

A Rational Foundation for Use of Force Policy, Training and Assessment

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❖ Introduction

Law enforcement trainers and administrators have wrestled with the best approach to use of force training and post-incident analysis since the Supreme Court decided [Tennessee v. Garner](#),¹ just over a quarter-century ago. In [Tennessee v. Garner](#), the Court articulated the Fourth Amendment “objective reasonableness” standard as the proper assessment tool in reviewing police use of force.² As courts have refined the parameters of objective reasonableness and as the Supreme Court has reinforced its constitutional validity, police trainers have attempted to fashion a training model that enables officers to make proper use of force decisions.

A common framework for police use of force instruction is the force continuum, also referred to as a use of force ladder or use of force barometer. The force continuum often is presented as a linear, stair step, wheel or matrix force instructional model that pairs suspect action with defined police response.³ Force continuum training has attracted much criticism, primarily due to its ill fit with evolving constitutional principles of use of force and lack of flexibility in incorporating the modern force tools available to officers.⁴

Many courts, including the United States Supreme Court, have expressed frustration at attempts to apply the “mechanical application” eschewed in [Graham v. Connor](#)⁵ to police use of force analysis. Justice Scalia’s majority opinion in [Scott v. Harris](#) acknowledged the seductive attraction for something like a mechanical continuum, while plainly renewing the Court’s rejection of such analysis. “Although [an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still sash our way through the factbound morass of ‘reasonableness.’ Whether or not [an officer’s] actions constituted application of ‘deadly force,’ all that matters is whether the [officer’s actions] were reasonable.”⁶ Justices Ginsburg and Breyer both joined the majority opinion, but penned individual

¹ 471 U.S. 1 (1985).

² 471 U.S. 1, 7 (1985).

³ For a brief history of force continua, see James Marker, [Teaching 4th Amendment-Based Use of Force](#), 2112 (7) AELE Mo. L. J. 501; Doug Nicholson, *Use of Force Models: Comprehension or Confusion*, www.Articlesbase.com (accessed August 10, 2012).

⁴ For critique of the frailties in various iterations of force continua, see generally Ken Wallentine, *The Risky Continuum: Abandoning the Use of Force Continuum to Enhance Risk Management*, The Municipal Lawyer, July 2009; John Bostain, *Training without Force Continuums: Learn to Love the Law*, CalibrePress.com Street Survival Newslite, Mar. 19, 2009; Dr. John Peters and Michael A. Brave, [Force Continuums: Are They Still Needed](#), 22 Police & Security News 1, (Jan./Feb. 2006); John Bostain, *Use of Force: Are Continuums Still Necessary*, FLETC Journal, V. 4, No. 2, Fall 2006, 33,.

⁵ 490 U.S. 386, 396 (1989), quoting [Bell v. Wolfish](#), 441 U.S. 520, 559 (1979) (“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.”).

⁶ [Scott v. Harris](#), 550 U.S. 372, 383 (2007).

concurring opinions to emphasize their view that plug-and-play analysis of force by police is inconsistent with the Constitution.⁷

The authors acknowledge the manifold criticisms of the force continuum approach. They propose a shift in the discussion to consideration of where law enforcement is with use of force policy and training, whether we are where we should be to be consistent with best practices and current constitutional analysis, and, if not, what should we do to begin moving in that direction. The authors offer a model for policy and training that is consistent with keeping officers on the street as safe as possible through the best training possible, what we know about human performance factors and with the law of the Fourth Amendment and with what the community expects from its police.

I. Defining the Dialogue

Use of force training does not exist in isolation. To be effective, it should be both tethered to policy founded on the constitutional authority and framework under which police are granted authority to operate and linked to community expectations of the police. It must also be constructed with the goal of providing the safest force options for the officer and those he or she contacts. Courts acknowledge and must accommodate the “tense, uncertain, and rapidly-evolving” situations in which officers must use force.⁸ Police officers need policy and training that acknowledges those same realities and that equips them to effectively manage resistance in an appropriate manner, particularly in light of the present day reality where scrutiny of police work is commonplace. Foremost, we urge a dialogue that begins with the understanding that police operate in a far more complex world, with much greater accountability and in the face of more asymmetrical threats than ever before.

Critics of use of force training premised upon constitutional law and not shackled to a stimulus/response model note that there is no consensus-based national policy or training model governing police use of force.⁹ They suggest that the force continuum should form the basis of a universally applicable model for use of force training and decisions. The United States Supreme Court has interpreted the United States Constitution to provide a national standard for police use of force. The standard is evident in the Fourth Amendment. However, the Supreme Court has never ventured into a discussion of how to train police officers to operate within that standard. One need only read [Graham v. Connor](#) to recognize the Court’s clear statement of the law on judging use of force by police.

The relationship between the United States Constitution to police policy, training, practice and assessment should not be minimized by calling a Constitution-based system as “just be reasonable.”¹⁰ To do so denies the state to which law enforcement has evolved. A linear barometer may have been acceptable four decades ago, prior to the Supreme Court’s shift in force constitutionality analysis from the Fourteenth Amendment to the Fourth Amendment.¹¹ But as others have effectively argued elsewhere, such an approach does not reflect the times and culture of accountability in which police work today.

⁷ *Id.*, 550 U.S. at 386-387.

⁸ [Graham v. Connor](#), 490 U.S. 386, 396 (1989), quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

⁹ Martin Kaste, *Police Say They Aimed For Restraint With Protesters*, NPR, December 26, 2011 (accessed August 10, 2012), interview with Associate Professor Lorie Fridell.

¹⁰ Lorie Fridell, *et al.*, [Taking the Straw Man to the Ground: Arguments in Support of the Linear Use-of-Force Continuum](#), *Police Chief* 78 (Dec. 2011): 20.

¹¹ In 1952, the Supreme Court followed a Fourteenth Amendment substantive due process analysis to excessive force claims against police decision. The Supreme Court held that police conduct that “shocks

The model we advocate is legally founded on the Constitution. James Marker refers to this model as an “amendment-based” training and teaching model.¹² Though we begin with the belief that police officers can and must be thoroughly schooled in what the Constitution requires of them and permits to them, our model incorporates integration of reality based scenarios, critical thinking and decision making training consistent with constitutional standards.

The foundation of reality based scenario training is teaching officers to anticipate and recognize threats that are likely to lead to force decisions. Threat assessment training teaches officers to recognize suspect threats and to respond to preempt unlawful force against the officer or public. In his seminal discussion of threat assessment, FBI Legal Instructor Thomas Petrowski noted that threat assessment training is “the cornerstone of use-of-force training.”¹³ Conditioning officers to recognize suspect threat factors simultaneously helps officers articulate and document the threat factors that informed the officers’ force decisions, thus facilitating inevitable administrative assessment and potential judicial review. We refer to this component as “Suspect Threat Assessment and Response Training” or “START.”

The agencies that have shifted to use of force training with a constitutional foundation and START have experienced great success. In 2005, the Federal Law Enforcement Training Center (“FLETC”) scrapped its stair step force continuum and created a Fourth Amendment-based curriculum supported by a powerful reality based scenario training regimen. Recruits learned constitution parameters of use of force in the classroom and were immediately presented with learning scenarios that helped them prepare to use force on the street, to recognize threats, to respond to the threats and to explain and report their force decisions in response to the threats presented. An excellent use of force training and reporting tool was developed as part of the FLETC training curriculum.¹⁴ The tool offers field utility as both a training tool and reporting support.

John Bostain, *Law Officer Magazine’s* 2012 Trainer of the Year and veteran FLETC instructor, recounts hearing from an agent trained in the new FLETC model who claimed that the rigorous use of force

the conscience” subjects an officer to liability for a constitutional violation. *Rochin v. California*, 342 U.S. 165, 172 (1952). Thirty-three years later, in *Tennessee v. Garner*, the Court held that the use of deadly force to apprehend a suspect is a seizure under the Fourth Amendment “objective reasonableness” standard. In 1989, the Court applied a Fourth Amendment analysis to all claims alleging excessive force by police officers in *Graham v. O’Connor*, 490 U.S. 386 (1989) (“Today we make explicit what was implicit in *Garner’s* analysis, and hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”). The Court held that the reasonableness of a seizure by police must be analyzed by the objective reasonableness of the seizure, viewed through the perspective of an officer at the scene and not through the “20/20 vision of hindsight.” *Graham v. Connor* provided the following factors for lower courts to apply when assessing the reasonableness of force by police: first, the severity of the crime at issue; second, whether the suspect poses an immediate threat to the safety of the officers or others; and third, whether the suspect actively resists arrest or attempts to evade arrest by flight. These factors are not an exhaustive list because the ultimate issue is always the objective reasonableness of the force used. *Smoak v. Hall*, 460 F.3d 768, 783 (6th Cir. 2006).

¹² James Marker, *Teaching 4th Amendment-Based Use of Force*, 2112 (7) AELE Mo. L. J. 501.

¹³ Thomas D. Petrowski, *Use-of-Force Policies and Training—A Reasoned Approach*, FBI Law Enf. Bull., Nov. 2002, 28.

¹⁴ The reporting tool developed by FLETC and adapted by many agencies is available at <http://kenwallentine.com/downloads/Use%20of%20Force%20FLETC%20training%20form.pdf> (accessed August 11, 2012).

training both prepared him well for a critical incident and provided him the critical knowledge and decision-making skills that he believed saved his life.¹⁵ FLETC instructors report increased confidence levels and testing success with the current training program. An intended consequence of any quality constitutional based, START-enhanced training program is reduction of deadly hesitation in force decision making on the street.

Even before FLETC abandoned its traditional force continuum training model, the Wyoming Law Enforcement Academy had fully revised its use of force training to an “amendment-based” system using reality based learning scenarios to reinforce classroom instruction and includes best practice defensive and arrest control techniques. The Wyoming Law Enforcement Academy began its amendment-based training program over a decade ago and continues to enjoy success today following periodic refinements.¹⁶

In 2008 the State of Florida migrated away from using a force continuum as a training tool. The dramatic shift in a statewide training recommendation resulted from extensive consideration by curriculum experts at the Florida Department of Law Enforcement (FDLE), after debate amongst subject matter experts and only after the extended consideration and approval by FDLE legal counsel and sanctioning by Florida’s Criminal Justice Standards and Training Commission.¹⁷

Some may observe that the model we advocate is not entirely mutually exclusive with continua. We agree. The continua may retain value as a starting point for a broader public policy discussion and as the rudiment of integrated training model.¹⁸ One may posit the introduction of a force continuum when training new recruits who have absolutely no understanding of the rules of engagement that govern police use of force.

Any veteran police academy trainer can relate countless stories of recruits who have never been struck in anger and who have never played rough contact sports. We gratefully acknowledge the contributions to our profession to those young men and women who join the ranks of law enforcement after honorable service in defense of our nation in the battlefield. Recruits who have not experienced contact sports or physical conflict may lack confidence when using force, perhaps leading to use of more force than reasonably necessary to reach the objective.

The majority of recruits know police force only through the false heroes of television shows and motion pictures. For those recruits, perhaps a force continuum will suffice in the kindergarten stage of police training, but it must be quickly supplanted as they learn law, conflict resolution skills, arrest control techniques and defensive tactics. A modern use of force training curriculum must reach far beyond traditional classroom lectures with visual models of stair steps, continua and wheels. We expect officers

¹⁵ John Bostain, *Training without force continuums: Learn to love the law*, Street Survival Newsline, March 19, 2009.

¹⁶ James Marker, *Teaching 4th Amendment-Based Use of Force*, 2112 (7) AELE Mo. L. J. 501.

¹⁷ Florida Law Enforcement Basic Recruit Training Program Version 2012.07, http://www.fdle.state.fl.us/Content/getdoc/d71b6636-f97f-42d7-9f5a-46869aea9db1/2012_LE_Text.aspx (accessed August 5, 2012).

¹⁸ For example, the United States Department of Justice, Office of Civil Rights, continues to post literature that broadly references a continuum of force. See <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf> (accessed March 12, 2014). Notwithstanding, recent consent decrees promulgated by the Office of Civil Rights do not include a formal continuum of force. See, e.g., http://www.justice.gov/crt/about/spl/documents/nopd_agreement_1-11-13.pdf (accessed March 13, 2014); http://www.justice.gov/crt/about/spl/documents/beacon_settlement_12-23-10.pdf (accessed March 13, 2014).

to be advanced beyond a stimulus/response force decision making model by the time that they hit the streets. Then we demand an even higher level of discernment, discretion and sophistication in force decisions from our veteran officers. A trainer must ask at what point does the rudimentary teaching tool of the continuum lose all relevance?

II. Objectives of Use of Force Training and Policy

The primary objective of police use of force training and policy is to teach officers to use force at the right time, in the right measure and for the right reason. We believe that fulfillment of this objective will keep officers safer, reduce overall force and reduce agency liability for improper force. Best practice use of force training must provide officers with a decision base that is more than a graphic depiction and that is consistent with law, policy and generally-accepted police practices.

A constitutional based, START-enhanced training program properly delivered easily meets this objective. Such a program is crafted to prepare officers to effectively perceive and assess threats and to respond appropriately when required to make a decision with imperfect/inadequate information and no discretionary time. Though scenario based training, also known as problem based learning has blossomed in popularity only in the past decade or so, trainers and researchers acknowledge the superiority of scenario based training to a more traditional classroom lecture and testing scheme.¹⁹

Another critical objective of use of force training is to teach officers when and how to defuse, de-escalate and disengage force in a dynamic situation. Constitutional based, START-enhanced training teaches officers to constantly assess their tactics and to measure the constitutionality of their force decisions in light of information that becomes available as the situation develops. Although continua allow both ascent and descent, escalation and de-escalation, in measured fashion at defined intervals, START training necessitates that an officer's force can and must be as fluid and dynamic as the situation itself, recognizing that force is primarily a product of suspect actions.

The objective for agency executives is to promulgate use of force policy that comports with the legal standards for use of force, allows for enhancing officer safety and effective organizational risk management and also reflects community expectations that a police department should use only the minimum amount of coercive force that is necessary to effectively bring an arrestee under control.

Continua can actually encourage a mismatch of these sometimes competing issues. By considering only a suspect's actions to formulate a response, the outcome may be that the level of force employed by an officer may not be the minimum amount of force reasonably required to safely accomplish the objective. It may also be sufficient to meet the legal standard because force should not only be reasonably necessary to accomplish the lawful purpose, but it must be proportional to the threat. Factors included in a threat assessment must therefore include more than the suspect's actions. A best practice use of force policy dictates that constitutional requirements be continually reassessed as the tense and uncertain situation dynamically progresses.

III. Why Linear Continua Have Proven To Be Ineffective In Policy, Training and Assessment

¹⁹ S.F. Hundersmarck, *Police Recruit Training: Facilitating Learning Between the Academy and Field Training*, FBI Law Enf. Bull., Aug. 2009, 26; U.S. Department of Justice, Office of Community Oriented Policing Services, *PTO: An Overview and Introduction* (Washington, DC, 2003); John A. Seibel, *Reality-Based Training: Skill development in Survival Stress Responses*, <http://www.emich.edu/cerns/downloads/papers/PoliceStaff/Training/REALITY-BASED%20TRAINING--Skill%20Development%20in%20Survival%20Stress%20Responses.pdf> (E. Mich. U. Center for Regional and National Security) (accessed August 5, 2012).

The continua no longer occupy the preeminent place they once held. At best, they retain value as part of a comprehensive education and training approach. At worst they are stilted and rigid and limit options and represent a veritable “Use of Force for Dummies.” Part of our concern with continua is that they have critical limitations—they do not recognize and effectively integrate what we have come to know about how individuals react, nor do they recognize how individuals learn how to perform complex tasks—and the responsible use of force is a highly complex task. Traditional use of force training focused on force continua fail to recognize the police officer as a variable in the decision making process, often limiting the force option discussion to reaction to particular suspect behaviors.

Continua can prescribe force when verbal persuasion may be effective, thereby reducing officer incentive to deescalate and defuse and substantially reducing situational flexibility (what starts as physical ends as physical). It also seems that one of the most compelling reasons to move away from continua is their persistent misuse. While perhaps intended as a minimum standard, continua have been, in some cases, simply adopted as the holy grail of both policy and agency training. There are substantial risks associated with either proposition.

Continua require an officer to react in a limited, prescribed and artificial stimulus-response manner rather than factoring in officer experience and situational variances. Continua therefore require a seasoned and experienced officer to react in much the same manner as a recruit officer. We believe that the profession is much better served by educating officers in critical thinking and decision making scenarios which more realistically reflect the complex environment in which they operate.

Continua also tend to reflect the discarded policing standards of decades ago, prior to the enactment of many of the federal anti-discrimination and disability protection acts and judicial decisions that have become “clearly established law” for civil rights litigation purposes. Arguably, a straightforward application of actions (or reactions) suggested by the continua might well result in subjecting individuals who are hard of hearing to TASER® applications, etc. This lack of ability to factor in experience and the totality of circumstances is both unrealistic and unacceptable from a public policy perspective.

The response-reaction model that has developed over the decades tends to ignore the reality of today’s public safety environment and the public safety employee in 2012. While the new hire of the 1960’s and ‘70’s was likely a military veteran who simply needed to transition to a new mindset of civilian rules of engagement (enter the revised continuum), today’s employee is a vastly different breed – one questioning rote adherence to historical methodology and one much more interested in a learning model which involves flexibility, reasoning, critical thinking and individual choice.

From a constitutional perspective, and we advocate for a framework of constitutional policing, the U.S. Supreme Court has unequivocally held that officers may use the amount of force that is objectively reasonable to control an individual during a lawful arrest.²⁰ By attempting to create a mental algorithm through which an officer divines a suspect’s action(s) and prescribe a predetermined and specific response by an officer, force continua grossly oversimplify the complexity of officer-subject interactions and do not effectively allow an officer to take into account that variation in circumstances required by the courts and consider other options to avoid or minimize the use of force that may be readily available.

Another very practical concern is that use of force training permeates the culture of an organization and shapes the way an organization interacts with and relates to the community. Over time a force continuum becomes ingrained as the agency’s *de facto* policy. Officers become oriented toward using force as their primary tool, when perhaps other less intrusive methods are available and may be effective. There then exists the strong possibility that continua instill the wrong organizational values and, in effect, teach young and impressionable recruit officers that they operate in an environment of likely aggression and that they then become conditioned and predisposed to react in an aggressive or adversarial manner.

²⁰ [Graham v Connor](#), 490 U.S. 386 (1989).

Continua may, in effect, also reduce agency accountability. Use of force reviews with a force continuum policy that began and ended with, the suspect did “X” and the continuum says “Y” is within policy, gives the agency an easy out, but certainly not a desired outcome. Post-incident analysis *must* be informed by how officers make decisions in order to justly assess the decisions. The officer is shifting from frontal lobe cognitive processing to mammalian brain pattern recognition and response. Why create a pre-incident tool that *will* be used for post-incident analysis and that fails to accommodate how officers actually reach force decisions?

IV. Why Constitutional-based, START Training Is Effective

Use of force training must be consistent with how officers make decisions. Dr. Gary Klein, a former U.S. Air force research psychologist and pioneer in the study of naturalistic decision making, has long studied command and control performance and decision-making. Klein concludes that most officers faced with a dynamic and complex situation use a “recognition-primed decision” (“RPD”) model.²¹ In the almost imperceptibly brief microseconds given to decision-making in a critical incident, an officer automatically processes perceived threats and possible responses. The brain shifts to RPD when faced with an urgent situation with little or no time for rational decision making and when lacking detailed data for linear processing. An officer’s survival, and potentially the officer’s civil and criminal exposure, hangs in the balance in the instant that RPD shapes the officer’s response to a threat.

Recognition-primed decision making involves rapid scanning of plausible options and selecting the first pattern match option. An officer observes cues and indicators that generate recognition of a pattern. The officer considers alternative action scripts (mentally sorted according to typicality) in a scan through the officer’s neurological database of similar experiences, compares a particular action script to the situation presented in a mental simulation, and accepts and executes the first non-rejected action script. One veteran emergency services trainer describes RPD as “if it sounds like a duck, it’s most likely a duck.”²² Recognition-primed decision making experts claim that as an officer becomes more experienced (whether by field experience or reality-based scenario training), the officer builds ability to choose the best action script.²³

Human performance research shows that continua don’t work in combat. Even in the self-defense world of martial arts, in recent years the disciplines have expanded to include free-form fighting and mixed martial arts strategies which are highly effective and which do not depend on the formalistic instruction and training of traditional martial arts. To be effective and to guide lawful uses of force, a force model must be much more complex, recognizing more factors than just a pairing of suspect action and officer reaction. Similar findings flow from research in other disciplines that employ RPD. For example, RPD is evident in firefighting,²⁴ emergency medicine,²⁵ and aircraft flying.²⁶

²¹ Gary Klein, *Sources of Power-How People Make Decisions*, (MIT Press 1998); Larry C. Miller, *RPD on the Fireground*, *American Fire Journal* (Apr. 1996) 7-8.

²² Bruce Evans, *A Picture is Worth a Thousand Words—at Least*, *Fire Chief*, June 2011.

²³ Thomas H. Killion, *Decision Making and the Levels of War*, *Military Review* (Nov./Dec. 2000) 66-67.

²⁴ Larry C. Miller, *RPD on the Fireground*, *American Fire Journal* (Apr. 1996) 7-8.

²⁵ Susan Bond, *Modeling emergency decisions: recognition-primed decision making. The literature in relation to an ophthalmic critical incident*, *Journal of Clinical Nursing* Vol 15, no. 8 (August 2006); Renu Sinha, *Impact of Experience on Decision Making in Emergency Situation*, Lulea University of Technology (2005).

The late Colonel John Boyd developed the OODA (Observe, Orient, Decide, Act) loop or cycle from his experience as a fighter pilot.²⁷ The OODA loop model posits that an officer—and the suspect—makes decisions in a dynamic situation through observation of circumstances, orientation to the perceived threat and forming a mental image of the unfolding circumstances, deciding on an action script and executing the selected action. The OODA loop is time-competitive. The officer's goal is to complete his or her OODA loop in a combat situation before the suspect completes the OODA loop. Victory goes to the person with the fastest OODA cycle processing.

Boyd's work and the work of those who built upon his concept of the OODA loop demonstrate that reaction speed in a crisis moment is perhaps as critical as the actual execution speed of the response. Discretionary time is rare, if not altogether absent in tense, uncertain and rapidly evolving situations. Reducing the time allotted to the decision-making component in the OODA loop is a primary objective of quality use of force training.

The goal of the constitutional based, START-enhanced training program that we advocate is to couple RPD with physical skills, refine the skills, and imbue an officer with confidence in the selected response. Trainers facilitate intuitive responses when the responsive actions have been experienced and mastered in training scenarios. Officers must be trained to recognize unfolding patterns as they rapidly develop, which means that we must provide them with pattern recognition experiences in training scenarios. START requires intensive reality-based scenario training, increasing intuitive response and decreasing decision making time in the OODA loop. Colonel John Boyd called this "implicit guidance and control."

Constitutional based, START-enhanced training begins with the presentation of police use of force—an unambiguously legal subject—in the same fashion as any other legal subject in the academy and in-service curriculum. We believe that officers who learn the intricacies of legal limits on search and seizure, arrest and detention, interrogation and other legal topics, are fully capable of grasping nuances of constitutional limitations on force. We know that those to whom we are accountable, the public, and those who hold us accountable, courts and political officials, expect no less.

It is an easy transition from teaching use of force law in the police academy to teaching recruits about the agency's use of force policy. Prevailing police use of force policies are based on the Supreme Court's overriding guidance in [Graham v. Connor](#) and its progeny. There is no dissonance created when officers are taught through scenarios using a constitutional base for force decisions and then guiding the officers' performance on the streets with a policy grounded on [Graham v. Connor](#).

Use of force training should also be consistent with how force decisions are evaluated. A linear force continuum illustration is not consistent with model or pattern jury instructions in use in state and federal courts across the nation. Judges demand that attorneys craft jury instructions tailored to the facts in the particular case and solidly grounded in the law. A common jury instruction in a lawsuit alleging excessive force by police provides:

Force is not excessive if it is reasonably necessary under the circumstances to [detain/make a lawful arrest]. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following:

(a) The seriousness of the crime at issue;

²⁶ Lt. Col. Brian Murray, *You Have to Be Mental to be a Fighter Pilot*, Canadian Air Force Journal, 45-46, Vol. 3, no. 4 (Fall 2010).

²⁷ Grant T. Hammond, *The Mind of War: John Boyd and American Security*, (Smithsonian Inst. Press 2001).

(b) Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; and

(c) Whether [name of plaintiff] was actively [resisting [detention/arrest]] [attempting to avoid arrest].²⁸

The elements of this jury instruction, required for use in a trial alleging excessive police force under 43 U.S.C. section 1983, are plainly drawn from the landmark case of [Graham v. Connor](#). The United States Supreme Court has articulated the law of use of force, at the same time providing Fourth Amendment jurisprudence as the proper jury education tool. Several noted police defense attorneys, including the lead counsel for the officers in [Graham v. Connor](#), have commented on the damage that force continua wreak on efforts to defend officers accused of excessive use of force.²⁹

Constitutional based, START-enhanced training is outcome-based, not formula-based and incorporates training to defuse, de-escalate and disengage from force. A continuum instructs when to use force; it does not ask or teach when *not* to use force. Stair steps, ladders, X-Y axis skyward arrows and barometers—the most common visual representations of force continua—all imply increasing force, adding force and don't accommodate visual cues for de-escalation of force. Training to a force continuum visual model is conditioning to that model, thereby shrinking room for creativity and flexibility as the officer addresses a critical incident. Constitutional based, START-enhanced training is outcome-based, not formula-based.

Experience and evidence suggests that constitutional based, START-enhanced training promotes significantly better thought process in both force decision making and in written reports. The Federal Law Enforcement Training Center conducted research to validate its methods to test recruit performance in use of force testing scenarios. The initial research was conducted at a time that FLETC used a stair-step force continuum to teach use of force law. Recruits generally selected an appropriate force option. However, while 70% of the recruits selected the correct force option, only 57% of the recruits correctly stated the legal justification for the use of force.³⁰ The latter is not a particularly attractive number for an administrator or for legal counsel defending the officer and the agency.

After FLETC revised its use of force curriculum with a constitutional based curriculum presented through intensive reality based scenarios and evaluations, FLETC staff replicated the research study with recruits who had been trained with the new curriculum. The results were remarkable and instructive. In the second study, recruits trained with a constitution-based use of force curriculum selected the correct force option 100% of the time.

FLETC testing also showed that 83% of those recruits were able to properly articulate a lawful justification for their selected force option.³¹ The quality and comprehensiveness of post-incident reporting directly correlates to the defensibility of the officer's action. Officers who are trained to perceive, assess and respond to threats are intuitively more prepared to articulate the threats that they perceived and the

²⁸ California Civil Jury Instructions. [Excessive Use of Force](#): Unreasonable Arrest or Other Seizure—Essential Factual Elements.

²⁹ Dr. John Peters and Michael A. Brave, [Force Continuums: Are They Still Needed](#), 22 Police & Security News 1, (Jan./Feb. 2006).

³⁰ J.L. Meyerhoff, *et al.*, [Evaluating Performance of Law Enforcement Personnel During a Stressful Training Scenario](#). Annals of the New York Academy of Sciences, 1032(1): p. 250-253 (2004).

³¹ T.N. Wollert & W.A. Norris, [Stress and Decision Making](#), Survival Scores Research Project, Federal Law Enforcement Training Center: Glynco (2011).

reasons for their force responses. We believe that constitutional based, START-enhanced training can lead to a higher level of safety for officers because they are trained and tested in perceiving threats before the threats mature to assaults and they respond earlier with possibly less force. This is important when considering how an agency responsibly and effectively manages risk, provides “police services” and operates in and interacts with the community. As Gordon Graham, a noted lecturer and risk management expert, has said: “What always amazes me is that ‘safety’ seems to take a back seat on these discussions.” Graham wryly notes that some in the profession seem to say, “let’s make it as complex as we can so that officers and deputies have to think a lot prior to acting.” We believe that constitutional based, START-enhanced training provides a higher level of safety for officers both in the field and in the courtroom.

V. Conclusion

We should not—indeed, cannot fairly—discuss use of force in a vacuum. It begs a much larger question. Law enforcement trainers, officers, legal counsel and policy makers should engage in dialogue about how or where use of force fits into the larger picture of the underlying purpose and role of law enforcement. The U.S. Constitution is based in part upon John Locke’s concept of the social contract.³² This social contract gives legitimacy to the role of police in society and basically holds that the purpose of government is to better protect the rights that people naturally possess: life, liberty and property. Citizens agree to give up their power to enforce their own rights to the government. As an agent of government the police are bound by this social contract. Their power is held as a public trust. We would argue that using principles from the Constitution and the Bill of Rights as the basis for use of force training is appropriate for policy and training models.

Our suggestion is a constitutionally based use of force policy and education and training tool (education is key) that relates use of force to the larger organizational, community and societal context. This is much the same approach to education and training that the U.S. Navy took when they embarked on a program of redesigning their entire curriculum (and organizational culture) to reflect an “ethics across the curriculum” approach to candidate and officer training and education. Because use of force training doesn’t exist in isolation, it must be tethered to something—and we believe that is the constitutional authority and framework under which we are allowed to operate. We recommend that, as an integral part of any use of force training (including our START model which is constitutionally-premised threat assessment and response training) there be continuing emphasis on communication, containment, negotiation, the exercise of restraint, de-escalation strategies and non-violent conflict resolution techniques.

Comprehensive education and training efforts should have as their goal the achieving of a civil rights compliant agency so that officers understand how to operate effectively within a larger constitutional context which both empowers us and which also constrains the use of allowable force. Even though the research suggests that use of force incidents are a very small subset of police-citizen encounters, they are certainly a subset that causes untold problems, expense and disharmony. We believe that we should be moving the profession toward a framework of continuous improvement best practices with constitutional and civil rights as the primary organizational value.

Because the U.S. Supreme Court has definitively articulated the constitutional standard for the use of force, and given the present national economic conditions and increasing use of regional structures, task forces and mutual aid, there seems to be a compelling argument for policy consistency across jurisdictions—particularly as it relates to thresholds for the use of force. We wonder why, when the Constitutional standard governing the use of force is the same everywhere in the country, why the policy and training should be so vastly different across jurisdictional lines? The constitutional/START model makes a powerful argument for working toward a national continuous improvement of best practices approach to police risk management. Such a best practices based approach on issues that should be

³² Locke 1690/1986.

uniform across jurisdictions could serve to bring the clarity and uniformity that a best practices model suggests—unlike the present proliferation of diverse and inconsistent policy and training models.

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