

Legal Implications of Use-of-Force Continuums in Police Training

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Abstract

For many years, police agencies have utilized “use-of-force continuums” in training police officers in the use of force, and in force policies. Typically, a continuum includes a diagram visually depicting a scale of force options to be used in response to a subject’s actions. In recent years, continuums have been increasingly criticized, and some agencies have abandoned them. Among the criticisms is that continuums fail to accurately reflect the correct legal standard for police use of force: objective reasonableness under the Fourth Amendment to the United States Constitution. Also, critics argue that force continuums are distorted in litigation, to the detriment of law enforcement. However, many experts continue to advocate in favor continuums. A comprehensive review of case law to determine whether there is a direct or implied legal requirement to use a continuum in law enforcement force training has been lacking. This paper undertakes such a review, and concludes there is no legal requirement to utilize a force continuum, and that courts should look to the *substance* of force training rather than its *format*. This review does suggest force continuums may divert the court’s focus away from objective reasonableness to arbitrary compliance with the continuum, and that force continuums may not accurately reflect the “totality of circumstances” that should be examined to apply the objective reasonableness standard. Nonetheless, it concludes that continuums can work both in favor of and against law enforcement in litigation, and that there are potential legal risks as well as benefits in abandoning continuums. However, legal considerations are only one factor in developing force training. The paper provides recommendations to develop legally sufficient force training with or without a continuum. It also calls for additional research on the impact of force continuums on decision-making and performance in actual force situations.

Keywords: force, deadly force, training, policy, continuum, matrix, Fourth Amendment, objective reasonableness, totality of the circumstances, deliberate indifference

Executive Summary

1. There is no direct or implied legal standard that requires police trainers to utilize a use-of-force continuum in defensive tactics or force training. The courts will look to the *substance* of training, rather than its *format*.
2. There is growing criticism of force continuums, and some law enforcement agencies and training institutions have abandoned them altogether in favor of focusing their defensive tactics training on the prevailing constitutional legal standard - “*objective reasonableness*” under the Fourth Amendment to the United States Constitution.
3. While there is some movement away from force continuums, there is by no means a professional or legal consensus to discard them; a number of experts continue to advocate in favor of force continuums, and many agencies continue to utilize them in their policies and training.
4. A comprehensive review of case law analyzing law enforcement use of force shows that continuums can work both in favor of and against law enforcement depending upon the facts of the specific case and the court reviewing them. However, this review does support the contention that force continuums may divert the court’s focus away from the correct legal standard, and onto arbitrary compliance with the continuum. Furthermore, this review supports the contention that force continuums, by their very nature, are unlikely to reflect applicable legal standards in an accurate, precise, and comprehensive manner.
5. There are many basic force continuum models, and multiple variations of those basic models. They are comprised of ever more complex text, geometric shapes, graphics, and colors, in an effort to account for all potentially relevant legal and practical factors. Furthermore, different continuums place the same force techniques at different levels, requiring different predicates for their use. There is no legal or professional consensus on which model or variation is best. Each has its own advantages as well as limitations.
6. There are potential legal risks as well as benefits that may be gained by eliminating continuums from force training. However, police trainers can develop legally sufficient force training with or without a continuum.
7. Before discarding a continuum in its force training, agencies should conduct comprehensive research on alternative force training approaches that should carefully test the new training before implementation.
8. Whether or not police trainers continue to use a continuum, force training should at a minimum address the points enumerated in this paper to ensure legal sufficiency.

Legal Implications of Use-of-Force

Continuums in Police Training

Use-of-force continuums are widely used in police defensive tactics training. A force continuum, or “force matrix,” usually

pairs appropriate officer responses to a list of increasingly resistant and violent behaviors. The use of force continuum instructs officer candidates to respond to threatening situations by using the least amount of force necessary such that these situations can be de-escalated without offending a person’s constitutional rights.¹

Typically, a force continuum is comprised of or includes a diagram or chart visually depicting a scale of force options to be used in response to a subject’s actions. Some continuums utilize the “plus one,” or “one plus one” approach, *i.e.* “[e]scalating the level of control is accomplished by using the ONE PLUS ONE THEORY of escalation, and only escalating to the next level of force that is justified considering the amount of resistance given and the potential for injury to the subject by using that type of control.”²

There are many different continuums in use, each incorporating different diagrams, models, scales, and graphics. Continuums may contain four or more different force levels or sub-levels. Academic research has identified as many as twelve different force levels that may be included in a force continuum:

- Social Control
- Verbal Control
- Weaponless Control Techniques
- Pain Compliance holds
- Control (short stick) instruments
- Stunning Techniques
- Direct Mechanical Techniques
- Neck Restraint Immobilization Techniques
- Electrical Shocking Devices

¹ The terms, “continuum” and “matrix” are used interchangeably in this context. Since the term “continuum” is used most commonly in the case law and professional literature, it will be used in this paper.

- Chemical Agents
- Impact Weapons
- Firearms³

Continuums were first developed in the 1960s. One commentator posits that law enforcement trainers developed continuums because “[h]istorically, 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.”⁴ They “were originally designed to provide operational guidance to officers regarding when and how much force can be applied in given situations.”⁵ In one case, an expert testified “[t]he use of force continuum is based on the Fourth Amendment, focusing on what is reasonable based on contemporary societal expectations.”⁶

The Continuum Controversy

Over the years force continuums have become ubiquitous in police and correctional training and policies throughout the United States. Some believe that “[t]he potential value of this visual and conceptual aid is that it provides an example or model that the officer can use to evaluate and plan his or her response.”⁷ Over time, many law enforcement agencies adopted a variety of use-of-force continuums. While force continuums have varied, “the intent has been the same: to guide officers in terms of the appropriate level of force to use in the circumstances they are facing.”⁸

But more recently, force continuums have come under increasing criticism as an unsuitable or even dangerous method of training law enforcement officers in the proper use of force.⁹ Peters and Brave (2006) observed that

[t]oday, 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.¹⁰

Various commentators,¹¹ advocating that continuums be abandoned in police policies, training, or both, argue that use-of-force continuums:

- are unrealistic and difficult, if not impossible, to apply to fast-moving and confusing, real-life force situations;
- are no longer needed because, unlike the time when they were initially developed, the courts now provide adequate legal guidance on police use of force;
- do not accurately reflect the correct legal requirements, including “objective reasonableness;”
- imply a legally incorrect “least amount of force” requirement;
- compromise officer safety by causing officers to be hesitant and uncertain as they attempt to analyze a proper force response in light of the force continuum; and,
- can confuse or divert a court or jury from the correct legal analysis in litigation of excessive force claims.

Some law enforcement training institutions, such as the Federal Law Enforcement Training Center (FLETC), the Federal Bureau of Investigation (FBI) Academy, and the Drug Enforcement Administration (DEA) Academy have discarded continuums in their force training programs.¹² Still other state and local academies, such as the Wyoming Law Enforcement Academy and the San Jose (CA) Police Department, have also removed continuums from their force training materials.¹³ These agencies have chosen alternative training that focuses more directly upon the prevailing Fourth Amendment legal standard for the use of force (“objective reasonableness”),¹⁴ and the “parameters of force.”¹⁵

At a recent conference sponsored by the Police Executive Research Forum (PERF), Los Angeles Assistant Police Chief Sandy Jo MacArthur stated that officers are taught, “to evaluate the entire situation,” and while a continuum is still used in training, it has been eliminated from policy:

In 2009 we implemented a major change in our use-of-force policy so that it was infused with the concept of an objectively reasonable standard. Although some people see the potential for flexibility in use-of-force continuums, unfortunately, there is a tendency for officers to look at a continuum and think, “If the subject does X, I use force option Y.” This is the danger in our continuums.

We still use a continuum in our training, but it is not part of our policy. We emphasize teaching officers to properly respond to suspects’ behavior, rather than simply prescribing a formula. This has helped us tremendously in getting officers to understand how to articulate their reasonable response to the incident. We have had this in place since 2009, and it’s been very successful.¹⁶

At least two other participants at the same conference described the elimination of use-of-force continuums in their respective agencies. Chief Noble Wray of the Madison, Wisconsin Police Department explained that

[w]hen we moved away from the use-of-force continuum and started looking at the objective reasonableness standard, which I support wholeheartedly, I noticed that we stopped saying that officers should use the minimum amount of force necessary. But this is an overarching goal that we always want to keep in mind, because that’s the humanity of dealing with the use of force. We really need to stress using the minimum amount of force necessary. The objective reasonableness standard is an excellent approach to dealing with issues of use of force.¹⁷

Chief Constable Ian Arundale of the Dyfed Powys Police, UK, stated:

We don’t use a use of force continuum. Instead, we use a situational use of force model. At the heart of it, we’re asking all our staff to identify the capability and intent of the individual. Even if a subject has a knife, an officer may determine that the person has no intention of using it. That still hasn’t stopped the

experience of in-custody deaths, though, as we have seen an increased number of in-custody deaths in the UK.¹⁸

Marker (2012) explained the fundamental difference between “4th Amendment-based” training and “continuum-based” training:

The basic concept of amendment-based use-of-force training is to move the post-incident analysis factors forward to the pre-incident decision-making process. Doing this takes a change in traditional training concepts. Use-of-force is not a team event; it is an individual decision which is judged individually. Traditional continuum-style training focuses on suspect behavior as a variable and the officer’s predetermined response as the constant. In contrast, amendment-based use-of-force training focuses on each officer as an individual and the suspect’s behavior cues as the constant.¹⁹

And yet, while some agencies move away from continuums, many continue to utilize them in their force policy, training, or both. In a recent study of injuries to officers and citizens occurring in police use-of-force events, PERF surveyed over 500 police agencies. That study found that most surveyed “agencies have a ‘use-of-force continuum’ that is covered in training, where officers learn to use suitable force levels depending on circumstances.”²⁰ Paoline and Terrill (2011) reported that another national survey of American police departments found “over three-quarters (82.5%) of the agencies utilized a use of force continuum...”²¹

Although continuums are no longer used in some federal law enforcement training programs, the Civil Rights Division of the U.S. Department of Justice often “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.”²² One typical recommendation states:

A use of force continuum is central to a comprehensive use of force policy. When properly designed and implemented, a use of force continuum is a fluid and flexible policy guide. Many departments employ the continuum because it provides a useful tool in training officers to consider lower levels of force, when appropriate, which protects the safety of both the officer and the

civilian. Moreover, a use of force continuum can emphasize that officers' presence, verbal commands, de-escalation strategies, and the use of "soft hands" techniques (using hands to escort rather than control subjects) be used as alternatives to more significant uses of force.²³

Some model policies issued by the International Association of Chiefs of Police (IACP) still include references to force continuums.²⁴ Nonetheless, its primary publication, *The Police Chief*, has reflected the increasing debate as to whether continuums should be included in force policies and training.²⁵

There is an ongoing national dispute over force continuums in law enforcement policies and training, which is increasing in scope and intensity. The colloquy between proponents and opponents of continuums often "polarize opinions as sharply as a debate about *Darwinism v. Intelligent Design*."²⁶ The following point and counter-point typify this debate:

Opposing 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.²⁷

Supporting continuums-

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 cannot 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.²⁸

To assist police administrators and trainers in making an informed judgment, the author undertook a comprehensive legal research project to determine the potential legal implications of

the use or non-use of a force continuum in defensive tactics and force training.* The author reviewed numerous published and unpublished Federal and state court opinions mentioning a law enforcement use-of-force continuum or matrix. In addition to numerous Federal and state cases, the author also reviewed recent professional literature discussing force continuums.

This paper summarizes the results of that research, and provides recommendations to ensure legally sufficient force and defensive tactics training, with or without a continuum. In doing so, the author has sought to present both sides of the continuum debate fairly and objectively, without advocating a position for or against them. This information may be helpful to those considering whether to continue using a force continuum, and seeking to enhance the overall quality of force training.

However, it is important to note that this is a *legal* analysis, and constitutes only one perspective on the force continuum issue, albeit an important one. Furthermore, this analysis focuses on the treatment of force continuums in case law. Less clear, but perhaps equally important, is the impact of continuums on lay jurors who sit in judgment of police use of force in civil and criminal trials. There appears to be scant empirical data on this point, and we are left with the professional—but fundamentally subjective—judgments of attorneys who sue police agencies and officers, and those who defend them.

Agencies are free to impose greater restrictions on police use of force than required by law through their internal policies, with or without a continuum. Whether internal agency force policies should be more restrictive than the law is another subject of debate in law enforcement circles, but is beyond the scope of this paper. As a primarily legal analysis, this paper uses the law as the standard by which police use of force is judged.

* The primary focus of this paper is the use of force continuums in *training*. *Policy* implications of continuums are addressed where relevant and appropriate.

In addition to legal and policy considerations, the decision whether to use a force continuum in training should also be based on research evaluating effective adult training and learning principles. It should include research of available data on the possible positive or adverse impacts of force continuums on decision-making and performance in actual force situations. Also, prevailing professional standards should be considered.

Clearly, more empirical research in this area is needed. As noted above, some experts believe that use-of-force continuums are dangerous because they delay officer response in potentially dangerous situations. For example, Ranelli (2013) contends current research shows that making a cognitive decision based on a force continuum can take five seconds, endangering officers and others.²⁹ Some argue this supports the claim that force training based on objective reasonableness rather than continuum-based training is safer. However, others contend “[t]here is no evidence to support the claim that the JBR [training based on the legal standard of “Just Be Reasonable” rather than a force continuum] produces quicker decisions and not even a claim that it produces higher quality decisions.”³⁰

Overview of the Fourth Amendment *Objective Reasonableness Test**

The leading Supreme Court case on police use of force is *Graham v. Conner*.³¹ *Graham*, in conjunction with the earlier case of *Garner v. Tennessee*,³² established that police use of force—both deadly and non-deadly—is governed by the reasonableness standard of the Fourth

²⁹The Fourth Amendment to the United States Constitution governs the use of force to make arrests or support investigatory stops. Depending upon the circumstances, additional legal rules may apply to force used by police or correctional officers. For example, the Due Process Clause of the Fifth Amendment may govern the use of force against a pretrial detainee. A claim of excessive force against a convicted and incarcerated prisoner might be analyzed under the Eighth Amendment’s prohibition against “cruel and unusual punishments.” Police may also be bound by State or local statutory standards. For example, police officers in New York State are also bound by the rules contained in Article 35 of the New York Penal Law. State law standards may accord greater protection to individuals than is required by the federal constitution, but they may not permit less protection. Civil litigation against officers may include allegations of assault and battery as tort actions under federal law, state law, or both. Some courts have noted that the legal standard for assault and battery in this context, under both the Federal Tort Claims Act (FTCA) and New York state law, is identical to the Fourth Amendment standard for excessive force. *See, e.g., Li v. Aponte*, 2009 U.S. Dist. LEXIS 96945, at *3-*5, n. 2 (S.D.N.Y. Oct. 8, 2009) and cases cited therein.

Amendment.³³ The Court stated that “[d]etermining whether the force used to effect a particular seizure is ‘reasonable’ under the *Fourth Amendment* requires a careful balancing of “‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’” against the countervailing governmental interests at stake.”³⁴ The Court explained that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application....”³⁵ Rather, it “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”³⁶ Thus, “the question is ‘whether the totality of the circumstances justify[es] a particular sort of ... seizure.’”³⁷

As the Supreme Court has consistently held in other Fourth Amendment contexts, the reasonableness standard applied to police use of force is an *objective* one:

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. ... [I]n analyzing the reasonableness of a particular search or seizure, “it is imperative that the facts be judged against an objective standard.” An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.³⁸

In a passage that has become a mantra among police administrators and force trainers, the Supreme Court in *Graham* acknowledged the “real world” difficulties faced by police officers attempting to apply precise levels of appropriate force in very difficult, split-second situations, and warned courts against second-guessing when applying the objective reasonableness standard:

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

than with the 20/20 vision of hindsight. ... The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, ... nor by the mistaken execution of a valid search warrant on the wrong premises.... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” ... violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that 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.³⁹

Particularly relevant to the question of force continuums is whether the objective reasonableness test requires the officer to resort to the “least intrusive means” when choosing a force option. The Supreme Court has explained that “[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn upon the existence of alternative ‘less intrusive’ means.”⁴⁰ This general principle of Fourth Amendment jurisprudence applies as well to force cases: “[o]fficers are not required to use the *least* intrusive means possible, but must act within the range of reasonable conduct, determined by considering the totality of the circumstances.”⁴¹ One Federal appellate court explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.⁴²

A few courts have observed “the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.”⁴³ However, the compelling weight of recent authority makes it clear that the objective reasonableness of a given use of force does not turn solely upon the existence of a lower force alternative.⁴⁴ Rather, “[t]he available lesser alternatives are ... relevant to ascertaining that *reasonable range of conduct*.”⁴⁵ The issue of lesser force alternatives is discussed further in the discussion of force continuums below.

The U.S. Supreme Court has not directly ruled on the impact of force continuums in analyzing police use of force under the Fourth Amendment. However, in a conceptually analogous context, the Court has held that the use of a “drug courier profile” does not change the objective Fourth Amendment analysis in determining whether there is reasonable suspicion to conduct an investigative detention:

We do not agree with respondent that our analysis is somehow changed by the agents’ belief that his behavior was consistent with one of the DEA’s “drug courier profiles.” A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a “profile” does not somehow detract from their evidentiary significance as seen by a trained agent.⁴⁶

Similarly, while an officer is required to articulate the factors justifying the use of force under the Fourth Amendment, precisely how those factors may be set forth within a “force continuum” does not somehow detract from their evidentiary significance as seen by a trained officer (or as examined by a reviewing court).

In sum:

- *Law enforcement use of force is a “seizure” governed by the Fourth Amendment.*
- *The Fourth Amendment establishes an “objective reasonableness” test to review claims of excessive force; the officer’s subjective intent is not relevant.*

- *In determining whether a given use of force is objectively reasonable, the courts look to the totality of the circumstances in each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.*
- *While courts may consider the availability of lesser force alternatives in determining whether force was within the range of objectively reasonable conduct, the existence of such alternatives, standing alone, will not render police conduct unreasonable.*

Court Analysis of Use-of-Force Continuums

This section reviews how courts have treated force continuums in their legal analyses of police and corrections uses of force and in force trainings. However, before examining the treatment of continuums in the case law, it is important to have a basic understanding of what is required to establish liability for claims of inadequate training.

Constitutional Liability for Inadequate Policy or Training*

The Supreme Court has made it clear that “[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.”⁴⁷ Rather, “[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”⁴⁸ While agency policy and training may be implemented to ensure compliance with Fourth Amendment limitations on use of force, those policies should not become part of the Fourth Amendment itself.⁴⁹

This is a fundamental underpinning to the Fourth Amendment’s *objective* reasonableness standard. The Supreme Court has observed that while “police enforcement practices ... vary

⁴⁹ This discussion focuses on training as a basis for federal constitutional liability, and does not address liability for claims of negligent training under state tort law, which may be subject to different standards.

from place to place and from time to time ... [w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable.”⁵⁰ Thus, the violation of a policy—even one meant to ensure compliance with the Fourth Amendment—does not guarantee that a constitutional violation has occurred, or that a constitutional remedy is appropriate.

While a violation of training standards does not, in and of itself, form the basis of a constitutional violation, there are “limited circumstances” where inadequate police training may result in constitutional liability.⁵¹ In general, “a municipality can be found liable ... only where the municipality *itself* causes the constitutional violation at issue.”⁵² Thus, the constitutional violation must be the direct result of a municipal policy or custom.⁵³ The Supreme Court has held that in the context of police training, a municipal policy or custom may be established only “where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”⁵⁴ The Court has recognized that when the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, they may be “deliberately indifferent” to the need.⁵⁵

The Supreme Court has explained “that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.”⁵⁶ The Court has made it clear that constitutional claims based on an alleged failure to train must be treated cautiously, noting that

[i]n limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983. A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.⁵⁷

Expounding on this, one federal appellate court has stated that

a municipality's deliberately indifferent failure to train is *not* established by: (1) presenting evidence of the shortcomings of an individual; (2) proving that an otherwise sound training program occasionally was negligently administered; or (3) showing, without more, that better training would have enabled an officer to avoid the injury-causing conduct.⁵⁸

Typically, a *pattern* of constitutional violations resulting from inadequate training must be present to establish deliberate indifference, rather than a single incident.⁵⁹ The Supreme Court has explained that

[i]n resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. ... It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.⁶⁰

Accordingly, "absent evidence of a program-wide inadequacy in training, any short-fall in a single officer's training can only be classified as negligence on the part of the municipal defendant - a much lower standard of fault than deliberate indifference."⁶¹

However, "in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference."⁶² Thus, the Supreme Court has not "foreclose[d] the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing

pattern of violations.”⁶³ The Court, in *dictum*, posited the following hypothetical scenario that could support single-incident liability for failure to train police officers:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.⁶⁴

Finally, deliberate indifference standing alone is not sufficient to form the basis of municipal liability. Inadequate training will form the basis of constitutional liability only “if it actually causes injury.”⁶⁵ There must be “a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.”⁶⁶ A plaintiff seeking to establish municipal liability for inadequate training must “show that there was a ‘direct causal link’ between the municipal decision at issue (*i.e.*, the decision not to properly train employees) and the constitutional or statutory violation for which redress is sought.”⁶⁷

In sum, in order to establish constitutional liability based on inadequate police training, a plaintiff must prove:

- *the inadequate training constituted “deliberate indifference,” i.e., the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the municipality can reasonably be said to have been deliberately indifferent to the need;*
- *that there was a pre-existing pattern of violations linked to the inadequate training, although in rare circumstances liability may be based on a single incident; and,*
- *the inadequate training was the actual cause of the constitutional injury.*

It is against this backdrop that the courts have analyzed the impact of police force continuums in cases alleging excessive force.

Impact of Force Continuums in Excessive Force Litigation

Given the prevalence of use-of-force continuums in police policies and training, it is not surprising that the courts have analyzed them in a variety of contexts. References to force continuums appear most often, though not exclusively, in federal civil cases where plaintiffs have alleged excessive force by police or correctional officers. This is usually in the context of a court's discussion of why it is granting summary judgment or of what constitutes qualified immunity.* Often, continuums are peripherally mentioned when describing use of force training or policies, in stating the allegation of excessive force (*i.e.*, the continuum was violated) or the defense to it (*i.e.*, the force used complied with the continuum). These cases mention continuums in describing testimony by involved officers, trainers, police officials, and expert witnesses from both sides, but most offer little or no substantive legal analysis of use-of-force continuums.⁶⁸

While most references to force continuums are found in civil litigation alleging excessive force, inadequate training, or unconstitutional policies, customs, or practices, there are a few references in other types of cases. Some cases refer to force continuums in connection with disciplinary proceedings against police officers.⁶⁹ Testimony about an agency's force continuum might also occur or be sought in criminal trials involving assaults on police officers or other victims, cases in which the prosecution or defense claims the continuum is relevant to some issue in the case, and cases in which police officers are criminally charged for alleged excessive

* Briefly, "*Summary Judgment*" refers to a determination made by a court without a full trial – it is only appropriate when no factual issues are in dispute. Often, in the context of police force cases, a court will dismiss all or part of a case based upon the application of law to uncontroverted facts. The "*Qualified Immunity*" doctrine insulates public officials from being sued for damages for violations of law, unless they have violated "clearly established" law, which reasonable officials in their position would have known. The goal of qualified immunity is the protection of civil servants from the fear of litigation as they perform discretionary functions entrusted to them by law. From a litigation standpoint, achieving summary judgment for the defendant-officer either on the ground that the force was lawful (*i.e.*, a reasonable use of force), or on qualified immunity grounds (*i.e.*, while unreasonable, the force did not violate clearly established law at the time it was used), is critical, as it avoids the risk of trying a case before a jury.

force.⁷⁰ In one case, a police officer convicted of domestic assault unsuccessfully cited his agency's force continuum as justifying the discharge of his Taser at the domestic assault victim.⁷¹

Most cases describe the continuum as part of an agency's standard training or policy. However, at least one case described a force continuum specifically implemented by police command officials as part of the operational plan for a single large-scale protest.⁷² Manufacturers of law enforcement weapons will sometimes refer to a force continuum in their products' warning or training materials.⁷³

There are some cases in which force continuums were helpful in successfully defending police or correctional officers in excessive force claims. For example, in granting summary judgment and dismissing a case against police officers, one court noted that the plaintiff "fail[ed] to demonstrate how the failure to train reflects a 'deliberate' or 'conscious' choice on the part of the Township, in light of the training [the officer] received on the force continuum and specifically on the use of tasers."⁷⁴

In another case, the court found that the use of OC spray by correctional officers did not violate the Fourth Amendment in part "because the officers' conduct was at the minimum end of the use of force continuum."⁷⁵ Another court dismissed a claim of inadequate force training, noting that "[the plaintiff] never explains or shows how the failure to train reflects a 'deliberate' or 'conscious' choice by Norristown in light of [the officer's] extensive testimony on the training he received with respect to the 'Force Continuum.'"⁷⁶ These cases illustrate how reliance on a force continuum was helpful in defending officers by highlighting the force training they received, and the force policies under which they operated.⁷⁷

In one interesting case, the force continuum used to train officers was cited as

justification dismissing a claim of inadequate *training*.⁷⁸ Conversely, in that same case, the court cited the lack of a continuum as part of the agency's force *policy* as its reason for refusing to dismiss a claim against the City and its Chief of Police alleging a custom or practice of excessive force:

At the time of the incident at issue, the City had a formal, written policy permitting its officers to use a chokehold to restrain a suspect. The City did not, however, have a use of force continuum policy such that officers were required to employ a step-by-step approach to eliminate resistance or violence. As a result, the City's formal policy condoned the use of a chokehold without first considering whether lesser responses would be preferred.⁷⁹

In yet another twist in the same case, the court dismissed claims against the individual officers accused of excessive force, stating the officers "relied on the City's customs and policies at that time, permitting the use of a chokehold and excessive force *without reference to a use of force continuum*."⁸⁰ Thus, within the same case, the use of a force continuum in *training* led to the dismissal of an inadequate training claim, while the lack of a continuum in the agency's *policy* led to both the sustaining of an unconstitutional policy and custom claim against the municipality and Chief of Police, *and* the dismissal of an excessive force claim against individual officers.

No case was found holding or suggesting that training or policy alternatives to force continuums are *per se* legally deficient. Indeed, the Supreme Court has made it clear that "failure-to-train liability is concerned with the *substance* of the training, not the particular *instructional format*."⁸¹ Thus, there is no merit to the contention that a force continuum is required to ensure legally sufficient training.

In one case, a court refused to dismiss an unconstitutional policy claim of because the Chief of Police testified that he replaced his agency's force continuum with a "reasonably necessary" policy, which the Chief described as a "solely *subjective* analysis," left to "the sole

discretion of the officer....”⁸² After consulting with counsel, the Chief attempted to clarify, testifying “that he was unclear as to the difference between ‘objective’ and ‘subjective.’”⁸³ However, the court stated that this explanation “cannot overcome the extensive previous testimony on this topic.”⁸⁴ Thus, the issue in this case does not appear to be the elimination of the continuum as much as it was the Chief’s confused testimony.

There are a number of cases in which courts focus at least to some degree on the continuum, rather than on the objective reasonableness test. For example, in reversing a summary judgment in favor of a police officer, one Federal appellate court stated that, “[i]n light of the evidence about the neck restraint’s position on the force continuum and the undisputed fact that Partee never actually had possession of Officer Sutherland’s gun, let alone threatened anyone with it, we can only conclude that a jury could find Officer Sutherland’s use of the neck restraint unreasonable....”⁸⁵

In another case, the court used *Graham* as a starting point, but analyzed the force in question primarily in light of the agency’s force continuum:

Looking beyond the *Graham* factors to the sufficiency of the evidence, we find that the record contains ample evidence to support a determination that Pietroski’s conduct was unreasonable, even under the Boston Police Department’s own standards. Coyne’s candid testimony is particularly useful here. According to Coyne, the Boston Police Academy instructs officers to follow the Use of Force Continuum in determining the proper amount of force to use when conducting a stop. The Continuum provides five levels of intensity: (1) the presence of a uniformed police officer; (2) verbal command, which includes a police car’s overhead lights or siren; (3) open-hand command, which entails physically taking control of a person; (4) non-lethal incapacitating devices, such as pepper spray; and (5) lethal force. Officers are to conduct a traffic stop using the least amount of force necessary and to end the use of force outright when a person has pulled over and stopped. Coyne’s testimony provided a clear framework for the jury to assess Pietroski’s use of force; applying this framework, a reasonable jury could easily conclude that the use of force should have ceased

when Raiche stopped and pulled over in response to the cruiser's overhead lights. Such a conclusion would compel a finding that Pietroski acted unreasonably when he slammed Raiche and his motorcycle to the pavement.⁸⁶

When addressing a claim of inadequate training, or a claim of unconstitutional policy, practice or custom, a court must focus on a continuum if it exists as part of the agency's training, policy, custom, or practice in question. However, when officers are sued in their individual capacities, the issue is whether they complied with the constitutional standard of objective reasonableness—not compliance with a force continuum. Nonetheless, courts are likely to admit the continuum into evidence.

For example, in one recent case, the defendant-police officer sought “to exclude evidence regarding the ‘force continuum’ and types of alternative force available to the defendant.”⁸⁷ The

Plaintiff counter[ed] that the force continuum evidence is relevant to determining whether Officer Grynkewicz acted as a reasonable officer would under the circumstances of the July 25 incident. The court agrees, and will admit the evidence with certain limiting instructions.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Here, evidence of the types of force available to law enforcement officers and their training on the subject is relevant to the *Graham* reasonableness inquiry. Specifically, such information is likely to assist the jury in determining how a reasonable officer might have acted in the situation at issue. The Constitution does not require a police officer to use the least harmful type of force available; only that the force actually used be objectively reasonable in light of the threat to officers and others. Nevertheless, the force continuum and testimony about the types of force that officers are trained to use, are instructive to a jury's understanding of what is a reasonable response.

Defendant notes that several courts have ruled that internal protocols are irrelevant to the determination of whether a plaintiff's constitutional rights were violated. The court agrees, and for that reason, evidence of the force continuum . . . shall be admitted for the purpose of proving only how a reasonable officer might

respond under the circumstances. To prevent the possibility of unfair prejudice, this evidence shall not be admitted for the purpose of showing that Officer Grynkewicz violated any internal guidelines or operating procedures.⁸⁸

In another recent case,

[t]he court admitted the disputed section of that Patrol Guide [containing the agency's force continuum], over Cabello's [defendant-police officer] objection, during Garcia's [plaintiff] direct examination of Cabello. . . . Before receiving the evidence, the court instructed the jury that "the claim is not a violation of the Patrol Guide. The claim is a violation of the Constitution, as I'll explain to you later. But I'm allowing this to come in as general background on what police are instructed."⁸⁹

In yet another case involving a force continuum, the plaintiff argued that testimony by a defense expert that the defendant-officer "acted in accordance with his training and accepted police practices should be excluded because it is irrelevant and, accordingly, does not assist the trier of fact."⁹⁰ The court disagreed and permitted the testimony.⁹¹ It noted "in an excessive force case, an officer's compliance with, or violation of, departmental policy is not conclusive as to whether or not the suspect's *Fourth Amendment* rights were violated."⁹² Nonetheless, "[i]n considering whether an officer's actions are 'objectively reasonable,' all of the facts and circumstances confronting the officer may be considered, including standard police procedures."⁹³

Occasionally the courts will preclude expert testimony on training in the use-of-force continuum. For example, in one case in which the "failure to train" claim was already dismissed, the court precluded testimony on continuum training in the trial of the excessive force claim against the individual defendant-officers:

Plaintiff seeks to exclude the testimony of . . . an Instructor in the "force continuum." Defendants contend that they seek to call Officer Wright to present "independent and uninterested testimony" regarding the training that police officers receive in the appropriate

use of force. Plaintiffs characterize this as expert testimony and point out that [the instructor] was not identified as an expert witness and has not prepared an expert report. Defendants deny that they seek to present Officer Wright as an expert witness.

As explained above, the focus of this trial is an incident which occurred on November 3, 2006. The issue for the jury is not whether the Officers received sufficient training in the use of force. Rather, the jury must decide whether the Defendant Officers violated Mr. Schutz's constitutional rights through the use of excessive force on that evening. That the Defendant Officers received proper training does not make it more or less probable that they complied with that training. Officer Wright was not present at the scene and cannot shed any light on the circumstances of the incident.⁹⁴

Nonetheless, although the courts are not unanimous, the weight of authority indicates that testimony regarding policy or training force continuums is likely to be admitted into evidence in litigation alleging excessive force by police officers, albeit with a limiting instruction. This has been applied specifically to force continuums. Typically, courts have held that “a qualified expert in an excessive force case can testify about the ‘continuum of force’ employed by officers generally, as well as the specific training the officers in the case before the Court did receive and whether their conduct in a particular instance violated those standards.”⁹⁵

However, even with a limiting instruction, focus on a policy or training continuum may divert attention from the correct legal standard – constitutional objective reasonableness. To the extent that a continuum appears to require or prohibit specific tactics at pre-defined “levels,” a legally incorrect result is possible. Certainly, to be objectively reasonable, the level and manner of force used by officers must be proportional to the level of resistance and threat with which they are confronted. Nevertheless, proportionality is best understood as a *range of permissible conduct* based on the totality of the circumstances, rather than a set of specific, sequential, pre-defined force tactics arbitrarily paired to specified types or levels of resistance or threat.

Thus, one potential problem with continuums is that their visual depictions, designs, and content appear to require a mechanical and sequential progression of force tactics through various levels based upon the resistance or threat encountered. Under the proper legal analysis, this progression should not be dispositive of whether a constitutional violation occurred. For example, in one case, the plaintiff argued that use of a Taser on him was excessive because “pursuant to the Pennsylvania State Police ‘use of force’ continuum, the officers should have used OC spray/pressure point control, strikes or kicks, or an impact weapon such as a baton, to gain compliance....”⁹⁶ The court properly rejected this claim, noting,

Plaintiff’s reliance on state police policy guidelines is misplaced. The source of [Plaintiff’s] rights is the *Fourth Amendment to the United States Constitution*, rather than the Pennsylvania State Police procedures manual. Because the *Fourth Amendment* protects citizens from unreasonable seizures, the ultimate issue is whether the officers acted reasonably, not whether they followed department guidelines.⁹⁷

Nonetheless, whether explicitly or implicitly, the progressive nature and design of force continuums sometimes seem to draw courts to the notion that officers should attempt to eliminate “lower” force options before progressing on to “higher” force options. For example, in describing an agency’s force continuum, one court explained “it teaches a *logical progression* through the stages of force.”⁹⁸ The following cases illustrate this problem:

Violation of continuum-

Moreover, as the district court noted, the officers were in violation of established police policy, as set out in the Akron Corrections Facility’s procedural manual. *It specifically provided that certain alternative measures (verbal persuasion, verbal warnings of the consequences of non-compliance, and intimidation through a “show of force,” i.e., the use of additional personnel) must be tried prior to the imposition of “compliance holds.”*⁹⁹

Compliance with continuum-

By progressing through less forceful options, the [officers] acted in accord with the “Use of Force Continuum,” a sliding scale that both Parties agree provides guidance to law enforcement as to how much force may be used in a given situation.¹⁰⁰

Although each court reached a different conclusion as to whether the force used was proper, these cases illustrate how a force continuum can lead a court to focus on a sequential progression through alternative force options. When an officer is confronted with a clearly deadly threat, this may not be an issue. For example, most people understand that it is objectively reasonable for an officer to use deadly force in self-defense to avoid being shot or stabbed. However, when dealing with less-lethal force situations, or potential deadly force situations involving unarmed subjects, a continuum may suggest, at least implicitly, that officers should be judged on whether they used the lowest possible level of force (“least intrusive means”)—a legally incorrect analysis. For example, in upholding discipline imposed on an officer for excessive force, a state appellate court found a violation of the agency’s force continuum because the officer “skipped a level of force, identified as a soft empty-handed control, by immediately using the brachial stuns and putting the patient in a headlock....”¹⁰¹ However, it is important to note here the disciplinary issue was compliance with the agency *policy*, not necessarily the Fourth Amendment’s legal standard for use of force.

Sometimes courts explicitly view a continuum as requiring the least intrusive means from a legal perspective as well:

The use of force continuum instructs officer candidates to respond to threatening situations by *using the least amount of force necessary* such that these situations can be de-escalated without offending a person’s constitutional rights.¹⁰²

*Glenn v. Washington County*¹⁰³ illustrates the problem. In that case, police responded to a 911 call from a mother requesting help with her intoxicated and emotionally disturbed son (Lukas). The mother informed 911 that her son was suicidal, out of control, threatening, busting windows, and was armed with a knife.¹⁰⁴ Responding officers were also informed that the son stated “he is not leaving till cops kill him ... [and that there are] hunting rifles in the house, he can’t get to....”¹⁰⁵ Upon arrival, the son confronted police in the driveway with a knife. After verbal attempts to resolve the situation failed, an officer fired several “less-lethal” beanbag rounds at the son, at which point he began to move toward the house, which was occupied by his parents, still holding the knife. Other officers then fired several rounds at the son with their semiautomatic firearms, killing him.¹⁰⁶

The federal district court granted the defendant-officers summary judgment, finding no constitutional violation in the use of deadly force. However, the federal appellate court reversed and remanded the case back to the district court for trial. The appellate court focused on the use of the less-lethal beanbag rounds rather than the deadly force. It held that a jury could find that use of the beanbag rounds was unreasonable, and that the son’s movement toward the house was not voluntary, but provoked by the unlawful use of the beanbag rounds.¹⁰⁷ In questioning use of the beanbag rounds, the court focused its analysis on the agency’s force continuum:

Washington County’s use of force continuum identifies five levels of resistance, ranging from least to most resistant: verbal, static, active, ominous and lethal. Applying Washington County’s definitions to the facts viewed in the light most favorable to Glenn, Lukas falls under the “static” resistance category, where the suspect “refuses to comply with commands . . . [and] has a weapon but does not threaten to use it.” According to Washington County guidelines, officers can employ various types of force in response to static resistance, including takedown methods, electrical stun devices and pepper spray. Use of less-than-lethal munitions, however, is unauthorized unless a suspect exhibits “ominous” or “active” resistance, which entails “pull[ing] away from a deputy’s

grasp, attempt[ing] to escape, resist[ing] or counter[ing] physical control,” or “demonstrat[ing] the willingness to engage in combat by verbal challenges, threats, aggressive behavior, or assault.” Accordingly, when viewing the facts in the light most favorable to the plaintiff, the defendants’ own guidelines would characterize Lukus’ conduct as less than active resistance, not warranting use of a beanbag shotgun.¹⁰⁸

The court sought to ground its analysis in *Graham*’s objective reasonable standard. It stated “[w]e do not suggest that the officers were required to attempt any of the various purportedly less intrusive alternatives to the beanbag shotgun[,] ... [t]he available lesser alternatives are, however, relevant to ascertaining that reasonable range of conduct[,] [and] the availability of those alternatives is one factor we consider in the *Graham* calculus.”¹⁰⁹ Nevertheless, the court’s analysis clearly seemed to focus upon the arbitrary placement of the subject’s actions and the force used on the agency’s continuum, rather than an analysis of the totality of the circumstances.

Also troubling in the context of continuums is the court’s statement that “[a]nother circumstance relevant to our analysis is whether the officers were or should have been aware that Lukus was emotionally disturbed[,] ... a factor to which the officers should have assigned greater weight.”¹¹⁰ Similarly, in another case, a plaintiff argued (unsuccessfully) that the agency’s training and use-of-force continuum was inadequate, contending that the “real issue” was the City’s “lack of training in dealing with mentally ill and emotionally disturbed individuals.”¹¹¹ Another court noted that in analyzing force cases, a court must also consider, under the totality of the circumstances, the ‘quantum of force’ used, ... the availability of less severe alternatives, ... *and the suspect’s mental and emotional state....*¹¹²

How to properly account for this factor on a force continuum is unclear. Would there be a separate progression of force relating only to mentally or emotionally disturbed subjects on a

general-use continuum? Would there be an entirely separate force continuum for mentally or emotionally disturbed persons? Either way, one can only imagine trying to chart different progressions and force techniques based on the subject's mental or emotional disturbance, the specific type of disturbance, the potential impact of that disturbance on the level of danger posed by the subject, and the officers' recognition and understanding of the disturbance and its impact.

Of course, the subject's mental or emotional state is part of the "totality of circumstances" in force situations. Accordingly, officers should consider a subject's mental or emotional state to the extent it is known and relevant in deciding whether and how to engage the individual, assessing the threat posed by the individual, developing a tactical approach, and the choice of reasonable force options. However, adequately and comprehensibly reflecting these variables on a force continuum would be difficult if not impossible.

The continuum problem is further complicated by the wide array of less-lethal force tactics that may be available, including various unarmed tactics such as pressure points, neck/choke/carotid artery holds, and pain compliance techniques; police batons (*e.g.*, nightsticks, PR-24s, collapsible batons); defensive sprays or chemicals (*e.g.*, OC, mace, tear gas); electronic compliance devices (*e.g.*, Tasers, stun guns); less-lethal launched impact projectiles (*e.g.*, beanbag rounds); police dogs; and others.

Furthermore, the "totality of circumstances" test includes other factors, such as the relative size, strength, stamina, and fighting skill of the officer and the assailant; any injury to the officer or assailant; the relative number of officers and subjects; the presence or availability of assistance; and the purpose for which force is being used (*e.g.*, self-defense or defense of a third person, to effect an arrest with consideration to the seriousness of the offense, prevent an escape, remove or disband protesters, or maintain discipline and order in a correctional facility, etc.).

While some continuums seek to depict these factors, it often results in multiple variations of proper and improper force responses, which make the diagram confusing. Thus, agencies should not rely on a force continuum alone, but should use it in conjunction with additional training that reflects the totality of the circumstances.

Marker (2012) explained how Fourth Amendment-based training deals with these variables:

For example, at the WLEA [Wyoming Law Enforcement Academy], each individual officer must make a solo arrest in a dynamic force-on-force scenario. The scenario has specific elements to be acted out to test the individual officers' tactics, use of force options, and ability to articulate his or her actions. The scenario is performed thirty-six times, for thirty-six officers.

Because the officer walking through the door is the “variable” with differing heights, weights, strength and abilities, there is potential for thirty-six different outcomes, with different force options, and they all could be reasonable. This is where the traditional force continuum has limitations by not addressing the officer as an individual and as a variable in a confrontation. Because reasonableness is “not capable of precise definition or mechanical application.”¹¹³

Another agency has replaced continuum-based training with a “force options” model:

In 2000, the San Jose Police Department became one of the first major agencies to move away from a continuum model to a “force options” model. This type of model policy is one that removes any two-dimensional diagrams and instead reflects the objective reasonableness standard as its premise. The force options available to the officer are not ranked in any particular level. This gives the officer more flexibility and discretion to choose the force option that is immediately most reasonable based on the totality of the facts known to him/her about that specific situation.¹¹⁴

Another potential issue is that the permissible force level or tactic may change multiple times in the course of a single encounter, requiring escalation or de-escalation of force based on

the developing circumstances. The necessary escalation or de-escalation often does not follow the neat progressive or sequential path of the typical force continuum. Philadelphia Police Commissioner Charles Ramsey observed,

[o]ne of the things that I've discovered during my time as a police officer is that it's easy for us to go up the use-of-force continuum, but the hard part bringing it back down, and de-escalating situations effectively. These are dynamic events that are taking place. An officer may be justified in using a certain level of force at one moment in time, but that doesn't necessarily mean that the same window is open three, four, five seconds later in an unfolding event.¹¹⁵

This becomes particularly problematic when courts seek to determine whether officers used the least intrusive means (*i.e.*, lowest possible level of force) displayed on a continuum, a judicial exercise that flatly contradicts the Supreme Court's admonition that "[t]he calculus of reasonableness must embody allowance for the fact that 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."¹¹⁶ Again, attempts to account for escalation and de-escalation of force in the course of a single event—sometimes multiple escalations and de-escalations—may lead to a complicated and confusing visual illustration on a force continuum.

Also problematic is that different continuums may place the same force tactic at different levels or points in a force progression, resulting in a wide variation of resistance or threat as a predicate for its use:

Interestingly, among American police departments, there is no universally agreed upon use of force policy. In fact, policies on force can vary dramatically from agency to agency. In a recent national survey of American police departments, Terrill *et al.* (2011) found that use of force policies were more likely to vary in terms of the ranking of various force tactics rather than policy design. More specifically, while over three-quarters (82.5%) of the agencies utilized a use of force continuum, 72.5% revealed that

they employed a linear model over an alternative design (e.g., matrix/box, wheel, etc.), although the placement of the various force tactics (i.e., hands and weapons) within the policy varied greatly.¹¹⁷

One federal appellate court noted that “[l]ocal law enforcement policies also reflect differing views of where the taser fits on the ‘force continuum[;]’ some allow taser use only as an alternative to deadly force, while others call for taser use whenever any force is justified.”¹¹⁸ Similarly, courts disagree about exactly where the Taser belongs within a force continuum. In one case, the court found “the policy which places the use of a Taser so low on the force continuum it is deployed before conventional physical contact is not permissible as currently stated, and can lead to excessive force being used.”¹¹⁹ However, in another case, the court stated that the plaintiff’s “attempt to categorically require arresting officers to make contact with their hands before deploying tasers against resisting suspects has no basis in constitutional law.”¹²⁰

This illustrates one potential danger of continuums, at least from a legal perspective: the reasonableness of a given use of force should not vary based on differing police policies or practices, such as where the agency chooses to place a particular tactic on a force continuum.¹²¹ Differing and conflicting placement of force techniques provides an opportunity for expert witnesses to attack a continuum which differs from the one favored by the expert. This is troubling for at least two reasons.

First, Paoline III and Terrill (2001) observed that “[t]he lack of a universally shared policy on force could be a function of the fact that there is currently no commonly accepted ranking of force by researchers or practitioners, nor is there a policy that has been empirically shown to be better than others...”¹²² Thus, the preference for one continuum model over another is inherently a *subjective* standard. However, as the Supreme Court has made clear, “it is imperative that the facts be judged against an *objective* standard.”¹²³ Second, focus on

competing continuums has the potential of diverting court and jury attention from objective reasonableness under the Fourth Amendment based on the totality of the circumstances.

These concerns challenge—at least from a legal perspective—the contention of Fridell, *et al.* (2011) that “[i]t is wholly inconsequential that agencies do not share the same definitions or labels for subject resistance and officer force.”¹²⁴ Clearly, there are potential legal consequences.

For example, in one case, the plaintiff argued that an agency’s police canine policy was constitutionally deficient because it placed a canine bite at the “intermediate” level in its force continuum, while the IACP, in its model policy, placed it canine bites as “high” on the continuum.¹²⁵ In this case, the court analyzed the substance of the agency policy, and decided that, despite the differing labels, it was not “materially inconsistent” with the IACP view.¹²⁶

However, in another case, a state appellate court upheld the denial of summary judgment primarily because the parties’ respective expert witnesses disagreed where a “sternum tap” should fall on the force continuum:

McCauley and Bosse [the competing experts] also disagreed as to where on the force continuum a “sternum tap” falls, though they agreed that officers are not required to attempt every level of the continuum before utilizing the force they believe is necessary. Nevertheless, McCauley concluded that the sternum tap ‘was unnecessary and excessive’ because Donnie was offering only “passive resistance.” Bosse concluded that the sternum tap was reasonable given Donnie’s non-compliance with several verbal commands as well as the need for officers to proceed quickly through past Donnie and into the home. This disagreement leaves unresolved the question of whether officers’ actions after they entered the home met the requirements for civil assault or civil battery, or, once again, whether the City is entitled to a defense.

Though the City correctly points out McCauley’s acknowledgement that he is “in the conservative school of thought” on the topic of the sternum tap and where it lies on the force continuum, his and Bosse’s testimonies nonetheless reveal two conflicting schools of thought offered by the experts in this case

concerning the crucial question of excessive force. *This conflict alone compels a jury's consideration of the surrounding facts.*¹²⁷

Over the years, continuums have evolved from simple linear or “ladder” models to consist of ever more complex text, geometric shapes, graphics, and colors, in an effort to account for all potentially relevant legal and practical factors. Aveni (2003) has identified five basic continuum models, each with numerous sub-variations: linear designs, modified linear designs, non-linear designs, wheel variants of non-linear designs, and perceptual or timeline continuums.¹²⁸ Despite these attempts, it simply may not be possible to construct a continuum that meets three important criteria: (1) comprehensively reflects the legal objective reasonableness and totality of the circumstances standards; (2) is an effective and understandable training tool; and, (3) is immune to misinterpretation or misuse in litigation. One police attorney has observed that

[o]ver 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.¹²⁹

However, even if a force continuum is eliminated, law enforcement trainers must recognize that in lawsuits alleging excessive force, “[e]xperts will still talk about continuums and there is no way to prevent that from occurring.”¹³⁰ Given that reality, some argue that it may be better to retain a continuum that will better reflect the training officers have actually received, rather than deferring to a less favorable continuum presented by the plaintiff’s expert. One attorney who specializes in defending and training police officers argues that “[e]scalation 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.”¹³¹ The reality is that if there is no continuum, plaintiffs will attack that; they will attack whatever policy and training is in place.

In an analogous context, a plaintiff challenged one department’s use of a “Risk Matrix” to determine whether to utilize its SWAT Team to execute a search warrant.¹³² Under a departmental General Order, “a search warrant affiant must complete a Planned Operations Risk Matrix (Risk Matrix) and assign numerical values to risks believed to be either present or unknown at the location of the search.”¹³³ The plaintiff alleged “that the City’s faulty Risk Matrix led to [an excessive] level of force in this case.”¹³⁴ However, the court disagreed, explaining that

plaintiffs fail to establish that the Risk Matrix is a policy that led to the use of excessive force in this case. The Risk Matrix is a tool used by officers to assess potential risks in executing a search warrant and the potential involvement of the SWAT unit. *The Risk Matrix itself does not dictate a specific technique or use of force in executing a search warrant, and it is but one of many factors taken into consideration.*¹³⁵

Conceptually, courts should view a force continuum in the same manner: it should not be construed to dictate a specific force technique or progression of techniques, but should be one of many factors taken into consideration. However, a review of the case law indicates that this does not always occur.

To minimize the potential adverse impact of a force continuum in excessive force litigation, some legal experts recommend that policy or training documents containing a force continuum include a “disclaimer.” Its purpose is “to carefully, unquestionably, and unambiguously document the fact that the force continuum is merely a visual training aid which attempts to illustrate the self-defense standard and the relationship between an officer’s

perceptions and his or her responses, and that it in no way creates or enlarges the applicable legal (federal and state) force standards.”¹³⁶ The following is an example of such a 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.*¹³⁷

However, Williams (2002) questions whether a disclaimer is effective in achieving its intended purpose:

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.¹³⁸

In sum, attempts to craft a legally sound force continuum, which is also an effective training aid *and* will not be distorted in litigation, may well be doomed to failure. Indeed, the more complex and detailed a continuum becomes (in order to accommodate the numerous relevant legal and situational factors), the more its very purpose is compromised, since, “[t]o be effective as a conceptualization device ... it must ordinarily be kept relatively simple.”¹³⁹

While the Supreme Court warned in *Graham* that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application...”¹⁴⁰, this is exactly what a force continuum seeks to do. As recently observed by the Court in analyzing a deadly force issue, “[a]lthough [the] attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of ‘reasonableness.’”¹⁴¹ Perhaps the same can be said about force continuums.

Conclusion

There is no legal authority suggesting that a force continuum *must* be utilized in order to ensure the legal adequacy of police force training. The numerous cases referencing and analyzing force continuums likely reflect the widespread use of such continuums in law enforcement training, rather than a legal admonition they must be used. When force training becomes the subject of litigation, the courts naturally focus on the actual training in question, which, in many cases, includes a force continuum. But this does not suggest that there *must be* a continuum, at least from a legal perspective. Stated another way, there is no support in the case law for the contention that police force training without a continuum is *per se* legally defective.

A few cases refer to force continuums as being “nationally accepted,” or a “national standard.”¹⁴² However, while continuums may be a common practice, there is no professional standard or mandate *requiring* police trainers to use a force continuum in policy or training. Neither the Commission on Accreditation of Law Enforcement Agencies, Inc. (CALEA), nor the New York State Law Enforcement Accreditation Program (LEAP), requires a force continuum in their force policy and training standards. In sum, there is no direct or implied legal or professional requirement that police trainers continue to utilize a continuum in force training.

To some degree, this legal review did not answer the ultimate question: should police trainers continue to utilize a use-of-force continuum in defensive tactics training? This reflects

the fact that there is no definitive *legal* answer to that question. This review did validate a number of the legal concerns raised regarding force continuums. Furthermore, in recent years there has been some movement away from force continuums. On the other hand, there is not yet a general professional or legal consensus in favor of abandoning force continuums, and many agencies continue to utilize them their policies, training, or both. At a minimum, however, this review does establish that there is no legal standard that *requires* agencies utilize a force continuum, and legally sufficient force training can be achieved with or without a continuum, since the courts will focus on the substance of the training in question, and not its format.

The focus on continuums as the standard by which force is judged rather than the law is not limited to the courtroom. Miller (2010), reporting on a study of the effect of organizational policy changes within one agency's continuum, observed:

The use-of-force continuum is the mechanism that guides police use of force and establishes what level of resistance must be present before various use-of-force methods can be employed. *The interpretation of what excessive force is in a given situation often is based on the placement of use-of-force methods on a particular agency's use-of-force continuum....*¹⁴³

This observation is probably accurate. In judging an allegation of excessive force internally within an agency, in the media, or by the public at large, the agency's continuum is likely to be viewed as the pivotal factor. While a court of law can mitigate this by viewing the continuum in the context of the legal objective reasonableness standard, such a nuanced analysis is unlikely in the court of public opinion.

The recent national controversy over the death of Eric Garner resulting from his arrest by NYPD officers—a portion of which was captured on video—illustrates this. Garner's death “after being put in an apparent chokehold by a New York City police officer during an arrest, has been ruled a homicide.”¹⁴⁴ According to the New York City Medical Examiner's office,

“Garner’s death was caused by compression of neck and chest, and his prone positioning during physical restraint by police....”¹⁴⁵

This tragic event has resulted in a debate whether the force used by police was “murder,” or “proper protocol.”¹⁴⁶ In framing the debate, Dow (2014) describes the “Use of Force Continuum,” and suggests “[r]emember that term, because you’re going to hear it a lot as the Garner case unfolds.”¹⁴⁷ While some view the video and see officers using excessive force that resulted in an unnecessary death, at least one expert has stated “I see them following the continuum of force ... [g]oing by the book, so to speak.”¹⁴⁸

Recommendations

If done properly, force training with or without a continuum can be effective and legally sufficient. Nonetheless, agencies currently using a continuum should carefully consider alternatives before eliminating it. The decision cannot be made in a vacuum: there must be a fully developed alternative force training program to which the continuum-based training can be compared before an informed judgment can be made.

Thus, trainers should develop and carefully evaluate its proposed alternative training approach *before* abandoning the continuum. Clearly, as Fridell, *et al.* (2011) argued, it is not sufficient to merely state that officers are taught to “follow the law” or to “just be reasonable.”¹⁴⁹ There must be legally sound, comprehensive, and consistent guidance provided to trainees in the use of force. Indeed, the debate would be elevated and more useful if continuum-based training were compared to actual alternative training curricula and methodologies, rather than the oversimplistic approach of “*continuum vs. no continuum*” typified by some of the professional literature.

For example, Fridell, *et al.* (2011) contend that opponents of continuums rely on a series of unsupported “straw-man arguments” that do not withstand scrutiny. However, they set up their own “straw man” by critically implying that opponents of continuums seek to replace them solely with a simplistic admonition to “just be reasonable,” or “JBR,” without sufficient analysis of the alternative training curricula or methodology actually being used.¹⁵⁰

Trainers considering elimination of a force continuum should review and, if possible, observe force curricula used by other training facilities that do not utilize continuums (*e.g.*, FLETC, or other federal, state, or local training academies). Trainers should test the new training curriculum, and attempt to evaluate whether it enhances comprehension and future application of the training objectives. Further, police trainers should arrange for legal review of any proposed new training before implementation. If the force curriculum is eliminated or changed, in-service training will be required to instruct current officers in the new force training methodology as well as academy training for newly hired recruits.

Agencies choosing to continue or to adopt use of a force continuum should review a variety of models and variations. This will help determine which will work best for that particular agency. In doing so, agencies should follow the same consultation and review steps outlined above. Furthermore, agencies must recognize that even the best continuum is not likely to be sufficient standing alone, must be incorporated into a comprehensive training program that adequately reflects legal and practical considerations.

It may be helpful to involve rank and file officers in the development of force training. Paoline, III and Terrill (2011) observed that “[I]argely ignored, in developing and revising use of force policies, is input from patrol officers[, and] [t]his is unfortunate given that these organizational members are arguably the most knowledgeable internal sources of force

information available.”¹⁵¹ By surveying 2,300 officers across eight agencies, they developed an “Officer-Based Force Continuum Model,” and concluded that:

officers are quite reserved in their views of force. We might even go so far as to say that the majority of street-level officers are more conservative in their views, as to what is and what is not reasonable force, than how police organizations presently conceptualize and implement the force continuum. . . . [T]he majority of agencies that reported using a force continuum (and provided a detailed accounting of force and resistance progression . . . appear to have one that is less restrictive than the model officer continuum.¹⁵²

In considering use of s continuum, trainers should consider whether there is a need for some type of visual aid for effective force training. One police attorney and trainer notes that “[a]dult learners are predominantly visual. . . .”¹⁵³ If true, some type of visual training aid, such as a continuum, may be helpful. One agency that eliminated continuum-based training created its own visual aid based the *Graham* objective reasonableness standard:

A test we use that seems to be very helpful is the “Graham Scale.” We conceptualize a typical two-plate scale (like the Scales of Justice). In one plate we put the factors listed in Graham based on the officers perception at the time (severity of crime at issue, threat of the suspect to officer and others, the level of resistance of the suspect). These factors are all “weighted.” The force option (tool and the manner in which it is used) goes in the second plate goes and that is “weighted” as to its intrusiveness, or reasonable expectation of injury.

What we are looking for in this model is somewhat of a balance between the Graham factors and the quality and nature of the intrusion into the persons [*sic*] rights against unreasonable seizures. It is understood that the scale will never be exactly dead level but that is not what is required of the officers. The plates should be somewhat balanced and that is where the reasonable comes into play instead of the exact or minimal amount of force necessary.

If the scale tips too far on the level of force (intrusion) then we get into excessive force. If it tips too far the other way, we may be looking at an officer safety issue. This model can be used as a teaching method through various examples and scenarios.¹⁵⁴

Trainers could even consider a “hybrid approach, *i.e.*, focus training on objective reasonableness and the legal parameters of force, while retaining some form of continuum as a visual aid to augment the training. The New York Police Department (NYPD) utilizes such a hybrid approach, using both a continuum and objective reasonableness in NYPD training:

We use both the continuum and objective reasonableness in our policy and training. We use the continuum as an essential ingredient in our training, especially at the recruit level where you’re trying to take a civilian and teach him or her the progressive steps in the use of force. We tend to rely more on the objective reasonableness standard for our in-service training.¹⁵⁵

Regardless of whether a continuum is utilized, there are some universal points that must be addressed to ensure the legal sufficiency of force training. These include:

- all material required by the State or local police training authority;
- the prevailing legal standards for use of force (Fourth Amendment objective reasonableness, applicable state law, etc.);
- important legal terms relating to use of force, including relevant legal definitions;
- quickly assessing the objective reasonableness of force levels and options in various situations, including the following points, which comprise substance of reasonableness:
 - ***lawful purpose*** of the force (*e.g.*, self-defense or defense of third person, effect arrest—including seriousness of the offense, prevent escape, etc.);
 - ***necessity*** to use force;
 - ***level of force*** used, including escalation and de-escalation; and,
 - ***duration*** of force;
- *all* force options, techniques, and weapons to be used by the trainees;
- proper application of force techniques, and proper use of issued weapons, with special emphasis on the rules governing sensitive techniques that may constitute deadly force, or create controversy, *e.g.*, chokeholds, canine bites, repetitive baton strikes, etc.;
- the duty to intervene to prevent use of excessive force by fellow officers;

- requirements for first aid or medical assistance to those injured by police use of force; and,
- the ability to document and articulate the justification for the use of force in written reports, departmental investigations, and court testimony.

It is important to ensure that *legal* training in force typically provided by lawyers or policy experts is closely coordinated with the *practical* and *scenario-based* training provided by hands-on defensive tactics and firearms instructors. The agency's legal advisor should review all force training curricula, lesson plans, and scenarios to ensure legal sufficiency and consistency. Legal and defensive tactics experts should work together in the development and delivery of force training. Whenever feasible, the agency's legal force experts should participate in scenario-based training to explain the legal implications of the situation posed by the scenario, and how the law would view the various alternative force options.

Police use of force does not occur in a vacuum. Force training—especially scenario-based training—should be “integrated in a way that allows officers to realistically practice using all relevant skills and knowledge needed...”¹⁵⁶ Glenn, *et al.* (2003) asserts that

[c]onnections and relationships need to be explored in the classroom and during practical exercises in the field. For instance, vehicle pull-overs, search and seizure, arrest, custody, and instruction involving persons with disabilities and special needs populations all have ties to the topic of deadly force. An officer should be aware of the potential for a “routine” contact to escalate to a situation in which force is required in every encounter that he has with a member of the public. It is a lesson that officers need to learn early: The need for force could arise in a split second when conducting a traffic stop, taking a person into custody, or communicating with a mentally ill member of society. Integrating these and other relevant issues during training replicates the conditions the officer will confront in the field.

... The concepts involved in applications of force and decisionmaking must be taught holistically.¹⁵⁷

All defensive tactics instructors, firearms instructors, and Field Training Officers should receive advanced “train the trainer” instruction in the legal rules governing use of force, including objective reasonableness, and any continuum utilized by the agency. As a practical matter, they will spend much more time with trainees than legal or policy experts. For example, the New York State Division of Criminal Justice Services requires only seven hours of instruction in the legal justification of force in its basic police academy curriculum. It requires 40 hours of training in arrest techniques, 40 hours of firearm instruction, and 160 hours of field training.¹⁵⁸ Inevitably, these instructors and trainers will be explaining and applying legal and policy rules regarding use of force. Thus, in order to ensure accuracy and consistency, they require a fundamental understanding of the legal rules governing force and the practical application of those rules.

It is also important agencies ensure that their street officers—especially supervisory officers—understand and can apply force policy and training consistently. In one case, officers unsuccessfully attempted to forcibly extract a subject who refused to exit a stopped vehicle that had been reported stolen, resulting in a deputy shooting the subject.¹⁵⁹ During the ensuing litigation over this shooting, the Commander of the Training Division testified that the forcible extraction tactics violated the agency’s policy and training, which, he claimed, classified the situation as a “barricaded subject,” which required deployment of the SWAT Team.¹⁶⁰ However, the involved deputies and supervisors disagreed, testifying that the situation did not meet agency criteria for a barricaded subject and SWAT call-out; one on-scene supervisor testified that in 22 years as a cop—including ten years on the SWAT Team—he had never seen a similar situation handled as a barricade situation and SWAT call-out.¹⁶¹

This disagreement led the court to observe that the deputies may have violated the agency's force continuum.¹⁶² However, since the court did not believe this factor led to the shooting, it did not consider it to be material in its summary judgment analysis.¹⁶³ Nonetheless, this case illustrates the potential danger of disagreement or misunderstanding among agency personnel as to fundamental force policy, tactics, and training requirements.

If an agency utilizes a state or regional training center, it must also ensure that it adequately trains its own officers in agency-specific force policy to the extent it is not addressed or differs from more general instruction received at academy servicing multiple agencies with different policies.

There should be regular in-service training to reinforce and enhance defensive tactics skills, especially the use of various force techniques and weapons. Training in the legal rules governing use of force should be incorporated into this in-service training. Typical basic certification courses are often inadequate to ensure proper long-term application of force techniques and weapons in real-life force situations. As a result of a three-year assessment of police training in the United States and the United Kingdom, the Force Science Institute concluded:

- The average officer within months of leaving an academy will be able only to *describe* how a given suspect-control technique should be used but will have “little ability” to actually *apply* it effectively in “a dynamic encounter with a defiantly resistant subject.
- At the rate academy and in-service training is typically delivered, it could take the average street cop up to *45 years* to receive the number of hours of training and practice in arrest-and-control and officer-safety techniques that a student athlete gets in competitive sports during the usual high school career.¹⁶⁴

Periodic in-service training is required to reinforce, maintain, and improve these perishable skills. To make the most of valuable training time, trainers should review local trends, issues, and needs, and incorporate them into in-service force training to improve realism and relevance.

Police agencies and training institutions must be willing to commit the time and resources needed to properly develop and implement legally sufficient force training programs. In the final analysis, trainers must take a more comprehensive approach than is found in the typical “*continuum v. no continuum*” debate, understanding that what works best in one agency may not be the best solution for another.

Although legal requirements are an important factor in developing force training, they are not the *only* factor. Trainers should strive to develop and implement high-quality force training, incorporating important legal and practical aspects, as well as effective training and learning principles. Police training will be judged based upon whether it is legally sound, and whether it promotes the proper and lawful use of force by law enforcement officers. It will also be judged on its effectiveness in promoting the safety of officers and the community. It must teach officers to know and understand *when* to use force, including application of various force levels to different situations. It must also provide them with the practical skills to guide them as to *how* to use various force tactics, techniques and weapons. Training must also develop the officer’s ability to recognize, document, and articulate the legal and policy justification for using force in each case. Ultimately, the best defense to any legal challenge to police force training—with or without a continuum—will be the overall quality and effectiveness of the training.

Endnotes

¹ *Kalma v. City of Socorro*, 2008 U.S. Dist. LEXIS 109441, at *25 (W.D. Tx. March 17, 2008).

² *Phillips v. Bradshaw*, 2013 U.S. Dist. LEXIS 44646, at *26-*27 (S.D. Fl. Mar. 28, 2013) (internal quotation marks and citations omitted) (emphasis in original); *see also*, *Ruffino v. City of Hoover*, 891 F. Supp. 2d 1247, 1262 (N.D. Al. 2012).

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⁴ Peters, Ph.D., John G., and Brave, Michael A. (January/February 2006). Force Continuums: Are They Still Needed. *Police and Security News*, 22(1), 2. Retrieved from <http://www.ecdlaw.info/outlines/forcecontinuums.pdf>.

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⁶ *Crace v. Efaw*, 2012 U.S. Dist. LEXIS 128812, at *5 (S.D. Oh. Sept. 10, 2012).

⁷ Hampton, *supra* at n. 3, 10.

⁸ Fridell, Lorie, Ijames, Steve, and Berkow, Michael. (December 2011). Taking the Straw Man to the Ground: Arguments in Support of the Linear Use-of-Force Continuum. *The Police Chief* 78: 20–25. Retrieved from http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=2548&issue_id=122011.

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¹⁰ Peters and Brave (2006), *supra* at n. 4.

¹¹ *See* n. 9, *supra*; *see also*, Fridell, *et al.* (2011), *supra* at n. 8.

¹² Bostain (2009), *supra* at n. 9.

¹³ Peters and Brave (2006), *supra* at n. 4, 4.

¹⁴ *Id.*

¹⁵ Williams (2002), *supra* at n. 9, 18.

¹⁶ Police Executive Research Forum (PERF). (August 2012). An Integrated Approach to De-Escalation and Minimizing Use of Force (Integrated Approach). *Critical Issues in Police Series*, Washington, D.C. 20036, 17, quoting MacArthur, Sandy Jo, Los Angeles Assistant Chief. Retrieved from http://www.policeforum.org/library/critical-issues-in-policing-series/De-Escalation_v6.pdf.

¹⁷ *Id.* quoting Wray, Noble, Chief. 26.

¹⁸ *Id.* quoting Arundale, Ian, Chief Constable. 25.

¹⁹ Marker (2012), *supra* at n. 9, 504.

²⁰ Alpert, Geoffrey P., Smith, Michael R., Kaminski, Robert J., Fridell, Lorie A., MacDonald, John, and Kubu, Bruce. (May 2011). Police Use of Force, Tasers and Other Less-Lethal Weapons, U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, 5. Retrieved from <http://www.ecdlaw.info/outlines/11-05%20NIJ%20Force%20Research%20Report.pdf>.

²¹ Paoline III, Eugene A. & Terrill, William (2011). Listen to me! Police officers' views of appropriate use of force. *Journal of Crime and Justice*, 34:3, 178-189. Retrieved from <http://dx.doi.org/10.1080/0735648X.2011.609740>.

²² Peters and Brave (2006), *supra* at n. 4, 4.

²³ Letter from Loretta King, Acting Assistant Attorney General, Civil Rights Division, and Lev L. Dassin, Acting United States Attorney for the Southern District of New York, to Raymond P. Fitzpatrick, Jr., Esq., Fitzpatrick and Brown, LLP, Re: Investigation of Yonkers Police Department (June 9, 2009) (footnote omitted), available at http://www.justice.gov/crt/about/spl/documents/YonkersPD_talet_06-09-09.pdf, accessed December 1, 2013; for a collection of similar discussions of force continuums in the context of Federal civil rights investigations, see U.S. Department of Justice, Civil Rights Division, Special Litigation Section Cases and Matters, available at <http://www.justice.gov/crt/about/spl/findsettle.php#Publications> accessed December 1, 2013. See also, *Rosales v. City of Bakersfield*, 2007 U.S. Dist. LEXIS 48437, at *69-*73 (E.D. Ca. June 27, 2007).

²⁴ See, e.g., IACP Model Polices and Commentaries on Use of Force (February 2005), Electronic Control Weapons (January 2005), Less-Than-Lethal Impact Weapons (April 2002), and Pepper Aerosol Restraint Spray (April 1994). However, IACP also has recently acknowledged the

²⁵ See, e.g., Peters and Brave, Chief's Counsel, Force Continuums: Three Questions. (September 2011). *The Police Chief, Chief's Counsel*. Retrieved from http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=791&issue_id=12006; and, Fridell, *et al.* (2011), *supra* at n. 8.

²⁶ Peters and Brave (2006), *supra* at n. 4, 1.

²⁷ Williams (2002), *supra* at n. 9,15.

²⁸ Peters and Brave (2006), *supra* at n. 4, 3-4, quoting Parsons, Kevin, Ph.D. (international law enforcement trainer and expert witness).

²⁹ Ranelli, Mike. Chief. (January 2013). The Impact of High Stress Events: Training, Investigations, Policy & Liability Issues. New York State Division of Criminal Justice Services.

³⁰ Fridell, *et al.* (2011), *supra* at n. 8.

³¹ 490 U.S. 386 (1989).

³² 471 U.S. 1, 8-9 (1985).

³³ *Graham*, 490 U.S. at 394-95.

³⁴ *Id.*, at 396, quoting *United States v. Place*, 462 U.S. 696, 703 (1983).

³⁵ *Id.*, at 396, quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

³⁶ *Id.*, at 396.

³⁷ *Id.*, at 396, quoting *Garner*, 471 U.S. at 8-9.

³⁸ *Id.*, at 397, quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (internal citations omitted).

³⁹ *Id.*, at 396-67, quoting *Johnson v. Glick*, 481 F. 2d 1028, 1033 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973) (internal citations omitted).

⁴⁰ *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *see also*, *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (“The reasonableness of the officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.”).

⁴¹ *Campbell v. City of Coeur D’Alene*, 2010 U.S. Dist. LEXIS 116213, at *15 (D. Id. Nov. 1, 2010) (emphasis in original); *see also*, *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994); *Davis v. Gryniewicz, III*, 2013 U.S. Dist. LEXIS 72307 (M.D. Pa. May 22, 2013).

⁴² *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1992), *cert. denied*, 515 U.S. 1159 (1995); *see also*, *Glenn v. Washington County*, 673 F. 3d 864, 878 (9th Cir. 2011), *reh ’g and reh ’g en banc denied*, 673 F.3d 864, 2011 U.S. App. LEXIS 25905 (9th Cir. Or. 2011); *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002).

⁴³ *Smith v. Hemet*, 394 F.3d 689, 701 (9th Cir. 2005); *see also*, *Chew v. Gates*, 27 F.3d 1432, 1441 n. 5 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (case remanded to district court to consider whether police had alternatives to using a police dog to bite and hold a fleeing suspect).

⁴⁴ *Contra*, *Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007), *reh ’g en banc denied*, 2007 U.S. App. LEXIS 13659 (6th Cir. May 1, 2007) (a Fourth Amendment seizure must be effectuated with the least intrusive means reasonably available).

⁴⁵ *See, e.g.*, *Glenn v. Washington County*, 2011 U.S. App. LEXIS 25932 at *37 (citations omitted) (emphasis added).

⁴⁶ *Sokolow*, 490 U.S. at 10.

⁴⁷ *Davis v. Scherer*, 468 U.S. 183, 194 (1984).

⁴⁸ *Id.*, at 197.

⁴⁹ *Cf.*, *Virginia v. Moore*, 553 U.S. 164, 168-178 (2008).

⁵⁰ *Whren v. United States*, 517 U.S. 806, 817 (2006).

⁵¹ *City of Canton v. Harris*, 489 U.S. 378, 387 (1989).

⁵² *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694-95 (1978) (emphasis in original).

⁵³ *Id.*, at 694.

⁵⁴ *Canton*, 489 U.S. at 388; *see also*, *Collins v. City of Harker Heights*, 503 U.S. 115, 123 (1992) (“[I]f a city employee violates another’s constitutional rights, the city may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation.”).

⁵⁵ *Canton*, 489 U.S. at 390, n. 10.

⁵⁶ *Id.*, at 390.

⁵⁷ *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011).

⁵⁸ *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1060 (3d Cir. 1991) (citing *Canton*, 489 U.S. at 390-91), *cert. denied*, 503 U.S. 985 (1992) (emphasis in original).

⁵⁹ *Connick*, 131 S. Ct. at 1361.

⁶⁰ *Canton*, 489 U.S. at 390-91 (citations omitted).

⁶¹ *Blankenhorn v. City of Orange*, 485 F.3d 463, 485 (9th Cir. 2007) (citation and internal quotations omitted).

⁶² *Connick*, 131 S. Ct. at 1361, *quoting*, *Bryan County v. Brown*, 502 U.S. 397, 409 (1997).

⁶³ *Id.*, at 1361; *see also*, *Frye v. City of Gary*, 2014 U.S. Dist. LEXIS 107743, at *21 (N.D. In. Aug. 6, 2014)

⁶⁴ *Canton*, 489 U.S. at 390, n.10.

⁶⁵ *Id.*, at 390.

⁶⁶ *Id.*, at 385.

⁶⁷ *Ickes v. Borough of Bedford*, 2011 U.S. Dist. LEXIS 88182 (W.D. Pa. Aug. 9, 2011), *quoting*, *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997).

⁶⁸ *See, e.g.*, *Phillips v. Community Insurance*, 678 F.3d 513 (7th Cir. 2012), *reh’g denied* 2012 U.S. App. LEXIS 11823 (2012); *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 781 (2011); *McKenney v. Harrison*, 635 F.3d 354 (8th Cir. March 28, 2011); *Revak v. Liebernum*, 2010 U.S. App. LEXIS 22466 (3rd Cir. Oct. 28, 2010); *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010), *reh’g en banc granted*, 2010 U.S. App. LEXIS 20195 (9th Cir. Sept. 30, 2010); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009); *Slusher v. Carson*, 540 F.3d 449 (6th Cir. 2008); *Murray v. City of Philadelphia*, 2014 U.S. Dist. LEXIS 104456 (E.D. Pa. July 31, 2014); *Leverette v. Genesee County*, 2014 U.S. Dist. LEXIS 76973 (E.D. Mi. June 6, 2014); *Grabski v. Logan*, 2014 U.S. Dist. 46680 (E.D. Pa. Apr. 4, 2014); *Richard v. Sedgwick County*, 2014 U.S. Dist. LEXIS 19586 (D. Ks. Feb. 18, 2014); *Standifer v. Lacon*, 2014 U.S. Dist. LEXIS 5212 (S.D. Oh. Jan. 14, 2014); *Garcia v. Wright*, 2013 U.S. Dist. 184395 (W.D. Ar. Dec. 13, 2013), *Summ. J. granted*, 2014 U.S. Dist. LEXIS 10915 (W.D. Ar. Jan. 29, 2014); *Estes v. Neff*, 2013 U.S. Dist. LEXIS 183210 (N.D. Fl. Dec. 11, 2013), *Summ. J. granted*, 2014 U.S. Dist. LEXIS 3753 (N.D. Fla. Jan. 13, 2014); *Woodward v. City of Gallatin*, 2013 U.S. Dist. LEXIS 164346 (M.D. Tn. Nov. 19, 2013); *Cunningham v. Hinrichs*, 2013 U.S. Dist. LEXIS 163612 (E.D. Mo. Nov. 18, 2013); *Speight v. Griggs*, 2013 U.S. Dist. LEXIS 186953 (N.D. Ga. Sept. 24, 2013); *Glascoe v. Sowers*, 2013 U.S. Dist. LEXIS 134596 (D. Md. Sept. 20, 2013); *Watson v. Dyersburg City Police Department*, 2013 U.S. Dist. LEXIS 134754 (W.D. Tn. Sept. 20, 2013); *Siceloff v. Township of West Deer*, 2013 U.S. Dist. LEXIS 109987 (W.D. Pa. Aug. 2, 2013); *Johnson v. Ashworth*, 2013 U.S. Dist. LEXIS 186521 (S.D. Ala. June 10, 2013), *Summ. J. granted*, 2014 U.S. Dist. LEXIS 41620 (S.D. Ala. Mar. 27, 2014); *Garcia v. City of New York*, 2013 U.S. Dist. LEXIS 147149 (E.D.N.Y. July 17, 2013); *Davis v. Grynkewicz, III*, n. 41, *supra*; *Phillips v. Bradshaw*, n. 2, *supra*; *Price v. City of Sutherland*, 2013 U.S. Dist. LEXIS 67494 (D. Or. May 9, 2013); *King v. Taylor*, 2013 U.S. Dist. LEXIS 65540 (E.D. Ky. May 8, 2013); *Keppler v. Haslam*, 2013 U.S. Dist. LEXIS 54807 (M.D. Tn. April 17, 2013); *Harrison v. City of Dickson*, 2013 U.S. Dist. LEXIS 52247 (M.D. Tn. Apr. 11, 2013); *Rakestraw v. Neustrom*, 2013 U.S. Dist. LEXIS 51182 (W.D. La. Apr. 8, 2013); *Peabody v. Perry Township*, 2013 U.S. Dist. LEXIS 46344 (S.D. Oh. March 29, 2013); *Hughes v. Judd*, 2013

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⁶⁹ See, e.g., *O'Brien v. New England Police Benevolent Association, Local 911*, 983 N.E.2d 1232 (Mass. App. 2013), *app. denied*, 989 N.E. 900 (Mass. 2013); *Farmer v. City of Rapid City*, 801 N.W.2d 291 (S.D. 2011); *Evangelist v. Department of Police*, 32 So. 3d 815 (La. App. 2010); *Wilson v. Wyoming*, 199 P.3d 517 (Wyo. 2009); *Penny v. City of Memphis*, 276 S.W. 3d 410 (Tenn. App. 2008), *app. denied*, 2008 Tenn. LEXIS 716 (Sept. 29, 2008); *Tannehill v. Louisiana State University Health Services Center*, 2014 L. App. Unpub. LEXIS 27 (La. Court of Appeal Feb. 3, 2014), *writ den.* 138 So. 3d 628 (La. 2104).

⁷⁰ See, e.g., *Illinois v. Mandarino*, 994 N.E.2d 138 (Il. 2013); *Louisiana v. Marlowe*, 2011 La. App. LEXIS 1601 (La. Dec. 22, 2011), *writ denied*, 89 So. 3d 1191 (La. 2012); *City of Westland v. Kodlowski*, 828 N.W.2d 67 (Mich. 2012), *vacated in part and rev. in part*, 837 N.W. 285 (2013); *Ohio v. Warmus*, 967 N.E. 2d 1223 (Oh. 2011), *cert. denied*, 133 S. Ct. 335 (2012); *Louisiana v. Compton*, 66 So. 3d 619 (2011), *writ denied*, 76 So. 3d 1177; *People v. Meinders*, 2014 Ill. App. Unpub. LEXIS 584 (App. Ct. Il. 4th Dist. Mar. 26, 2014).

⁷¹ *Minnesota v. Pool*, 2010 Minn. App. Unpub. LEXIS 1054 (Minn. October 19, 2010).

⁷² See *Owaki v. City of Miami*, 491 F. Supp. 2d 1140 (S.D. Fla. 2007).

⁷³ See, e.g., *Fontenot v. Taser International, Inc.*, 2011 U.S. Dist. LEXIS 68761, at *9-10 (W.D. N.C. June 24, 2011) (*quoting manufacturer's warning*, "Law enforcement customers are deployment and tactical experts and will determine all deployment and tactical practices including where the TASER X26 fits in their respective use of force continuum."), *dec. on appeal and remanded*, 2013 U.S. App. LEXIS 23510 (4th Cir. 2013).

⁷⁴ *Buchanan v. West Whiteland Township*, 2008 U.S. Dist. LEXIS 106149, at *25 (E.D. Pa. Jan. 7, 2009).

⁷⁵ *Bucherl v. Miller*, 2006 U.S. Dist. LEXIS 71427, at *11 (N.D. Oh. Oct. 2, 2006).

⁷⁶ *David v. Borough of Norristown*, 400 F. Supp. 2d 790, 800 (E.D. Pa. 2005).

⁷⁷ See also, *Carswell v. Borough of Homestead*, 381 F.3d 235 (3d Cir. 2004), *cert. denied*, 546 U.S. 899 (2005); *Adilovic v. County of Westchester*, 2011 U.S. Dist. LEXIS 76040 (S.D. N.Y. July 14, 2011); *Clark v. White House Police Department*, 2008 U.S. Dist. LEXIS 118245 (M.D. Tenn. June 10, 2008); *Ogan v. Spokane County Jail*, 2007 U.S. Dist. LEXIS 85633 (E.D. Wash. Nov. 13, 2007), *reconsideration granted*, 2008 U.S. Dist. LEXIS 120528 (Jan. 28, 2008), *mot. denied and dismissed*, 2010 U.S. Dist. LEXIS 24435 (Feb. 1, 2010).

⁷⁸ *Kalma v. City of Socorro*, 2008 U.S. Dist. LEXIS 109441, at *22-*26.

⁷⁹ *Id.*, at *30.

⁸⁰ *Id.*, at *39 (emphasis added).

⁸¹ *Connick*, 131 S. Ct. at 1363 (emphasis added).

⁸² *Cavanaugh v. Wood Cross City*, 2009 U.S. Dist. LEXIS 116214, at *15-*17 (D. Utah December 14, 2009), *aff'd*, 625 F.3d 661 (10th Cir. 2010) (emphasis added).

⁸³ *Id.*, at *17, n. 7.

⁸⁴ *Id.*

⁸⁵ *Griffith*, 473 F.3d at 658 (emphasis added); see also, *Gantt v. Akron Correctional Facility*, 1996 U.S. App. LEXIS 1417, at *7 (6th Cir. Jan. 8, 1996) (unpublished); *Harris v. City of Circleville*, 2008 U.S. Dist. LEXIS 4610, at *30-*31 (S.D. Oh. Jan. 23, 2008), *aff'd* 583 F. 3d 356 (6th Cir. 2009).

⁸⁶ *Raiche v. Pietroski*, 623 F.3d 30, 37 (1st Cir. 2010).

⁸⁷ *Davis*, 2013 U.S. Dist. LEXIS 72307, at *8.

⁸⁸ *Id.*, at *9-*10 (internal citations omitted).

⁸⁹ *Garcia*, 2013 U.S. Dist. LEXUS 147149, at *25.

⁹⁰ *King*, 2013 U.S. Dist. LEXIS 65540, at *9.

⁹¹ *Id.*, at 22-23.

⁹² *Id.*, at *13 (citations omitted) (emphasis in original).

⁹³ *Id.*, at *14.

⁹⁴ *Schutz v. Honick*, 2012 U.S. Dist. LEXIS 66207, at *11-*12 (W.D. Pa. May 11, 2012).

⁹⁵ *Gregg v. Hatmaker*, 2013 U.S. Dist. LEXIS 184963, at *11, n.1, (E.D. Tn. Mar. 15, 2013), *citing United States v. Eberle*, 2008 U.S. Dist. LEXIS 95770 (E.D.Mich. Nov. 10, 2008).

⁹⁶ *Mohney v. Hageter*, 2013 U.S. Dist. LEXIS 12098, at *21 (W.D. Pa. Jan. 13, 2013).

⁹⁷ *Id.*, at 21-22.

⁹⁸ *Pelzer v. City of Philadelphia*, 656 F. Supp.2d 517, 521 (E.D. Pa. 2009).

⁹⁹ *Gantt*, 1996 U.S. App. LEXIS 1417, at *7 (emphasis added).

¹⁰⁰ *Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 408 (D. Vt. 2009), *aff'd*, 400 Fed. Appx. 592 (2d Cir. 2010).

¹⁰¹ *Tannehill*, *supra* at n. 69, at *9.

¹⁰² *Kalma*, *supra*, at n. 1 (emphasis added).

¹⁰³ 673 F. 3d 864.

¹⁰⁴ *Id.*, at 867

¹⁰⁵ *Id.* at 868, n. 4.

¹⁰⁶ *Id.*, at 868-69.

¹⁰⁷ *Id.*, at 878-80.

¹⁰⁸ *Id.*, at 875.

¹⁰⁹ *Id.*, at 878.

¹¹⁰ *Id.*, at 875 (citations and quotation marks omitted).

¹¹¹ *Woodward*, 2013 U.S. Dist. LEXIS 164346, at *14.

¹¹² *Hayes v. County of San Diego*, 2013 U.S. App. LEXIS 23939, at *21 (9th Cir. Dec. 2, 2013) (internal citations omitted).

¹¹³ *Marker*, *supra* at n. 9, p. 504, *quoting*, *Bell*, 441 U.S. at 559.

¹¹⁴ *Flosi* (2012), *supra* at n. 9.

¹¹⁵ PERF (2012), 1, *quoting* Ramsey, Charles, Police Commissioner.

¹¹⁶ *Graham*, 490 U.S. at 396-97.

¹¹⁷ Paoline III & Terrill (2011), *supra* at n. 21, 179, *citing*, Terrill, W., Paoline, E.A., III, and Ingram, J., 2011. *Assessing police use of force policy and outcomes: final report*. Washington, DC: National Institute of Justice.

¹¹⁸ *Henry*, 652 F.3d at 540, *citing*, U.S. Gov't Accountability Office, GAO-05-464 *Taser Weapons: Use of Tasers by Selected Law Enforcement Agencies 9-10* (2005).

¹¹⁹ *Kirby v. Roth*, 2010 U.S. Dist. LEXIS 119242, at *39 (W.D. Ark. Nov. 9, 2010), *aff'd*, 515 Fed. Appx. 642 (8th Cir. 2011).

¹²⁰ *Ickes*, 2011 U.S. Dist. LEXIS 88182, at *48.

¹²¹ *See Whren*, 517 U.S. at 817.

¹²² Paoline III & Terrill (2011), 180, *citing*, Terrill, W. and Paoline, E.A., III, 2010. *Non-lethal force by police in the United States: the various lenses through which appropriateness is examined*. In: J.B. Kuhns and J. Knutsson, eds. *Police use of force: a global perspective*. Santa Barbara, CA: Praeger, 6–13.

¹²³ *Graham*, 490 U.S. at 397, quoting, *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

¹²⁴ Fridell, *et al.* (2011), *supra* at n. 8.

¹²⁵ *Morris v. Opashi*, 2014 U.S. Dist. LEXIS 21990, at *11-*13 (D. Co. Feb. 21, 2014).

¹²⁶ *Id.*, at *12.

¹²⁷ *McKinney v. City of Paducah*, 2014 Ky. App. Unpub. LEXIS 138, at *14-*15 (Ky. Court of Appeals Feb. 14, 2014) (emphasis added).

¹²⁸ Aveni, Thomas J., M.S. (December 1, 2003). The Force Continuum Conundrum. The Police Policies Study Council, published in *Law and Order*. Retrieved from http://www.theppsc.org/Staff_Views/Aveni/The%20Force%20Continuum%20Conundrum.pdf.

¹²⁹ Peters and Brave (2006), *supra* at n. 4, 3, quoting Police Attorney Mike Stone.

¹³⁰ *Id.*, 4.

¹³¹ *Id.*, 4-5.

¹³² *Ernst v. City of Eugene*, 903 F. Supp. 2d 1172 (D. Or. 2012).

¹³³ *Id.*, at 1176.

¹³⁴ *Id.*, at 1186.

¹³⁵ *Id.* (Emphasis added.) (Internal citations omitted.)

¹³⁶ Peters and Brave (2006), *supra* at n. 4, 5.

¹³⁷ *Id.*

¹³⁸ Williams (2002), *supra* at n. 9, 17 (footnote omitted).

¹³⁹ Aveni (2003), *supra* at n. 128.

¹⁴⁰ *Graham*, 490 U.S. at 396, quoting, *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

¹⁴¹ *Scott v. Harris*, 550 U.S. 372, 383 (2007).

¹⁴² *Brister v. Walthall County*, 2007 U.S. Dist. LEXIS 56262, at *26 (S.D. Miss. Aug. 1, 2007); *McAtee*, 2007 U.S. Dist. LEXIS 95067, at *12-*13.

¹⁴³ Miller, Michael E. (September 2010). Taser Use and the Use-of-Force Continuum: Examining the Effect of Policy Change. *The Police Chief*, 77(72-76) (citations omitted) (emphasis added). Retrieved from <http://www.nxtbook.com/nxtbooks/naylor/CPIM0910/index.php#/72>.

¹⁴⁴ CBSNews.com. “NYPD “chokehold arrest” of Eric Garner ruled homicide”, CBS/AP, August 1, 2014. Retrieved from <http://www.cbsnews.com/news/nypd-chokehold-arrest-of-eric-garner-ruled-homicide-by-medical-examiner/>.

¹⁴⁵ *Id.*

¹⁴⁶ Dow, Jay (2014). “John Jay professor says cop didn’t use ‘excessive force’ in Eric Garner arrest.” WPIX, PIX11, July 23, 2014. Retrieved from <http://pix11.com/2014/07/23/john-jay-professor-says-cop-didnt-use-excessive-force-in-eric-garner-arrest/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, quoting Haberfield, Maki. Professor of Police Science, John Jay College of Criminal Justice.

¹⁴⁹ Fridell, *et al.* (2011), *supra* at n. 8.

¹⁵⁰ *Id.*

¹⁵¹ Paoline III & Terrill (2011) *supra* at n. 21, 179.

¹⁵² *Id.*, 186.

¹⁵³ Peters and Brave (2006), *supra* at n. 4, p. 4.

¹⁵⁴ Flosi, *supra* at n. 9.

¹⁵⁵ O’Keefe, James, Deputy Commissioner, *Integrated Approach*, at p. 26.

¹⁵⁶ Glenn, R.W., Panitch, B.R., Barnes-Proby, D., Williams, E., Christian, J., Lewis, M.W., ... Brannan, D.W. (2003). *Training the 21st Century Police Officer Redefining Police Professionalism for the Los Angeles Police Department*, 7. Los Angeles, CA: RAND Public Safety and Justice. Retrieved from http://assets.lapdonline.org/assets/pdf/boi_rand_03_03_31.pdf.

¹⁵⁷ *Id.*, 144.

¹⁵⁸ New York Division of Criminal Justice Services (1/2009). Basic Course for Police Officers. Retrieved from <http://www.criminaljustice.ny.gov/ops/docs/training/pubs/basicpolice/bcpooutline.pdf>.

¹⁵⁹ *Phillips v. Bradshaw*, *supra* at n. 2.

¹⁶⁰ *Phillips*, 2013 U.S. Dist. LEXIS 44646, at *28.

¹⁶¹ *Id.*, at *28-*29.

¹⁶² *Id.*, at *40, n. 19.

¹⁶³ *Id.*, at *39.

¹⁶⁴ Force Science Institute (June 17, 2011). “Current training may leave officers more vulnerable”: Early highlights from forthcoming FSI assessment project. *Force Science News* # 180, (emphasis in original). Retrieved from <http://www.forcescience.org/fsnews/180.html>.