

Bruce Baker

From: [REDACTED] (DCJS)
Sent: Monday, November 30, 2020 9:42 AM
To: [REDACTED] (DCJS); Bruce Baker
Subject: RE: Use of Force Question

Hi Bruce,

Thanks for reaching out. We stopped using the continuum as a training aid a few years ago with the adoption of the new *Use of Physical Force and Deadly Physical Force* lesson plan in the Basic Course for Police Officers which was required to be taught beginning in 2018. If you recall, previously the section was much shorter and essentially consisted of a restatement of Article 35. We determined that this was the wrong approach for several reasons, not the least of which is that Article 35 is a defense to criminal liability and not a decision-making tool for police officers and the fact that Article 35 excuses conduct that would clearly be unconstitutional. The continuum was actually in the Defensive Tactics program, but we dropped it there too.

Your reference to the continuum as a "standard" illustrates one of the problems with the continuum. Use of force use of force continuums were developed as *training tools* – many before the current controlling case law was even decided. Prior to the effective use of 42 U.S.C. §1983 to address police use of excessive force in the 70's & 80's, agencies were left to train officers on use of force using state justification statutes like Article 35. Many states didn't (and still don't) have similar statutes and the current case law hadn't yet been decided. What was seen as controlling was the *Glick* decision which, relying on a test devised in 1952(i), was widely interpreted to require that a plaintiff claiming excessive force show that an officer acted with malice in applying force "for the purpose of causing harm." Since the constitutional standard could not be trained to (how do you train cops not to act sadistically or maliciously?), agencies devised use of force continuums to assist officers in understanding what was expected of them. Again, during this time, the case law was not instructive, because the substantive due process analysis that existed provide no guidance to officers. So LAPD came up with their thermometer style and other agencies came up with pyramids, step-ladders, and eventually circular shapes.

In 1989, the United States Supreme Court, in a 9-0 decision, declared that use of force by law enforcement officers was a question not of the 14th Amendment's Due Process clause, but of the 4th Amendment's *reasonableness* and removed the requirement that a plaintiff show that an officer's use of force "shocks the conscience." Additionally, they declared that this standard required a careful balancing of the rights of the individual with the legitimate interest of government and required an analysis of the "totality of the circumstances" of the situation. They also cautioned that the standard was not capable of "precise definition or mechanical application." But law enforcement already had their continuums and law enforcement trainers were already training with them, so police training went largely unchanged.

But the standard *had* changed. And here's where I want to stress that continuums were never a standard... they were a training tool to be used in the *absence* of a workable standard, which is what we had before under the hodgepodge of state laws and the substantive due process standard under the constitution. But 31 years ago, SCOTUS gave us a standard that is workable and is trainable and takes into account the rights of citizens and balances them with the legitimate interest of government, again in a unanimous Court decision. And the courts – SCOTUS and the lower courts – kept giving them to us. We've got decision after decision that

can be used to training police officers in the lawful use of force. Of course, there are policy provisions that an agency may choose to enact that are not necessarily constitutionally unreasonable... shooting at moving vehicles or banning of neck restraints. There's nothing preventing an agency from adopting those provisions within policy and training to them.

Continuums are not a standard but have become to be viewed as such; they are the attempt at a mechanical application that SCOTUS warned us about. No matter how complex they become or what shape they take, they cannot allow for a consideration of the totality of the circumstances which is what's required by the constitution. They don't, for instance, tell an officer that a 35 year old man with a baseball bat is not the same as a 10 year old armed with one or that a Taser on a fire escape is a different amount of force than a Taser in the grass. They don't differentiate between closed fist strikes to a person who is against a wall vs a person who is not. They can't account for the relevance of the number of officers or suspects or the size, age, or physical condition of those suspects. They can't account for mental condition, known physical abilities, or known violent history of a suspect. All of these things (and more) are required to be considered by the constitution.

One final critique of continuums (but I have more)... the argument that a color-coded chart can be used to help an officer make a decision is laughable to anyone who's ever made a decision under time compressed, rapidly evolving, and uncertain circumstances – the very definition of the police decision-making environment. That's simply not how human beings make decisions and that rational decision-making model has been rejected by those that study decision-making of the type engaged in by police officers. If you'd like to talk further, I'd be happy to. Additionally, I might suggest keeping an eye out for our 2-day Use of Force Refresher course where we going into the constitutional standard in great detail and discuss methods to train it too. There are none currently scheduled, but that should change soon!

Best,

Senior Training Technician - Police, Office of Public Safety

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P.S. - Here's a webinar that Daigle Law Group recently conducted on use of force
<https://digitallearningcenter.com/free-webinar-use-of-force-continuum/>

From: [REDACTED] (DCJS) <[\[REDACTED\]@dcjs.ny.gov](mailto:[REDACTED]@dcjs.ny.gov)>
Sent: Friday, November 27, 2020 10:48 AM
To: Bruce Baker <bruce.baker@co.schoharie.ny.us>
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Subject: RE: Use of Force Question

Bruce,

I am copying [redacted] in my response, as he is best to answer the questions regarding the continuum. I have attached a copy of the MPTC model policy for your review in case you have not had a chance to review it. It may help with some of your questions until [redacted] is able to respond.

[redacted] will get back to you early next week.

Thank you,

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From: Bruce Baker <bruce.baker@dcjs.ny.gov>
Sent: Friday, November 27, 2020 10:39 AM

To: [redacted] <[redacted]@dcjs.ny.gov>

Subject: Use of Force Question

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Good morning-
As part of the Governor's reform order, I have been assigned to the Sheriff's Office task force. As such, our community representatives have been pursuing input with regards to our use of force policy. They frequently sight Campaign Zero and similar groups that seek a use of force continuum rather than NYS's objective reasonableness approach. As such, we have tried to explain the fact that NYS has determined the standard and as such trains officers to that standard. I am wondering if you could possibly tell me 1) When did NYS discontinue following the continuum standard? And 2) is there a specific document (outside of Graham v. Connor, or the training manual that would indicate the NYS reasoning? We have completed our newest policy in accordance with the 2019/2020 legal updates and wish to roll it out, however we want to ensure the community we are not making an arbitrary decision to overlook the continuum ideal. Any help would be greatly appreciated. Thank you

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