies, including Dr. Kevin Parsons’ *Confrontational Continuum*<sup>®</sup>, and the Federal Law Enforcement Training Center’s very colorful use-of-force chart, to mention two well-known and adopted ones.

Today, there are more than 50 use-of-force ladders, circles, stair steps, wheels, and other uniquely shaped continuums used as visual training aids to assist officers in learning how much force to apply in a seemingly, never-ending combination of situations. Many of these continuums are complex, ambiguous, confusing, and difficult to use, while others are deceptively simple and seemingly straightforward.

According to longtime international trainer and expert witness, Kevin Parsons, Ph.D., “The concept of the continuum was to explain to officers ‘when’ to use force as opposed to the traditional defensive tactics class which dealt only with ‘how’ to use force. Thus, the continuum was designed to be a training tool.” Dr. Parsons agrees, “Certain continuums have been developed and presented which are so overly complex as to be of little use to the

officer making decisions on the street.”

With so many continuums available, those which are complex and hard to understand are easily identified. These appear all too often to confuse officers about force legal standards, thus making force decisions and applications more difficult, and post-force incident reporting (and justification explanations) far more difficult, hence fueling opponents’ and critics’ calls to eliminate force continuums. When compared to the force continuums developed before 1980, many appear to have been *customized* by individual trainers because of their training philosophy, or as a way to promote their training firms, and/or just to be different. Force continuums can’t be “mine,” if they look like someone else’s model, or if they really belong to others.

Setting aside egos, philosophies, and techniques, it appears the real historical basis for force continuum development was to make an intangible – force – tangible. In short, they were originally designed to provide operational guidance to officers regarding when and how much force can be applied in given situations. With clear force standards now in existence, have they outlived their usefulness? Further, do they help or hinder law enforcement’s objective of educating officers in the appropriate and judicious application and explanation of force?

### **Force Continuums: Legal Issues**

Some critics of force continuums argue they are no longer needed because the United States’ judiciary has provided adequate guidance, since 1989, about how much force officers can use – be it to seize a free person, to stop an attack, or to restrain a prisoner. The guidance comes from two United States Supreme Court cases, *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989), respectively. According to longtime police legal advisor and internationally recognized trainer, Randy Means, “*Garner* gutted the common law fleeing felon rule, and provided other guidance on the use of deadly force against fleeing felony suspects. In its use of Fourth Amendment analysis, it forecasted the objective reasonable standard to be born in *Graham* a few years later.”

Four years later, in *Graham* (1989), the Court held an officer’s use of force to seize a free person would also be analyzed under the Fourth Amendment “objective reasonableness” standard. All claims of excessive force in making a stop or a seizure will be analyzed under the Fourth Amendment. *Graham* also held that excessive force claims would be judged under the Fourth Amendment’s “objective reasonableness” standard. Some force continuum opponents argue this is the only legal standard which needs to appear in an agency’s policy (more on this later) or be taught to officers regarding seizures of free people; unless, of course, there is a more restrictive state law.

There are other constitutional standards which apply other than the Fourth Amendment’s objective reasonableness standard. Very few force continuums discuss these other constitutional standards of force. Many also fail to include canines, automobiles, electronic control devices, spotlights, use of conventional force tools and/or techniques, in unconventional or unforeseeable ways, improvised force tools and techniques, etc., highlighting that not all force continuums are created equal.

“The continuum approach invites a ladder/stair stepped ranking of officer force applications which is, for the most part, not based in law or logic,” notes police attorney and legal advisor, Robert Thomas. Manager of the *Graham v. Connor* case which went before the U. S. Supreme Court, Mr. Thomas underscores that “Fourth Amendment reasonableness does not require that an

officer use the least intrusive means. The continuum concept invites (and may compel) people to conclude (in error) that stair stepping officer force escalation(s) is required.”

In contrast, “Individuals criticize the continuum because it requires an officer to ‘attempt each level of force before going to the next level’. This has never been a part of the continuum process. In fact, it is the continuum which allows an officer to explain why a particular level of force was utilized instead of a lower level,” explains Dr. Parsons.

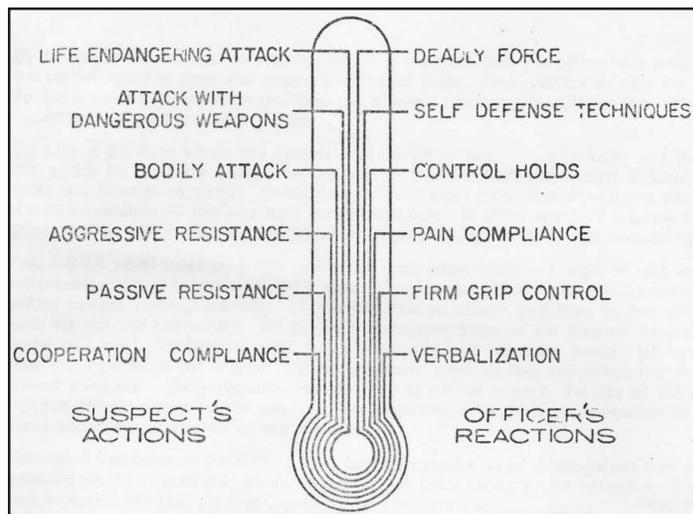
According to Milwaukee police defense and trial attorney, Gregg J. Gunta, “In my 20 years as a trial lawyer, a recurring problem with continuums is that once the plaintiff’s lawyer introduces a ladder- or staircase-type escalation of force continuum, jurors often look at it and think officers must enter the ladder or staircase at the bottom. This forces me, and other defense counsel, to move the jury away from this visual, and reteach them about force, and that officers are not required by law to move from the bottom to the top of the ladder or staircase. It is often hard to get lay people to understand that police officers can enter at any level, based upon the totality of the circumstances facing them.” Another area of concern is the jargon officers use to explain the level of force they used.

“Particular continuums employ terms which are vague or imprecise, permitting reasonable minds to substantially differ as to what is meant by those terms. A favorite example is the term ‘aggressive-combative’ – suspect behaviors which permit the application of intermediate levels of force. But, applying this description to actual events is most difficult to do when the person is actually actively resisting the officer(s) (which would justify intermediate force, if reasonable), but may not seem ‘aggressive-combative’ to the trier of fact [judge and/or jury],” says California police attorney, Mike Stone.

“The Fourth Amendment also requires that attention be given to the facts and circumstances confronting the officer(s), considered from the perspective of a reasonable officer on the scene. The analysis of reasonableness must take into account the severity of the crime; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Consequently, the emphasis cannot be on whether the officer could have succeeded with less force (or what continuum level the force applied was at), but whether the force used was reasonable, in light of the circumstances confronting the officer,” says Attorney Thomas.

Supporting this viewpoint is Attorney Means. “The federal Constitutional standard does not require an inquiry into whether the force or incident could have been avoided or minimized, if the officer had somehow done better or differently. It only requires that the officer’s actions be ‘reasonable’ under the prevailing circumstances.”

Means also suggests another problem with some continuums, charts and matrices is “they inappropriately suggest that the officer’s response should be determined solely from categorization of the subject’s current behavior. A 90-year-old, 90 pound great-grandmother is a very different ‘active resister’ than Mike Tyson, and so is a 10-year-old, 90 pound boy. Analysis of the ‘totality of circumstances’ obviously includes much more than the subject’s current behavior. On the surface, the circumstances (active resistance) may sound the same to a third party, but without the addition of firearms or knives, the reasonable officer would most likely have two different viewpoints based upon the totality of the circumstances, not just the individual’s initial behavior. These facts and



**Figure 1 - A force continuum barometer taken from a 1978 LAPD training bulletin**

circumstances must be added to the force/response equation.”

Most force continuums create, directly or indirectly, what is known as the *continuum standard of care*. That is, the typical continuum *only* shows a relationship between the perceived threat to the officer and/or others, and his (or her) available force response. Also known as a self-defense-type standard, the continuum standard of care is much more restrictive about the officer’s use of force than the law. In contrast, “the Fourth Amendment addresses ‘misuse of power,’ not the accidental effects of otherwise lawful conduct.” *Brower v. County of Inyo*, 490 U.S. 593, 596 (1989).

Attorney Stone notes, “Over the years, some force continuums have evolved into multicolored, multilayered, and multifunctional diagrams which are too complex, frankly; they are difficult to learn, difficult to apply or recall in a combative situation in the field, and may confuse those who sit in judgment of police use of force, whether they are agency adjudicators or lay jurors.” As one example, a large West Coast police agency, several years ago, had more than five different force standards in its use-of-force policy. How reasonable and practical is it for officers to remember these various standards and when to apply them?

#### **Force Continuums: Policy Issues**

If the officer’s agency uses a force continuum, should it be contained in the agency’s written use-of-force policy? According to Attorney Stone, “Departments seem to be moving away from grandiose policy statements which do little to assist the officers, but permit plaintiff and prosecutors to turn an otherwise legitimate use-of-force event on its head by twisting carelessly worded statements to condemn the force used. The same thing can happen with continuums which are misused.”

Some individuals who support doing away with force continuums and using only the constitutional legal force standards and any more restrictive applicable state law standard(s), argue that an agency’s written policy should only contain the language of the *Graham* standard: An officer’s use of force on a free person shall be objectively reasonable based upon the totality of the circumstances known or perceived by him (or her) at the time force was used. Dr. Parson’s disagrees. “Replacing the continuum concept with a simple admonition to ‘follow the law,’ adhere to

Supreme Court standards,' or 'abide by the Fourth Amendment' is dangerous and a disservice to the profession. We can not and should not make police officers lawyers. Telling an officer to adhere to legal precedent gives officers little practical guidance in when to use a baton versus [their] hands or a firearm. The continuum is a practical training tool which officers can understand." The U. S. Department of Justice (DOJ) shares the viewpoint of Dr. Parsons.

The DOJ's Civil Rights Division insists in its Consent Decrees and in its Technical Assistance Letters that police agencies adopt a progressive force continuum and train all officers in it. *Although not required to be in agency policy*, the DOJ does mandate that force continuums include all of the actual types of force used by the agency, including, but not limited to, firearms, oleoresin capsicum, batons, canines, etc. For more information about the DOJ's Consent Decrees and Technical Letters of Assistance, visit [www.usdoj.gov/crt/](http://www.usdoj.gov/crt/).

Since there are only a few law enforcement agencies under DOJ Consent Decrees, the DOJ's recommendations may be viewed as moot. The real issues are liability exposure or enhancement. Some people argue the idea that, if it is not in the policy, then it can't be used against the agency. This is fiction – and dangerous. It is folly to tell a jury that the officers follow the Constitution, as most officers do not know the constitutional standards. Also, if the force continuum is not in the agency's written use-of-force policy, will it matter to a jury that the policy is not detailed?

Captain Greg Meyer of the Los Angeles (CA) Police Department (LAPD) is wrestling with the force continuum policy question. "Ours [force continuum] is not part of policy, but rather has been used as a training aid. We are currently considering whether to do away with it, and teach *Graham's* 'objective reasonableness' standard." Captain Meyer is a member of the Los Angeles Police Academy and coordinates the LAPD Use-of-Force "Best Practices" Work Group for Chief of Police William J. Bratton.

There is a growing consensus among expert witnesses and others that the agency force policy should not be more restrictive than a statement of the constitutional standard(s). The real issue is in understanding the reaction by an officer to levels of resistance with consideration to what tools are available to either the officer or the suspect. If the reaction of an officer does not follow a continuum, his (or her) actions may violate a force continuum-based policy. Rather, the officer's reaction is based upon his (or her) perceptions, abilities, and available equipment at the moment to respond reasonably. "It seems to me that the question of whether (and in what form) agencies should have a force continuum belongs with the trainers, not with policymakers in the first instance. The reason is that I believe a continuum is simply a training aid, to teach the principles of escalation and re-escalation and the rules of engagement," says Attorney Stone.

#### **Force Continuum: Training Issues**

Regardless of what decision is made about force continuums and their inclusion or exclusion into written policies, the bottom line is that every officer must be given similar training for dealing with similar circumstances (if there is such a thing as similar circumstances). "The purpose of the continuum is to train officers to employ reasonable responses to actions of a subject. It is a training tool. Continuums were never designed to replace policy. However, they are a means of explaining policy to officers," says Dr. Parsons. Can effective and reasonable force training be conducted without the use of a force continuum?

"In Wyoming, we have no state statute governing the police

use of force, so we train our officers to the very clear and simple standards provided in those decisions [*Garner and Graham*]," says James Marker, Campus Training Supervisor, Wyoming Law Enforcement Academy. Continuing, "We have been teaching without any reference to a force continuum or model since 2001. Our recruits graduate with a clear understanding of how and when they, as individual officers, should use force. As a result, we have consistently seen and heard a real sense of relief on the part of both line officers and administrators since they no longer have to 'envision' or 'work their way through' the image of the continuum or model when making or evaluating their force decisions." Will what is working for Wyoming work for other agencies?

"The consensus of our tactics instructor supervision staff is that they can teach the *Graham* standard without a continuum," says LAPD Captain Meyer. San Jose (CA) Police Department is no longer teaching the force continuum. In fact, California Peace Officers Standards and Training (POST) questions whether continuums should be a part of agency policy and, for that matter, a necessary ingredient in the teaching of force.

#### **Force Continuums: The Future**

Many critics – even some supporters – of the criminal justice community have accurately observed that change is slow to take place inside criminal justice agencies. In fact, many lawyers, criminal justice administrators, and others will admit that it usually takes an officer's death, a court ruling with a huge verdict against a government entity, or a similar serious event to "force" change within the criminal justice system. In some cases, even when a government entity loses a lawsuit, departments make no changes. Regarding *change*, Charles Lowery, Ph.D. has observed that few people will admit they are against *change*. While they may claim not to be against *change*, Dr. Lowery has observed these same folks are often against *changing*. Keep this in mind as you continue to read.

Professional law enforcement agencies need to have written policies and procedures in place, if for no other reason, than to manage and minimize liability exposure. The questions are whether or not to adopt and teach a force continuum, and second, whether or not to include it in written policies? Attorney Stone observes that policy and training do not exist as separate systems. "Policy drives the training because they [policy and training] are integrated, and the training establishes the agency's actual policy. The continuum is thus a visual aid to assist the trainers in teaching use-of-force principles," says Stone.

One real issue is minimizing potential losses in litigation. People who want to abolish any kind of measured response (which is what some folks argue the continuum really is) are looking to cut their losses, but will abolishing the force continuum really change anything? Some claim not. Experts will still talk about continuums and there is no way to prevent that from occurring.

"Lawyers who defend cops sometimes are academicians, having never taught a class, or perhaps taught one that anyone understood. Adult learners are predominantly visual – if we cannot explain our use-of-force policies with a visual representation of the escalation of force because we are afraid that a plaintiff's lawyer or, worse yet, a criminal prosecutor, in the prosecution of a law enforcement officer, will take and twist the explanation, then we need to look at what we are teaching and at the use-of-force policy itself," says well-known, police defense attorney and trainer, "Missy" O'Linn. Continuing, she notes, "Escalation of force, whether you use words or a diagram of some sort, will be

presented to a jury in a diagram type of form by one side or the other, and I like the opportunity to show the jury how the officer was taught.”

One consideration for those agencies which have adopted a force continuum and/or use it in training: They may wish to carefully, unquestionably, and unambiguously document that the force continuum is merely a visual training aid which attempts to illustrate the self-defense standard of the relationship between officers’ perceptions and responses, and that it in no way creates or enlarges the applicable legal (federal and state) force standards. Consider this sample disclaimer:

*Any visual force scales, graphical illustrations, continuums, etc. used by this department are solely demonstrative training aids utilized to encourage interactive force discussions. These aids have substantial limitations and are narrow in their focus. These aids are not the policy of this department and do not create or enlarge any standards of care. These aids specifically do not create, enhance, elevate, reduce, compare to, replace, circumvent, or supersede the applicable legal standards of force provided by federal and state law which provide clear administrative, civil, and criminal accountability guides for officers’ force applications.*

While all those interviewed about this contentious issue have made good points, most everyone will agree, in today’s use-of-force cases, judges have never instructed juries to measure (weigh) officers’ force against the agencies’ adopted continuum, but, rather, to use a jury instruction which instructs the jury on the proper measure of determination of guilt or innocence, liability, or no liability based upon the law. 

End Notes

1. Peters, Jr., J.G. (1989, March/April). “Use of Force: Making the Intangible, Tangible.” Police and Security News, 5-23.
2. Williams, G.T. (2002). Perspective Force Continuums A Liability to Law Enforcement? FBI Law Enforcement Bulletin, 71, 6, 14-19.
3. Los Angeles Police Department. (1978, May). Use of Force. Training Bulletin, X, 10, 2.
4. AELE Law Enforcement Legal Center. (2005). The AELE workshop on police civil liability and the defense of citizen misconduct complaints. Park Ridge, IL: Author.

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*About the Authors: John G. Peters, Jr., M.B.A., Ph.D., has over 25 years of experience as an expert witness, litigation consultant, and trainer in police tactics and equipment. He has been judicially qualified in federal, state, and international courts. President of both the Defensive Tactics Institute, Inc., and the Institute for the Prevention of In-Custody Deaths, Inc., Henderson, Nevada, he developed the Range of Response Continuum™ in the late 1970s. He may be contacted through the Institute’s Web site at [www.ipicd.com](http://www.ipicd.com).*

*Michael A. Brave, Esq., M.S., C.L.S.<sup>3</sup>, C.L.E.T., C.P.S., C.S.T., is a well-known international use-of-force trainer, educator, and expert, and is president of LAAW International, Inc. He is formerly the Chief of Intelligence and Investigative Operations Unit, Office of Enforcement Operations, and Deputy Director (for International Operations) of the Federal Witness Security Programs, U.S. Department of Justice. You can contact Mike through LAAW’s Web site at [www.laaw.com](http://www.laaw.com).*