

REPORT
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The Police Canine Bite: Force, Injury, and Liability

by

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force. These non-deadly force options include physical contact, holding, hitting; use of pepper spray or mace—chemical weapons; the use of a baton—impact weapon; the use of a Taser or stun gun—electronic weapon; and the use of bean bag impact projectile — kinetic energy weapon. In addition to these weapons the police are equipped with other devices that have become considered, arguably, tools rather than weapons. These tools include flashlights, police cars, and barking police canines (the terms K-9, police dog, service dog, and patrol dog are used synonymously). However, the moment a police officer hits a person with a flashlight, rams a person or another vehicle with a police car, or causes a police dog to bite someone, these tools instantly become instrumentalities of force, even if one chooses not to use the term weapon.

Obviously, police dogs and police cars are quite different instrumentalities of force, yet ironically, they have something in common and provide a good example of the canine use of force dilemma. Neither is considered a weapon traditionally, but both can be used to apply force and even deadly force. In April 2007 the United States Supreme Court decided in *Scott v. Harris* that a police officer who stops a high-speed chase by ramming a fleeing suspect's car does not violate the Fourth Amendment when the fleeing car poses an actual and imminent threat to others. The opinion weighed the need to prevent the harm the driver could have caused, against the high probability that the driver would be harmed by the officer's use of force.²

This research addresses the use of force in police situations where the police instrument of force is a police canine. Of course these situations involve suspects on foot, who may be suspected of or who have committed a felony, a misdemeanor, or even a minor traffic violation, who may be armed or unarmed, and who may or may not be a

² *Scott v. Harris*, 127 S. Ct. 1769 (2007).

are trained to bite down hard, bite with full-mouth using all the teeth, bite multiple times/places, and hold until handler commands the dog to release.^{7, 8}

⁷ P.C. Meade, Police and Domestic Dog Bite Injuries:

arrest. However, an officer must not initiate force, but rather respond to a suspect's threat and/or resistance with a level of force that is appropriate and proportional to overcome that threat and/or resistance. The force options are the police techniques used to gain control and an individual's compliance, often through the deliberate and lawful infliction of pain. These include a continuum of force ranging from mere verbal commands and escalating to the application of pain through hand and arm control holds, pepper spray, stun gun/Taser, baton strikes, impact projectiles (Kinetic Energy Impact Projectiles), canines, police cars, and ultimately the use of deadly force.

A Force Continuum is one of the common police use of force training techniques used to translate the law and police policies to meaningful police procedures and practice. A force continuum is used to provide a structure for determining the appropriate amount of force an officer may use to control a subject in response to a subject's resistance. Since numerous variations of force continua are used by police agencies, the authors will use the *Confrontational Force Continuum* as a reference.

The *Confrontational Force Continuum* is an example of the models used to train police officers in the United States in the use of force. This model consists of seven steps. They are as follows:

Step I. Officer Presence

The officer assumes control of the situation or suspect through his announced and/or uniformed presence.

Step II. Verbal Command

Presence has failed; the officer now begins verbal persuasion/dialog and if needed command/warning mode to take control of the incident.

Step III. Open Hand

Where practical, the officer places his hand on the suspect and advises him that he is under arrest. All resistance beyond this point is unlawful and must be countered by the officer. This step often leads to a wrestling match, grabbing, and pushing.

Step IV. Pain Compliance

This is where officers may employ pressure point control or oleoresin capsicum (OC). Officers may utilize OC at Step III whenever an accelerated reaction using higher force is appropriate. The potential for weapons, considerable size difference, multiple suspects, combative behavior, the influence of alcohol, controlled substances, or other drugs could justify this greater force.

Step V. Mechanical Compliance

The usual methods of mechanical compliance include wristlocks, arm bar, or other come along techniques. These employ counter joint pressures and leverage. They may be applied utilizing handcuffs or the police baton (as a lever

Step VII. Deadly Force

This ultimate step is appropriate only to protect yourself or another from death or serious injury, or to apprehend a forcible felon when you have exhausted all other reasonable means of apprehension and the suspect presents an imminent risk to the community if not immediately apprehended. Where practical, a verbal warning must be given.¹¹

Of significance to this paper is *Step VI. Impact*. It is here where police, generally may use batons, Taser/stun gun, and flexible and non-flexible impact projectiles (e.g., gun fired bean bags, rubber, and plastic projectiles) to the body (not to the neck or head) to overh(e)4nenot to the neck or h

Apprehension of Suspects

1. The deployment of a police canine for the location and apprehension of a suspect is a use of force that must be consistent with this escalation of force.
2. Decisions to deploy a canine shall be based upon
 - a. the severity of the crime;
 - b. whether the suspect poses an immediate threat to the safety of the officers or others; and
 - c. whether the suspect is actively resisting arrest or attempting to evade arrest at the time.¹³

III. Law Enabling Officers to Use Force

State and federal criminal laws provide explicit provisions for the use of force in law enforcement. Section 508 of the Pennsylvania Crimes Code is an example of such a law.

§508. Use of Force in Law Enforcement.

- (a) Peace officer's use of force in making
arrest.

1. A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He

¹³ Int'l Ass'n of Chiefs of Police Model Policies, *Law Enforcement Canines* (1991 and 2001).

is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest.

IV. Case Law Regarding the Police

Canine as a Use of Force

The Supreme Court in *Tennessee V. Garner* decided (a) Apprehension by the use of deadly force is a seizure subject to Fourth Amendment's reasonableness requirement.

was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's

court held that no particular case law is necessary for a police officer to know that excessive force has been used when an officer sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control.²³ Further, in *Watkins v. City of Oakland*, the court held that in some circumstances, the use of such a 'weapon' might be unlawful, and that use of a police dog is subject to excessive force analysis.²⁴

In *Marley v. City of Allentown*, the court held that a fleeing, unarmed misdemeanant could not be attacked by a police dog because the suspect posed no threat to the officer.²⁵ The Eleventh Circuit Court held in *Kerr v. City of West Palm Beach*, that

constitute deadly force. Depending upon the circumstances, the use of so-called Less Lethal weapons may constitute deadly force.³³

The need for research to better understand the extent physical force applied by a police canine can and, in fact, does result in injury, is essential for this developing area of law. Moreover, knowledge and understanding of the dynamics of police canine bites and the likely known extent of injuries will play an important role in the assessment of present and development of future police policies, corresponding training, and police canine operations.

V. Police Use of Force Policy

A review of more than 90 law enforcement agencies' force and canine policies, found that the majority of agencies do not include or specifically mention canines in the agencies' use of force policies. Likewise, many agencies follow the IACP model and do

in their use of force training.³⁵ Bostain questions whether use of force continuums are necessary.³⁶ Given the complexity of use of force decisions, especially those involving police dogs, discontinuance of continuums is being considered with caution.

The ambiguity of the police canine as an instrument of force, lies at the heart of much of the legal, policy, and training controversies. Peters states, according to the Department of Justice, a force continuum should include all types of force used by an agency, including firearms, pepper spray, batons, and canines.³⁷ Since the law does not provide adequate operational guidance for police officers using force, and particularly police canine officers deploying dogs to apprehend suspects, law enforcement agencies and professional organizations must. The International Association of Chiefs of Police Model Policy, *Use of Force*, February 2006, is consistent with current constitutional law and is used to guide police agency policies, training, and ultimately police officer performance. The Model Policy states:

It is the policy of this law enforcement agency that officers use only the force that reasonably appears necessary to effectively bring an incident under control, while protecting the lives of the officer and others. It must be stressed that the use of force is not left to the unfettered discretion of the involved officer. This is not a subjective determination. The use of force must be objectively reasonable. The officer must only use that force which a reasonably prudent officer would use under the same or similar circumstances.

³⁵ FLETC, Confrontation Force Continuum (n.d.)

³⁶ John Bostain,

Deadly force: Force that creates a substantial risk of causing death or serious bodily injury.

Objectively Reasonable: This term means that, in determining the necessity for force and the appropriate level of force, officers shall evaluate each situation in light of the known circumstances, including, but not limited to, the seriousness of

canine/handler training, sequence of tactical events at the bite encounter, suspect's clothing, and a host of other variables became apparent and were considered.

Because of the complications posed by these variable and random factors the authors decided to examine the result of force, i.e., hospital visitations as a result of police use of force with batons, Tasers/stun guns, canines, and projectile weapons. This approach was adopted since medical record privacy issues prevented matching police use of force reports to specific injury victims/patients.

During May and June 2006, a survey instrument was designed and sent to 29 law enforcement agencies, in the United States and Canada, identified as using all of the previously mentioned weapons. From the initial response a general lack of injury data caused by the police use of force was apparent. Therefore, a second mailing was sent to the police departments/services in the four largest cities in each of the 50 states and the 50 largest cities in Canada. The combined two mailings of 279 surveys resulted in a return of 69 with 30 usable surveys. Selected telephone follow-up calls were made to 30 non-responding police departments/services with each stating they did not respond to the survey because they either did not collect or were unable to retrieve police canine and use of force data with related injuries.

VII. Analysis and Findings

The first research question involves looking at all police departments with or without a Mandatory Hospital Visitation Policy over all types of Use of Force. What proportion of Use of Force incidents result in a Medical/Emergency Room/Hospital Visitation for all departments?

The overall picture is that in non-mandated Medical/ Emergency Room/Hospital Visitation policy departments the rate is 21.8% of all reported incidents (See Table 1). The visitation rate for Mandated departments is 58.0% of all reported incidents. The

Table 1

Use of Force Visitation Mandate Status Comparison with Hospital Visitation for All

Departments

Medical/Emergency Room/Hospital Visitation

Table 2

In departments where no mandate or policy exists, the Canine Force Type resulted in a Medical/Emergency Room/ Hospital Visitation rate of 67.5% of all reported

The clear overall finding is that the Canine Force Type results in a higher proportion of hospital visitations than any other Force Type category. This leads to the recommendation that, although biting police canines are non-lethal force, they are much more likely to result in medical service visitation than other less than lethal weapons/devices considered in this research. Therefore, police canines that are trained to

VIII. The Police Canine Re-Conceptualized

Although, the police dog, at law, is not considered deadly force, it does create a substantial risk of causing serious bodily harm. Based on the research findings, the authors suggest the police canine needs to be reconceptualized as the physical equivalent of a police baton with spikes three centimeters in length, the approximate length of German Shepherd teeth (i.e., a spiked impact weapon capable of sustained puncturing, compression-pressure, pulling, and tearing).

If police officers were issued a baton with three centimeter spikes when would its use be objectively reasonable, where would it fall on the use of force continuum, and what policy limitations and restrictions would be placed on its use? Of course, it can be argued rationally that the police should not be issued a spiked baton. Can it then not be argued rationally that the police should not be issued a spiked/toothed canine? Clearly, the police dog has unique characteristics useful to law enforcement other than as an instrumentality of force, which requires careful consideration.

IX. A Calculus of Liability

Lawsuits (state and federal) are a frequent consequence of police dog bite incidents. Police policymakers must consider basically two choices: preventing lawsuits before they are filed and winning lawsuits after they are filed.

As with police vehicle pursuit policies, law enforcement agenc0 0 14(for)6(e)4(th)-11(e)-1558 woig

restrictive canine policies argue that banning or restricting police canine use (and vehicle pursuits) will promote lawlessness.

In its simplest form the use of police canine liability calculus has two elements: the initiating event and the resulting injury sustained by the citizen/suspect. On one side of the equation are the *Graham* factors (seriousness of the crime, level of threat, and degree of resistance). On the other side of the equation is the type and degree of injury suffered by the citizen/suspect.

In this calculus, the police handler and canine have control over the initiating event. Once the canine is engaged, the part of the suspect's body the canine will bite is random and not under the control of the handler. The handler has control to call-off the engagement; however, the canine may or may not always respond immediately to the call-off. Further, the research findings herein provide some basis for assessing the need to use force by police canines in light of the resulting injury of that force. It is this calculus that makes restrictive canine policies attractive.

Agencies who want to reduce injury to citizens and in turn reduce the risk of lawsuits will adopt restrictive canine policies, including training options that limit biting. Such policies will eliminate citizen injuries from police canines that were initiated for minor crimes, non-violent felonies, and where the suspect was not threatening and resisting.

The Supreme Court, in *City of Canton, Ohio v. Harris* stated,³⁸

The inadequacy of police training may serve as the basis for 1983 liability only where the failure to train in a relevant respect amounts to deliberate indifference

³⁸ 489 U.S. 378, 388 (1989).

to the constitutional rights of persons with whom the police come into contact.

(...) Only where a failure to training reflects a deliberate or conscious choice by the municipality can the failure be properly thought of as an actionable city policy.

Moreover, the identified deficiency in the training program must be closely related to the ultimate injury.

This research may be of value as future questions and arguments are advanced regarding police canine training and whether a municipality's training of police dogs to bite rather than to bark rises to a constitutional issue.

The issue of excessive force asks, when is the force applied by a police canine, which is likely to produce serious injury, unnecessary or clearly excessive force? By viewing the police canine as a baton with three centimeter spikes, the *Graham* test and the legal standards of objective reasonableness, totality of circumstances, necessary force, excessive force, and liability gain clarity and take on a new dimension.

Recognizing this research found that police canine engagements are substantially more likely to result in a hospital visitation than baton strikes or impact projectile, law enforcement needs to rethink police canine policy, training, and deployment as a use of force. This is especially important when considering the potential for harm and subsequent liability.

IX. Police Canine Policy and Training Options

The need to have a police canine outrun a fleeing suspect is understandable and readily acceptable. However, what the canine does when it overtakes or finds a hidden suspect is at issue. Canine training to bark and circle/ find and bark and alternatively

bite and hold are two options, but the latter must satisfy the *Graham* test, because the authors argue it is the highest level of non-lethal force with a very high likelihood of serious injury to a suspect.

It is apparent the police canine is a different kind of force instrumentality. It is one member of a two member team (dog and handler). It can be projected out and

injuries approaches deadly force, certainly to the extent that if a police officer were confronted by a similar dog the officer would be justified in using deadly force against that dog because of the threat of serious injury or death to the officer.

Police canine policies and corresponding training set the limitations and utility of a police canine. Canines trained to bark and circle have greater flexibility and utility because of the reduced likelihood of serious injury to a suspect.

However, police policy makers should be prepared to make concessions when canines are trained to bite and circle. These canines should have the most restrictions and police policies and training should limit their deployment to clearly and actively resisting and violent felons who are posing a threat of injury to officers or others (the *Graham* test). Perhaps, a better approach is to return to the idea of the spiked police baton. Under what circumstances would an officer be justified, by agency policy, to use such an instrument of force?

The failure to include the police canine in police use of force policies and training, including use of force continua, may well reflect an organization's deliberate indifference to train and to ensure the safety and well-being of citizens in arrest situations. This study is offered as an effort to assist the law enforcement and legal communities to better assess the limitations and utility of the police canine.

Finally, this research found generally, that United States police departments surveyed did not keep records of injury seriousness as a result of officers' use of force. Beyond merely keeping count of use of force incidents, there was virtually a complete void of readily available and useable police data regarding the degree of harm suffered by citizens who have been subjected to all forms of police use of force. It is suggested that

law enforcement agencies collect, consistent with law,