

**The Bill Blackwood
Law Enforcement Management Institute of Texas**

Reasonable Force

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ABSTRACT

This paper will discuss the advantages to the force option model and the disadvantages to force continuums. The U.S. Supreme Court case of *Graham v. Connor* was decided in 1989, over 20 years ago. The Graham decision applied the Fourth Amendment's objective reasonable standard to use of force by law enforcement; still a large majority of police agencies choose to use some type of use of force continuum instead of a constitutionally based force option model. The force option model is based in law and improves an agencies legal standing. Police departments should develop policies and training that apply the force option model and move away from policies and training that operate under force continuums.

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INTRODUCTION

According to the Texas Commission on Law Enforcement Officer Standards and Education, the state of Texas has approximately 74,791 peace officers. Texas peace officers serve an estimated population of 26,059,203 people ("State & county quickfacts," 2013). It is estimated that over 1,000,000 arrests are made each year in the state of Texas (Puzzanchera, Adams, & Kang, 2014). With those types of numbers, police use of force is inescapable. According to a 2001 nationwide study done by the International Association of Chiefs of Police, "police used force at a rate of 3.61 times per 10,000 calls-for-service. This translates to a rate of use of force of 0.0361%. Expressed another way, police did not use force 99.9639 of the time" ("Police Use of Force," 2001, p. i-ii).

Police rarely use force, but when they do, it is heavily scrutinized by the public and the courts. In a survey conducted by the Bureau of Justice Statistics (2008), 74% of respondents believed that the threat of force or the actual force used against them by police was excessive. In that same survey, 84% of the respondents believed the police acted improperly. Force is defined by the International Association of Chiefs of Police Law Enforcement Policy Center as "any physical effort used to control or restrain another or to overcome the resistance of another" ("Use of Force," 2006, p. 2). Force can be broken down into two broad categories: deadly force and nondeadly force. Deadly force is "force that creates a substantial risk of causing death or serious bodily injury" ("Use of Force," 2006, p. 2). Nondeadly force is force other than deadly force ("Use of Force," 2006). Force options would include the use of empty hand control techniques, such as takedowns and strikes; less lethal weapons like chemical sprays,

impact weapons, and conducted energy weapons; lethal force such as the use of a firearm. The method of use of a particular force option would determine whether it is considered deadly force or nondeadly force. Force does not include officer presence or verbal commands ("Use of Force," 2006). Excessive force is defined as "the application of an amount and/or frequency of force greater than that that required to compel compliance from a (willing or unwilling) subject" ("Police Use of Force," 2001, p. 14).

Over the years, federal courts have created case law that has stimulated training, policy, and procedure on how police officers respond to resistance and aggression, more commonly referred to as use of force. A policy is defined as "a definite course or method of action to guide and determine present and future decision making under a given set of circumstances within the framework of corporate objectives, goals, and management philosophies" (Kinnaird, 2007, p. 202-203). Procedures are the methods for how something actually gets accomplished (Kinnaird, 2007). Currently, two predominant schools of thought exist on policy and decision making for use of force incidents. One model is the force continuum, the other is the force option model (Flosi, 2012).

Force continuums are graphic displays that provide officers with a "range of force options in response to a suspect's action. Though there are many various articulations of force continua, a typical continuum usually progresses from 'officer presence' to 'deadly force' 'in rigid steps'" (Wallentine, 2009, p. 1). According to the National Institute of Justice (2009), force continuums are policies that guide an officer through levels of increasing force. Force continuums task officers with using the proper level of force in a given situation.

Force continuum models can be classified into four categories: linear, modified-linear, matrix, and wheel. The four different continuum models come in different shapes and provide various advantages and disadvantages with their use. The linear model ranks force options available to an officer by level from least to greatest. The modified-linear model is similar to the linear model but adds in subject resistance and provides officers options for escalation and de-escalation. The matrix model compartmentalizes resistance and provides available response options for that resistance in chart form. The wheel model provides resistance and available options to that resistance in a wheel or circle format (Terrill & Paoline, 2013). The first force continuums are believed to have been created in the late 1960s. Over 50 various types of continuum are in use today. They range in ease of application from difficult to clear cut. Continuums were intended to be training tools that guided officers in use of force incidents (Peters & Brave, 2006a).

The force option model is more of a concept than a model. The force option model “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” (Flosi, 2012, p. 1). The force option model has also been referred to as a continuumless or “just be reasonable” standard (Fridell, Ijames, & Berkow, 2011).

Force continuum models are not based on current legal standards, are inflexible, and increase liability. The force option model is based on current legal standards and provides officers with options that consider the totality of the circumstances. Police

departments should develop policies that apply the force option model and move away from policies that operate under force continuums.

POSITION

In 1952, the U.S. Supreme Court decided *Rochin v. California*, which clearly established that police conduct that shocks the conscious violates the fourteenth amendment. Then, in 1972, the Court of Appeals for the Second Circuit developed a four-part test in *Johnson v. Glick* to determine whether an officer's use of force would shock the conscience. The four-part test considered the following: the objective need for force, the relationship between the need for and the amount of force used, injuries, and the officer's intent when using force (Wallentine, 2009).

Thirteen years after the Court of Appeals for the Second Circuit developed the four part test, the U.S. Supreme Court decided *Tennessee v. Garner*, (1985). In that case, Edward Garner was a fleeing suspect in a residential burglary, and Elton Hymon was a responding Memphis police officer. Hymon shot and killed the unarmed Garner as he attempted to flee over a fence (*Tennessee v. Garner*, 1985). Garner's father filed a lawsuit. The U.S. Supreme Court determined that the use of deadly force is a seizure under the Fourth Amendment objective reasonableness standard. Justice White delivered the opinion for the court and stated, "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or other" (*Tennessee v. Garner*, 1985, p. 4).

Four years later, U.S. the Supreme Court applied the objective reasonableness standard to *Graham v. Connor* (1989). Dethorne Graham was a diabetic that was

detained during an investigative detention. Officer Connor was a Charlotte police officer, who observed what he thought was suspicious criminal behavior and then detained Graham. Graham was eventually released but was injured during his detention (*Graham v. Connor*, 1989). Graham filed a lawsuit, and Chief Justice Rehnquist delivered the opinion of the court, stating this about excessive force claims “in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person. We hold that such claims are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard” (*Graham v. Connor*, 1989, p. 8).

In deciding *Graham v. Connor* (1989), the U.S. Supreme Court held that all claims of excessive force while making a seizure will be analyzed under the Fourth Amendment and will be judged under its objective reasonableness standard (Peters & Brave, 2006b). The Graham decision provided the lower courts with a guide to assist them in determining reasonableness that could easily be written into police agency policy. While the Graham decision could have affected police use of force policy across the nation, it did not. In a 2013 nationwide study of more than 600 police agencies, 80% indicated they use some type of use of force continuum (Terrill & Paoline, 2013). The Graham decision “is the federal constitutional legal standard that governs an officer's use of force, unless state law is more restrictive, this is the only standard that need appear in an agency's use-of-force policy regarding seizures of free people” (Peters & Brave, 2006b, p. 1).

What is most interesting about the Graham decision is that the Supreme Court “did not decide whether the use of force by the detaining officers was constitutionally

permissible, the Court defined how use of force by law enforcement should be constitutionally evaluated” (Petrowski, 2002, p. 1). The Supreme Court also stressed the importance of evaluating an officer’s use of force from the perspective of a reasonable officer without the aid of 20/20 hindsight (Petrowski, 2002). *Graham v. Connor* (1989) also provided lower courts with a three-pronged test to evaluate the reasonableness of a particular use of force. Courts are to consider the severity of the crime, the immediate threat to officers or public, and attempts by the suspect to resist arrest or flee (*Graham v. Connor*, 1989).

The force option model, which is based off of the current legal standard of objective reasonableness, takes into account the totality of circumstances and allows an officer to choose a reasonable response option to resistance or aggression. The force option model only requires that a particular response option be reasonable from “the perspective of a reasonable officer on the scene, rather than with 20/20 vision hindsight” (*Graham v. Connor*, 1989, p. 8). Reasonableness in a response is determined by assessing the totality of the circumstances to include the suspect’s crime, threat to officers and or public, and attempts to flee or evade (*Graham v. Connor*, 1989). Reasonableness is the pertinent factor, not what a use of force continuum says or recommends. The force option model does not require an officer to stick to a prewritten script that could not predict what may happen during a particular response to resistance and aggression event. Once again, reasonableness is the pertinent factor and 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” (*Graham v. Connor*, 1989, p. 11). The Supreme Court in *Graham v. Connor* (1989) was neither concerned with a use of force continuum nor whether an officer followed it.

Use of force continuums are inflexible models that are unable to consider the “tense, uncertain and rapidly evolving” (p. 11) circumstances in a response to resistance or aggression (Peters & Brave, 2006b). Use of force continuums give the perception that they must be strictly adhered to. The current “legal standards, such as those articulated in *Graham*, take numerous factors into account that continuums do not. For example, many continuums depict only the relationship between the subject's current behavior (‘actively resisting,’ for example) and the officer's force response” (p.2). In short, use of force continuums cause self-imposed requirements that are not based in law.

Plaintiff councils often use force continuums to influence juries that an officer did not use the minimum amount of force necessary or the “best level of force” (Williams, 2002, p. 17). Use of force continuums can feed into this thought process and “judges, juries, and police administrators erroneously substitute the continuum standard for the constitutional legal standard or commingle the two standards when analyzing a use-of-force event” (Peters & Brave, 2006b, p. 2). Police officers are scrutinized in use of force events. When an agency employs a continuum approach to their use of force policy, it can open the officer and agency to more scrutiny and liability. An officer's use of force can be considered reasonable under the current legal standard and still violate agency policy that follows a continuum approach (2006).

Another concern of the continuum approach is the “theory of escalating or de-escalating force” (Williams, 2002, p. 17). Continuums tend to be officer based rather than suspect based. Juries hear that an officer should have escalated or deescalated in a use of force as it relates to the use of force continuum. What the juries do not hear and should is what the suspect did to cause a particular response from the officer. The force option model provides an “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” (Flosi, 2012, p. 1). In the end, what matters whether the use of force is objectively reasonable considering the totality of the circumstances (Williams, 2002).

COUNTER POSITION

Critics of the force option model, like Fridell, Ijames, & Berkow (2011), do not believe that *Graham v. Connor* (1989) offers well-defined standards to officers in using force. They argue that the reasonableness standard in *Graham v. Connor* (1989) is imprecise and ambiguous. Their contention is that officers need more guidance to make use of force decisions with continuums because “continuums are designed to facilitate an officer’s understanding of what ‘reasonableness’ means (Fridell, Ijames, & Berkow, 2011, p. 3).

The reality is the U.S. Supreme Court demonstrated in their *Graham* decision that they understood “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” (*Graham v. Connor*, 1989, p. 11). The Supreme Court most likely understood that to be precise and exacting is not

possible because every circumstance is different. The Supreme Court did, however, provide the lower courts with a guide to determine what a reasonable use of force is. Police officers can use the same guide to determine reasonableness in their use of force responses by doing what the Supreme Court said and assess the totality of the circumstances to include the suspect's crime, threat to officers and or public, and attempts to flee or evade (*Graham v. Connor*, 1989).

Even with the guidance of *Graham v. Connor* (1989), some continuum supporters believe that the continuum is still needed to train officers on what is reasonable (Fridell, Ijames, & Berkow, 2011). However, that position is not true. Officers can be trained to work under the force option model by educating them in the law and then having them apply it in scenario-based training. Scenario-based training is designed around scenarios that mimic real world events. Officers are put into these scenarios and are told to respond how they normally would on the street. After the completion of the scenario, officers are then required to "articulate and justify their responses based on the law and policy" (Flosi, 2012, p. 2). This type of training is guided by experienced trainers with clear objectives. In this way, officers learn what is reasonable through as close to real life events as possible.

When an agency chooses to use the force option model and teach officers what is reasonable, agency-level police training teaches agency policy and or agency procedure. It is not "critical that use of-force-policy and training not be based on strict rules or, as the Court said in *Graham*, 'mechanical applications.' The law is defined by the realistic functional aspects of each case" (Petrowski, 2002, p. 25). Force continuums can't possibly include every possible scenario that an officer may

encounter. Therefore, agencies should understand that “in use of force training, legal and practical considerations are not two separate subject matters; they are complementary” (p. 25).

RECOMMENDATION

Use of force continuums have been in existence since the late 1960s. There is no definitive date to when the use of force continuum began making its way into police agency policy, but one can assume that it was relatively close to its development date. If that assumption is true, then use of continuums have been in operational policy for over 40 years. Still today “a large majority of police agencies (more than 80%) use some type of continuum. Of these agencies, the linear design was, by far, the most frequently used (73%), followed by matrix/box designs and circular/wheel designs” (Terrill & Paoline, 2013, p. 57). What is even more interesting is that police agency administrators that use a force continuum in their agency policy are aware of the shortcomings of the continuum based policy, but they still use it in policy (Terrill & Paoline, 2013). Police departments should develop policies that apply the force option model and move away from policies that operate under force continuums.

Police agency administrators and trainers need to review their use of force policy and rework that policy so that it adheres to a constitutionally based force option model. The force option model is grounded in the current legal standard of objective reasonableness and is subject based rather than officer based. Take, for example, the Round Rock Police Department’s (2012) response to resistance and aggression policy that “places minimal reliance upon the use of force and authority. Department members shall respond to resistance or aggression only with the force that appears reasonable to

bring an incident under control” (p. 5-1). A policy similar to the one above is constitutionally based and helps guard agencies and officers from plaintiff attorneys that would use force continuums against them.

Some pundits still argue that force continuums are needed for training and clear guidance. The Supreme Court provided the guidance in its decision in *Graham v. Connor* (1989). Officers should assess the totality of the circumstances to include the suspect’s crime, threat to officers and or public, and attempts to flee or evade (*Graham v. Connor*, 1989). Police agencies need to provide the use of force or, better yet, response to resistance or aggression training. Training that is scenario based and requires the officer to explain their response under the objective reasonableness standard should spearhead this initiative. If agency trainers and administrators apply these philosophies in the future to their use of force policies and training, it will place them on solid ground when force is used.

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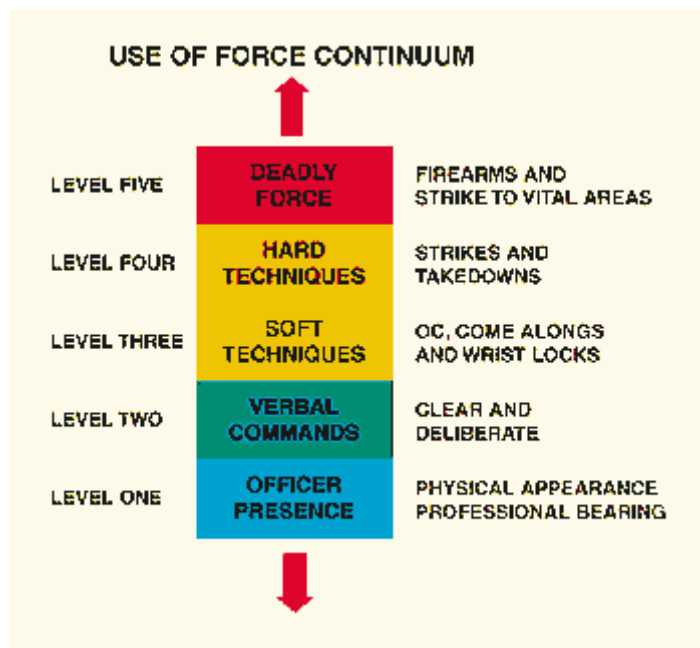
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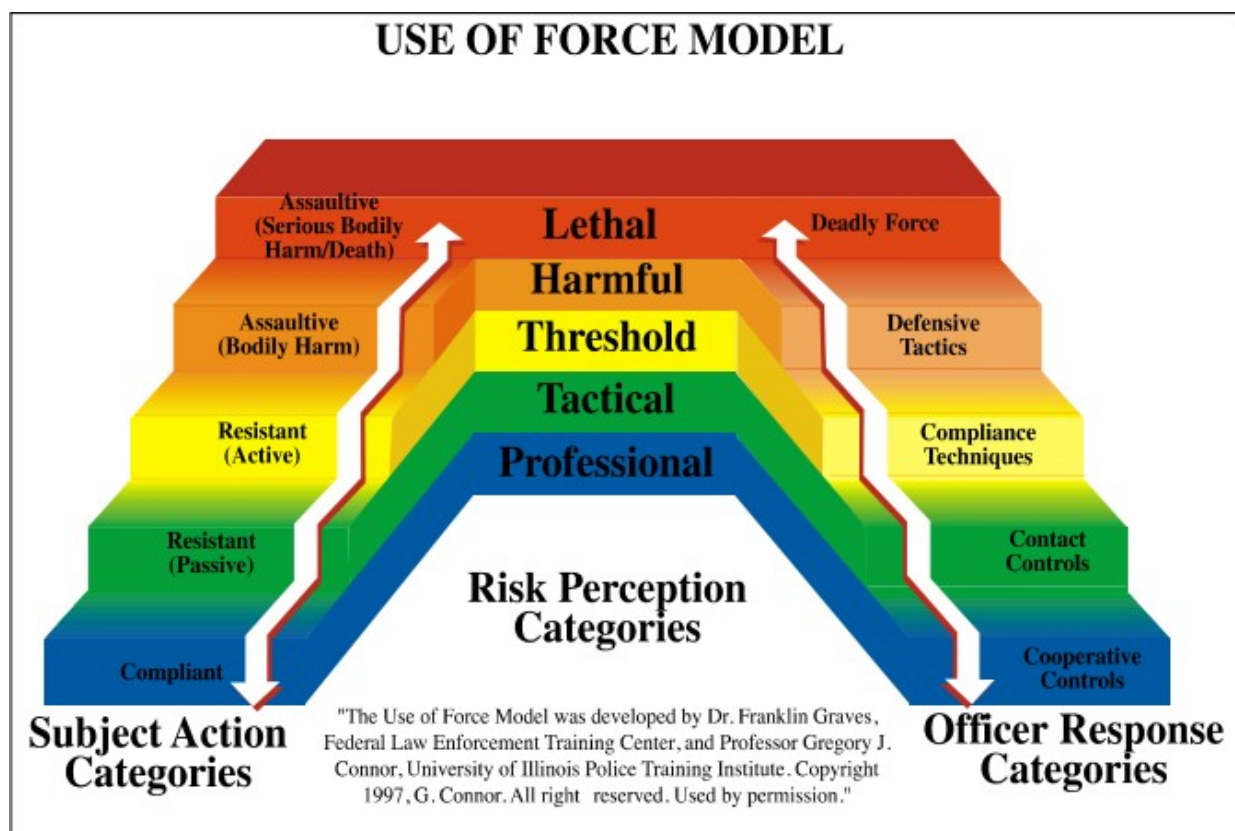
APPENDIX 1

Linear Model



APPENDIX 2

Modified Linear Model



APPENDIX 3

Matrix Model



USE OF FORCE MODEL CHICAGO POLICE DEPARTMENT

Assailant	Actions will likely cause death or serious physical injury	Subject's Actions: Probable Control Difficulty / Danger	<div>Probable Ineffective Control</div> <div>Probable Excessive Control</div>
	Actions will likely cause physical injury		
	Actions are aggressively offensive without weapons		
Resister	ACTIVE* Movement to avoid physical control Variable Dynamics		
	PASSIVE Non-movement in response to verbal and other direction Variable Positioning		
Cooperative Subject	Subject(s) cooperative, only in response to direction Variable Risk		
	Subject(s) cooperative without direction Variable Distance		

Officer's Reaction: Probable Reversibility / Control / Tissue Damage

Social Control: Presence of Law Enforcement Representative	
Used Alone	Used with means of physical control
Verbal Control: Persuasion /Advice /Warning	
Used Alone	Used with means of physical control

Control Modes without Weapons		
Holding	Stunning	Direct Mechanical
Pain Compliance/ Neuro Muscular	Diffused pressure striking	Direct body mechanics against body structure
Control Modes with Weapons		
Control Instruments		Impact Weapons Impact Munitions
OC Spray/Chemical Weapons (Individuals not part of a group or crowd) See "Force Options" for use of OC guidelines for "Resisters"		
OC Spray/Chemical Weapons (Groups, crowds, and individuals taking part in a group or crowd) Superintendent or Designee Approval Required		
Capsaicin II Powder Agent Superintendent or Designee Approval Required		
LRAD Acoustic Transmission Superintendent or Designee Approval Required		
Taser **		
Canine ***		

Firearms and Other Lethal Force

Note: With permission of the authors, the Use of Force Model has been modified to conform with the Chicago Police Department General Order entitled "Use of Force Guidelines."

- See addendum entitled "Force Options" for appropriate options and specific guidelines on active resisters.
- See addendum entitled "Force Options" for specific conditions on the use of tasers.
- See addendum entitled "Canines as a Force Option" for specific conditions on the use of canines.

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APPENDIX 4

Wheel Model

