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Teaching 4th Amendment-Based Use-of-Force

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Developing an amendment-based use-of-force training program takes a lot of work, insight, collaboration and foresight. Critics of the amendment-based approach highlight “Graham’s direction to be objectively reasonable in light of the totality of the circumstances cannot be transferred straight from the law book to the street.”^[1] While this is procedurally correct, it is the substantive approach that makes the amendment-based approach viable.

To date, there has been limited direction on how to train and teach the reasonableness standard. Most often, only the discussion on the legal standard is presented and oftentimes, the trainer only focuses upon the 4th Amendment standard, even though his or her agency may also need training on the 8th and/or 14th Amendment standards. In 2000, the Wyoming Law Enforcement Academy (WLEA) began developing how to teach an amendment-based use-of-force training program for peace officers, detention officers and corrections.

WLEA formally launched the new training program in January 2001. Through training approximately 2,000 officers since the program’s inception, the program has evolved with

the latest revisions occurring in 2011. Following WLEA in 2005, at the federal level, the Federal Law Enforcement Training Center (FLETC) transitioned to an amendment-based use-of-force program using a similar methodology.^[2] The purpose of this article is to provide insight, based on the WLEA model, for transitioning from a continuum to amendment-based use-of-of force training and offer a trainer's perspective to developing and teaching a 4th Amendment use-of-force training program.

❖ **“Clearly established law” establishes training**

In the mid 1970's, Prof. Gregory Connor created the first “force continuum” as an instructional aide, designed to assist criminal justice trainers throughout the country.^[3] LAPD developed the “Force Continuum Barometer” which was published in their 1978 training bulletin. In 1980 longtime international trainer, Kevin Parsons, Ph.D., developed the “Confrontational Continuum.”

According to Parsons, “The concept of the continuum was to explain to officers ‘when’ to use force options as opposed to the traditional defensive tactics class which dealt only with ‘how’ to use force options. Thus, the continuum was designed to be a training tool.”^[4] John C. Desmedt of Protective Safety Systems, Inc. developed a “Use of Force Model” concept in 1981.

According to Desmedt, “In order to produce a valid model, it would have to be organized essentially as our original model.”^[5] Years later, in 2003, the use-of-force “Sector Model” was created by Ken J. Good of Strategos International and was described as “an evolution in Use of Force models.”^[6] Historically, agencies and training providers developed their own use-of-force programs generating a variety of contemporary continuums consisting of stair steps, ladders, barometers, matrices, etc., which total more than 50 different models.

Through the years, continuums increased in complexity it seems for no other reason than to reinvent the wheel producing several differing standards to explain to a jury. So why have varying use-of-force continuums been accepted by law enforcement trainers and the legal community without debate for so many years?

The general concept of use-of-force is, “A law enforcement officer may use that amount of force upon a person that the law allows. A law enforcement officer may not use more force upon a person than the law allows.”^[7] As the Tenth Circuit Court of Appeals stated, “Clearly established law dictates training, not the other way around.”^[8] Thus, an understanding of clearly established law is imperative for a use-of-force trainer. Clearly established Federal law is defined as “the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.”^[9]

Historically, from 1952 to 1985, the Supreme Court applied a Fourteenth Amendment substantive due process analysis to excessive force claims against police.^[10] It was not until 1972 when the Second Court of Appeals provided a four-part test and a definitive statement to further define the shocks-the-conscience standard, "...force that is brutal and offensive to human dignity..."^[11] In 1985 the United States Supreme Court's landmark case [Tennessee v. Garner](#) began a slight shift in clearly established law and away from Fourteenth Amendment substantive due process analysis.

The court ruled, "the use of deadly force to apprehend a suspect is a seizure under the Fourth Amendment objective reasonableness standard..." A police officer may not seize an unarmed, non-dangerous (fleeing felon) suspect by shooting him dead.^[12] The court went on to provide guidance for lower courts conducting judicial analysis of officer's decisions in this particular circumstance.

In 1989 in [Graham v. Connor](#), the Court moved the judicial analytical focus from the long used Fourteenth Amendment substantive due process, to the Fourth Amendment objective reasonableness standard. The court expanded post incident analysis to include all uses of force.

"The notion that all excessive force claims brought under § 1983 are governed by a single generic standard is rejected." "Instead, courts must identify the specific constitutional right allegedly infringed by the challenged application of force and then judge the claim by reference to the specific constitutional standard which governs that right."^[13]

To say the years from 1985 to 1989 created a change in clearly established law is an understatement. [Tennessee v. Garner](#) and [Graham v. Conner](#) changed the post use-of-force analysis process for the courts and indirectly provided an opportunity for change for the law enforcement community and their use-of-force trainers. Some argue it mandated change via clearly established law.

❖ **Teaching the 4th amendment reasonableness standard**

Since 1989 multiple use-of-force training courses and conferences around the country presented the legal points of the [Graham v. Conner](#) case and the reasonableness standard. Many presented by former or retired law enforcement officers who are now attorneys. However, a critical missing link between the legal world and the law enforcement community and their trainers was created. There was very limited direction on HOW to train the reasonableness standard, only discussion on the legal standard.

As previously stated, the [Garner](#) and [Graham](#) decisions were directed towards the legal profession in the context of use-of-force post-incident analysis, making the court-provided guidelines very appealing for use-of-force investigators at all levels. However,

when developing a decision-making use-of-force training program for the officer, which includes report writing and testifying guidance, the substance and the training methodology are critical variables to ensure there is not a casual transferring of legal principles to the law enforcement classroom.

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.

For example, at the WLEA, 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."^[14]

The court provided directive guidance in the *Tennessee v. Garner* case, providing factors to aid in describing the totality of the circumstances. Along with these factors new guidance was given to fact finders (courts) analyzing uses of force:

- 1) "Proper application requires careful attention to the facts and circumstances of each particular case.
- 2) Must be judged from the perspective of a reasonable officer on scene not 20/20 hindsight.
- 3) Must embody allowance for split-second decisions in tense, uncertain, and rapidly evolving situations.
- 4) 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."^[15]

❖ Teaching the *Tennessee v. Garner* standard

In 1985 the Supreme Court established rigid preconditions for using deadly force (shooting with a firearm) in the context of preventing the escape of a violent fleeing felon. In 2007 the Supreme Court further stated in *Scott v. Harris*, “*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute deadly force.”

Garner was simply an application of the Fourth Amendment’s “reasonableness” test, *Graham* to “the use of a particular type of force in a particular situation.”^[16] In the Tenth circuit, as recent as 2010, lower courts continue to use the *Tennessee v. Garner* standard to judge officer’s use of deadly force (shooting with a firearm) to prevent escape.^[17]

For these reasons the *Garner* standard is currently included in the WLEA use-of-force curriculum. *Garner* provided several factors, the court stated, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”^[18]

When teaching the first factor, probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, emphasis is placed on the probable cause standard. Differing from reasonable suspicion, probable cause is the standard for making an arrest without a warrant. Thus, if an officer does not have articulable information to place the person under arrest for a violent crime, the factor cannot be satisfied, resulting in a no-shoot situation.

The second factor is, deadly force may be used if necessary to prevent escape; however, the *Garner* court did not clearly define what “necessary” means. In 1997, the Ninth Circuit Court of Appeals, further defined necessary, “The necessity inquiry is a factual one “Did a reasonable non-deadly alternative exist for apprehending the suspect?”^[19] If the suspect is fleeing with a gun in hand, tackling the suspect, using OC Spray or a baton to prevent his escape would certainly not be reasonable.

The final factor is, give a warning of the imminent use of force, if feasible. There are two inquiries to be answered by an officer in determining when it is both feasible and appropriate to issue a warning prior to using deadly force to apprehend a fleeing suspect.

- 1) “An officer first should consider whether the suspect is aware that the police are trying to apprehend him, such that he has knowledge that he should stop.”
- 2) “If an officer reasonably believes, based on the suspect’s prior conduct, that such a warning would not cause the suspect to surrender, but rather would provoke the

suspect to engage in violent and life-threatening behavior, or to increase his or her efforts to flee, then a warning is not feasible.”^[20]

In the training environment, officers will at times passionately debate the reasonableness of using deadly force in the context of a fleeing felon. In the legal world, most all decisions are debatable. The goal in training *Garner*'s rigid guidelines is to encourage the officer make the least debatable use-of-force decision in the context of using firearm to prevent escape.

❖ Teaching the *Graham v. Connor* standard

The [*Graham v. Connor*](#) use-of-force post-analysis factors included, but were not limited to, “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.”^[21] Using the *Graham* factors for decision-making and a report-writing template for training purposes requires an adjustment in the alignment of the original factors.

The first and most important factor for an officer in decision-making as well as report writing is threat assessment. In 2002, FBI Special Agent Thomas D. Petrowski, J.D., stated, “The cornerstone of use-of-force training should be threat assessment.” Petrowski further explained, “officers must be trained to respond to the *threat* of violence and not to the *actual* violence itself, guarding against the inherent presence of hesitation.”^[22] When training threat assessment, elements of ability, opportunity, and intent can help train officers to reasonably come to their conclusions”, as “[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern”.^[23]

The second is active resistance. Given the officer's presence and verbal commands, the suspect is left with the decision to comply or actively resist. Several definitions are available to choose from. The WLEA defines active resistance as “Some physical or mechanical means willfully used to resist,” and is based on the premise that resistance is an act of the subject's will.^[24] The ninth circuit court of appeals has even provided guidance, “Resistance, however, should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer.”^[25]

The Supreme Court in *Graham* gave the directive to post analysis fact finders, “Reasonableness of particular use of force must be judged from perspective of reasonable officer on the scene, and the calculus of reasonableness must allow for fact that police

officers are often forced to make split-second judgments, in circumstances that are tense, uncertain and rapidly evolving, about amount of force that is necessary in a particular situation.”^[26] Although not a factor, the pacing of the event for an officer making a decision to use force can determine the difference between an imminent threat versus an immediate threat.

For example, depending on the totality of circumstances, a suspect walking towards an officer with a baseball bat versus a suspect running towards the officer is a significant element in making a decision. After all, if the fact finder must allow for split-second decisions, as it provides a means to articulate the totality of the circumstances for the written report.

The final decision-making factor is the severity of the crime at issue. It is important to keep this factor in context, as it is the crime that is causing the officer to use force at the moment. For example, the officer is dispatched and arrives on scene to a disturbance without known weapons. As the officer investigates, a suspect escalates the situation by drawing a knife and threatening the officer. The latter is the crime at issue, not the disturbance that brought the officer on scene.

❖ Conclusion

Choosing to adopt the amendment-based approach to use-of-force training program that includes a correlating policy is the decision of the agency administrator. There is another viable way of training use-of-force versus the traditional continuum style. The courts do not recognize a force continuum when analyzing the reasonableness of an officer’s use-of-force was reasonable under the 4th Amendment.

The amendment-based approach to use-of-force training allows the officer and agency a unified methodology with the adjudication process. With product risk and safety warnings directing officers to their agency policy for when to use force options, there is potential municipal liability without an operational plan for an agency’s use-of-force training program. Policy guides the officer’s decisions and municipalities act through official policy makers. If a person has proof their deprivation of constitutional rights was caused by a policy that approved an unconstitutional practice, or a policy that is deliberately indifferent to a known risk, liability attaches.^[27]

Notes:

1. Lorie Fridell, Steve Ijames, and Michael Berkow, “[Taking the Straw Man to the Ground: Arguments in Support of the Linear Use-of-Force Continuum](#),” *The Police Chief* 78 (Dec. 2011): 20-25.

2. John Bostain, "Training without Force Continuums: Learn to Love the Law" CalibrePress.com Street Survival Newsline, Mar. 19, 2009.
3. Gregory Connor, "Understanding and Application of Force Alternatives: Overview," www.use-of-force.com (Accessed Feb. 22, 2012)
4. John G. Peters and Michael A. Brave, Force Continuums: Are They Still Needed?" Police and Security News 22, no. 1 (Jan./Feb. 2006)
5. John C. Desmedt, "[The Use of Force Paradigm for Enforcement and Corrections](#)", Protective Safety Systems Inc. (Accessed Feb. 22, 2012)
6. Doug Nicholson, [Use of Force Models: Comprehension or Confusion](#), www.Articlesbase.com, Posted June, 2009 (Accessed Feb. 22, 2012)
7. Michael Brave, "[TASER Electronic Control Devices \(ECDs\): Legal Update](#)" (Dec. 19, 2010).
8. [Weigle v. Broad](#), 544 F.3d 1143 (10th Cir. 2008).
9. [McClish v. Evans](#), 2009 U.S. Dist. Lexis 80666 (E.D. Cal. Aug. 21, 2009).
10. [Rochin v. California](#), 342 U.S. 165, 172 (1952); [Tennessee v. Garner](#), 471 U.S. 1, 7 (1985).
11. [Johnson v. Glick](#), 481 F.2d 1028 (1973).
12. [Tennessee v. Garner](#), 471 U.S. 1, 7 (1985).
13. [Graham v. Connor](#), 490 U.S. 386, 394 (1989).
14. [Bell v. Wolfish](#), 441 U.S. 520, 559, 99 S.Ct. 1861 (1979).
15. [Graham v. Connor](#), 490 U.S. 386, 394 (1989).
16. [Scott v. Harris](#), 433 F. 3d 807 (2007).
17. [Brooks v. Gaenzle](#), 614 F.3d 1213 (2010).
18. [Tennessee v. Garner](#), 471 U.S. 1, 7 (1985).
19. [Forrett v. Richardson](#), 112 F. 3d 416, citing *Brower v. County of Inyo*, 884 F.2d 1316, 1318 (9th Cir.1989).
20. [Ridgeway v. City of Woolwich](#), 924 F.Supp. 653 (1996).
21. [Graham v. Connor](#), 490 U.S. 386, 394 (1989).
22. Thomas Petrowski, Use-of-Force Policies and Training – A Reasoned Approach, FBI Law Enforcement Bulletin, Nov. 2002, p. 28.
23. [Deorle v. Rutherford](#), 272 F.3d 1272 (9th Cir. 2001).
24. Wyoming Law Enforcement Academy, Use-of-force training curriculum (2011).

25. [*Bryan v. McPherson*](#), 590 F.3d 767; rehearing en banc [denied](#), 630 F.3d 805 (2009).
26. [*Graham v. Connor*](#), 490 U.S. 386, 394 (1989).
27. Klotter, J., Kanovitz, M., “Constitutional Law (8th edit., Anderson Pub. Co, 1999) 446-448.

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