

## Force Continuums A Liability to Law Enforcement?

By George T. Williams

Perhaps, no more important and potentially inflammatory issue faces the law enforcement community today than the use of force. Because of this, force continuums have become such an accepted part of the culture that many do not question their existence or utility. Is this wise? Should law enforcement professionals begin to challenge the strict adherence to and propagation of force continuums? Should agencies continue to require their officers to start at the lowest level of force and escalate to higher levels without considering the effectiveness such action has in serving the law enforcement mission?

Such questions call for serious, reflective, and frank discussions among the entire criminal justice community.<sup>1</sup> These deliberations should center on the rational examination of the theory of force continuum versus its reality, the legal requirements of the use of force, the consequences of force continuums to the law enforcement profession and the public it serves, and the available alternatives to force continuums.

### FORCE CONTINUUM THEORY

Prior to the 1960s, little organization existed within most law enforcement agencies regarding training officers in the use of force against suspects. Most officers received their service weapons and other equipment and then spent a month or two riding with veteran officers before going out on their own to do their best to enforce the law. Agencies expected their officers to use common sense in their arrests and to maintain a safe environment for the citizens they served.

A growing understanding of constitutional limits to force created the need to train officers in when and how much force they legally can employ during an arrest. Therefore, in the late 1960s, law enforcement trainers who sincerely desired to assist officers in properly employing force developed force continuums. The first continuums provided officers with guidelines for the use of force. The most recent, however, define the concept in the form of stairs,

pyramids, tables, and ladders. For better or worse, the terms *escalation* and *de-escalation* have become inextricably linked with force continuums.

Force continuum theory states that officers should begin at the lowest levels of force *necessary* to effect an arrest (e.g., command presence and oral commands represent the lowest level on the force continuum ladder). Failing to gain compliance, officers then attempt a progression of graduating force options, each increasing in severity and probability of injury to the suspect. This, in effect, requires officers to experiment to see what level of force finally will succeed, eventually concluding with deadly force should the other “lower” efforts fail. In short, continuums require officers to escalate *progressively* from one level to another until they have control of the suspect. Then, once the suspect decreases resistance, officers must de-escalate their actions to an appropriate level of force.

### FORCE CONTINUUM REALITY

Rather than reflecting the real world of confusion, fear, and sometimes an overwhelming sense of urgency that officers face in any violent confrontation with offenders, force continuums often represent an unrealistic, almost wishful ideal. Apparently, law enforcement trainers developed the continuum theory based on the premise that officers take resisting suspects into custody through an orderly, sterile, and

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inevitable process. In this atmosphere, escalation constitutes an easy, logical transition, climbing the ladder or stair steps of force to the reasonable and proper level of force before instantly de-escalating. This concept requires officers to continuously consider lesser alternatives of force to know when to properly de-escalate.

The real world, however, is different. While most offenders submit to arrest<sup>2</sup> and many of those who resist generally are controlled by officers, a police fight is anything but a clear progression of enforcement tools and tactics. In reality, “a series of mistakes corrected as they are made,”<sup>3</sup> generally defines most physical confrontations. Struggling with or sometimes fighting a suspect is not sterile, orderly, or clean; rather, it often is ugly, chaotic, desperate, and bloody. When fighting with offenders, officers must *react* to the suspects’ actions. In addition, officers have various weapons and tools that offenders can gain control of and use against them. Even more important, officers cannot be certain of the motivations and goals of aggressive suspects. Such issues emphasize the disparity between theory and reality when examining force continuums and bring to mind the necessity of understanding the legal requirements regarding the use of force.

## LEGAL REQUIREMENTS

Since 1989, courts have evaluated the constitutional limits to the use of force based on the Fourth Amendment to the U.S. Constitution.<sup>4</sup> *Graham v. Connor* requires officers to use force based on the “reasonable officer standard”<sup>5</sup> given the totality of the facts known to the officer at the time. The officer must use objectively reasonable force given the severity of the crime at issue, the immediate threat of the suspect to officers and the public, and the active resistance of the suspect to arrest or to attempts to evade arrest.

This requirement by the U.S. Supreme Court states nothing about “escalating” or “de-escalating” force. The Court does not require de-escalating, or

decreasing, the officer’s response to the suspect’s resistance progressively. The standard for force employment remains simply that of objective reasonableness. What the officer reasonably perceives as a threat legally can be responded to with force that reasonably is calculated to overcome the threat of resistance perceived by the officer.<sup>6</sup> “With such insightful language from the Supreme Court, why would any agency impose a policy (or training guideline) which begs so-called experts to apply ‘precise definitions’ or ‘mechanical application’”<sup>7</sup> to the use of force?

Legally, officers do not have to consider less intrusive alternatives of force in a fight, something that inherently is subjective and creates endless second-guessing of the officer’s use of force.<sup>8</sup> To create the requirement of escalating and de-escalating according to a progressive scale limits the spontaneity and flexibility of officers in the field to protect themselves and the public.

Moreover, it does not reflect the real world where officers who hesitate during use-of-force incidents often are injured or even killed, demonstrating the grave consequences of adhering too closely to force continuum policies.

## CONSEQUENCES OF FORCE CONTINUUMS

Self-imposed requirements of a force continuum can cause various consequences. While sincerely attempting to adhere to the policies and training that they have received about employing force continuums, officers can encounter threats to their personal safety and can face departmental, as well as civil, liability.

### Officer Safety

When officers respond to a call, they frequently arrive knowing little more than an address, a reporting party’s name, a vague description of the suspect, and an even more general description of the problem they must resolve. More often than not, officers must make quick threat assessments based on limited information. Furthermore, when they make an arrest, officers

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often know little about the capabilities, goals, or level of intensity with which an offender will respond and usually possess limited knowledge as to whether, or to what extent, the individual is armed.

If an officer effects an arrest, the suspect *might* resist in some manner. Suffering from the human performance limitations of stress, attention, and reaction times, the officer begins to decide what to do upon interpreting that something is happening. Often, the officer is a second, or sometimes several seconds, behind the offender whose motives and goals remain unknown. If operating under the dictates of a force continuum, the officer now must consider whether to *escalate* to muscular force, attempt a pain-compliance hold, or use a chemical irritant. In a very real sense, the officer must experiment with some type of force and wait to discover whether the suspect responds positively and whether the situation requires escalation or de-escalation.

Within this formal equation, discussion rarely occurs about the physical and emotional reaction of an officer under threat. At the beginning of any physical conflict, all of those involved likely are frightened and nervous. Adrenaline flows and all of the well-known physical and emotional effects occur, most of which prove detrimental to the officer's ability to cognitively choose the path of least intrusiveness. The inability to make complex decisions when under threat represents the most important of these effects. As the complexity of any decision increases, especially when under threat, an officer's ability to decide quickly and efficiently erodes. Because of the natural human will to survive, an officer's ability to select less-injurious alternatives may dissolve.

Moreover, in a fight, an officer must react to what the offender did nearly a second, or more, before—that is, when the officer first perceived the action. The more options the officer must consider, the slower the reaction<sup>9</sup> and the more likely that the officer is making a decision no longer relevant to the situation.

Physical confrontations with dangerous offenders do not allow the officer the luxury of considering and then implementing a complex strategy. The time it takes to observe, orient, decide, and act upon the lesser-force alternative may make whatever option the officer elects moot and could translate into needless injury and death.

By definition, force continuums represent complex systems. While proponents may say that continuums easily allow officers to instantly respond with higher levels of force, they also, by definition, require officers to instantly de-escalate whenever possible. This creates a state of doubt in the mind of

an officer who then becomes constantly worried not only about being injured but also about being disciplined or sued due to a failure to *properly* de-escalate, a highly subjective matter. Officers with doubts about the force they employ in a fight are neither effective nor desirable. In fact, they can become a liability to the safety of all involved.<sup>10</sup>

Therefore, officers must employ force confidently to be effective. An effective application of force results in fewer injuries to both officers and

offenders by quickly ending the confrontation.<sup>11</sup> This can occur only when officers are required to engage suspects with *reasonable force*, per *Graham v. Connor*. Officers are permitted to use reasonable force to overcome a suspect's resistance, among other reasons.<sup>12</sup> The courts do not require officers to ponder the level of force that they use nor to consider whether the force is slightly higher than that which someone else might use (and may second-guess later). The law asks, Was the force reasonable given the totality of the circumstances at that moment? While it calls for officers to use reasonable force given the situation, it does not ask, What was the *best* level of force an officer could have used at that moment?

Being involved in a fight is hard enough without being required to consider the best and most appropriate choice at the moment. The law does not require this, but continuums do.

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## Liability Issues

### *Departmental Considerations*

Officers should consider their agency's use-of-force policy as a guide in the employment of force in the field. A modern use-of-force policy should contain administrative limitations, legal restrictions, and general behavior guidelines consistent with community expectations as opposed to a force continuum.

Force continuums can create a double standard for officers as they attempt to follow not only the limits to force as set by the Constitution but also the implacable requirements of their agency's policy. This, in turn, reinforces the belief that administrators *always* will second-guess an officer's actions. In practice, few uses of force exist that someone cannot second-guess when placed side by side with any continuum of force. This frequently occurs not only in law enforcement agencies that have policies containing continuums but also in civil court.

### *Civil Concerns*

Consider the situation where your officer is fully prepared by your defense counsel for his upcoming testimony at the civil trial. Suddenly, your well-prepared officer walks into the awe-inspiring federal courtroom as a defendant.... All of the preparation succumbs to fear and he becomes fair game for any of the skillful plaintiff's lawyers currently making their living suing cops. When the officer is shown only the escalation of force portions of your use of force policy (or training), he acknowledges it and is asked how much time he spent considering each of the listed alternative levels of force.... At this point, don't expect plaintiff's counsel to remind the officer of your convenient disclaimer that suggests that it might be appropriate to skip steps on the scale. Unfortunately, that only comes when your defense counsel tries to rehabilitate the officer the next day.<sup>13</sup>

This statement reflects the problem agencies can face in the courtroom when plaintiff counsels begin using force continuums to try and sway juries into finding that an officer failed to use the *best* level of force. Some have gone so far as to refer to the "nationally accepted force continuum" in their zeal to help their clients. The fact that no nationally accepted force continuum exists seems not to matter.

Another problem with the theory of escalating or de-escalating force is that it hinges on actions committed by the officer. It places the onus on the officer for the situation, rather than on the offender where it rightly belongs. Juries hear that the officer escalated, or should have escalated, to a certain level, then to the

next level, and then to yet another before de-escalating. This focuses on the officer and creates an atmosphere where plaintiff counsels may introduce the following strategy: The officer, out of control and outraged by what the officer believed to be an affront to authority, used force against the suspect who merely reacted to the officer's provocations and aggression.

Such a strategy, however, contradicts how force reasonably is employed and properly evaluated in the United States. In reality, officers receive training

on how to react to a suspect's resistance. Therefore, the suspect's actions *require* the officer's reasonable reactions. What other, *less-injurious* option the officer had to choose from becomes irrelevant. The suspect acted in a particular manner, and the officer perceived and then reacted to the resistance or threat by using a particular type of force. Only one question remains—was the force the officer used reasonable given the circumstances?

### **ALTERNATIVES TO CONTINUUMS**

To combat these consequences of adhering to the strict interpretation of force continuums, the law enforcement community should examine some alternatives. Primarily, if the profession does not use

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continuums, how will it train its members in the proper and reasonable use of force?

Officers regularly receive training in common skill and knowledge domains involving tactical communications; methods of empty-hand control and strikes; aerosol restraints; various impact, electrical, and less-than-lethal weapons; several tools and other devices; and firearms. They even learn about employing service dogs, although perhaps not technically weapons, as force in limited circumstances. Regardless, officers must learn not only *how* to use force but *when*. They also must become thoroughly conversant with the legal aspects of the use of force.

### Parameters

During each training session, officers should receive instruction in the parameters of force. For each type of weapon and degree of force, officers should answer four main questions, illustrated here with the baton as the weapon.

- 1) When is it proper to employ an impact weapon?
- 2) What offender behavior and actions should an officer perceive prior to striking various targets with a baton?
- 3) What level of imminent danger must the officer perceive prior to using a baton as deadly force?
- 4) What type and degree of injury can an officer expect from this type of tool and duration of force during typical employment scenarios?

Such parameters create a “threshold requirement” for every degree of force. As a subject meets the threshold for the type of weapon or degree of force, the officer then can decide to employ that amount of force reasonably suited to overcome the suspect’s resistance given the offender’s conduct at the moment. This places the onus for reasonable force on the officer to justify the type or level of force used given the suspect’s behavior and, most important, mirrors the legal requirements of the use of force.

In this type of training, no need exists for the “escalation” or “de-escalation” of force. When the officer’s perception of the offender’s behavior meets the requirements that the officer has been trained to observe, the officer may employ the tools, tactics, or methods that are appropriate and reasonable.

### Legal Aspects

Training also must include the legal aspects of the use of force. Officers must have thorough knowledge of the federal laws, as well as their own state laws, relative to the use of force. During training, whether on the firing range, the defensive tactics training floor, or in front of the impact weapon mannequin, instructors constantly should remind officers of the context in which they should use the force being presented. Then, instructors should test the officers on this knowledge. Moreover, agencies should impose regular examinations requiring officers to articulate their knowledge of the force laws and departmental policies as a condition of employment.

Overall, well-trained officers are confident officers, and confident officers know the law and the context in which they can use force. In the end, confident officers employ force reasonably and sustain fewer injuries and less liability exposure.

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### CONCLUSION

While use of force stands as a difficult issue for all law enforcement agencies, force continuums often represent an additional obstacle in the overall debate. Policies that require officers to strictly adhere to force continuums can cause problems not only for the officers but also for the public they serve. Now may be the time to begin an earnest look at the concept of gradual force response that many agencies require.

While the law enforcement community must not overstate the problems associated with force continuums, it must not understate them either.

Rather, an open and honest discussion of the continued employment of force continuums should occur throughout the criminal justice community. The officers who must use force as a means of protecting the public must have the best policies, guidelines, and training to help them carry out their duties and, equally important, to help safeguard their own lives as well. ♦

#### Endnotes

<sup>1</sup> The author based this article on his 10 years of experience as a police defense expert in civil cases and his 20 years of teaching force skills to law enforcement officers. He has found that most officers have great difficulty in explaining their actions when relying exclusively on the defense of "I followed the force continuum." His experience has led to his strong belief in the need for agencies to avoid relying on the strict interpretation of a force continuum as a means of policy for their officers who confront the issue of using force on a daily basis. To discuss the matter further, contact the author at 360-671-2007 or at [gtwilliams@cuttingedgetraining.org](mailto:gtwilliams@cuttingedgetraining.org).

<sup>2</sup> National Institute of Justice, *Understanding the Use of Force By and Against the Police* (Washington, DC, November 1996).

<sup>3</sup> Police Close Defense and Ground Fighting seminar presented by Cutting Edge Training, Bellingham, Washington.

<sup>4</sup> *Graham v. Connor*, (1989) 490 U.S. 386, 109 S.Ct. 1865.

<sup>5</sup> Reasonable officer standard is defined as: Would another officer with the same or similar training and experience, given the same or similar circumstances as presented to the officer being evaluated, do the same thing or use similar judgment?

<sup>6</sup> In an attempt to provide officers with an alternative to the force continuums, as well as an explanation of how to employ "objectively reasonable force," the author developed the use-of-force wheel. See George T. Williams, "Use-of-Force Wheel," *The Police Marksman*, July/August 1994.

<sup>7</sup> Bruce D. Praet, "An Alternative Use of Force Policy Without an Escalation Scale," handout material for training session about investigating the officer-involved shooting, Cutting Edge Training, Bellingham, Washington.

<sup>8</sup> *Scott v. Heinrich*, (9th Cir. 1994) 39 F. 3d 912.

<sup>9</sup> Richard A. Schmidt, *Motor Learning and Performance: A Behavioral Emphasis*, 2d ed. (Champaign, IL: Human Kinetics, 1991).

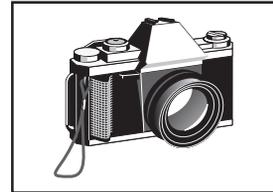
<sup>10</sup> The author interviewed numerous officers who voiced doubts or concerns about their responses in the middle of a difficult, sometimes desperate, struggle with a suspect because they were not "sure" about whether to escalate or de-escalate. One officer, paralyzed from the waist down after being shot by an assailant he was grappling with, stated that he hesitated to make a contact shot to the head to end the fight because he was concerned about administrative issues relative to the continuum. Many officers revealed that they are not comfortable with the continuum's artificial requirements to de-escalate in the middle of a fight. This can lead to hesitation and possible officer injury or death.

<sup>11</sup> Greg Meyers, "Nonlethal Weapons Versus Conventional Police Tactics: The Los Angeles Police Department Experience," (master's thesis).

<sup>12</sup> *Reed v. Hoy*, (9th Cir. 1989) 909 F. 2d 324.

<sup>13</sup> Supra note 7.

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