DEFINING INSTRUMENTALITIES OF DEADLY FORCE

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I. INTRODUCTION

Byron Warnken, a professor of law at the University of Baltimore School of Law, was interviewed by the Maryland Daily Record when he made this comment: "We cannot expect the cops to be constitutional scholars."[1] Most judges and many lawyers would probably agree; police officers are not trained lawyers and they should not be expected to be constitutional scholars.[2] Nevertheless, thirty years of policing has taught me that while police officers may not be constitutional scholars, they are constitutional practitioners.

The body of law that is the subject of this Article—particularly in the context of force—would not exist but for the proverbial decisions made at three o'clock in the morning on the side of the road by non-lawyers. In fact, police officers in particular are responsible for crafting what courts later determine to be clearly-established law.[3]

With respect to force, a court will consider a police officer's actions from the perspective of the officer on the scene.[4] Courts give law enforcement great deference; they trust the officers' expertise and respect the fact that the situations police officers find themselves in are difficult and oftentimes unpredictable.[5]

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[1] Steve Lash, Evidence Excluded Despite Authorized Search Warrant, MD. DAILY REC., May 19, 2010, *available at* http://thedailyrecord.com/2010/05/19/evidence-excluded-despite-authorized-search-warrant/.

[2] *See* Saldana v. Garza, 684 F.2d 1159, 1165 (5th Cir. 1982) ("Certainly we cannot expect our police officers to . . . be held to . . . a legal scholar's expertise in constitutional law.").

[3] *See* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 411 (1997) (suggesting that "courts are not the sole source of law" and that police officers do not solely implement the law).

[4] *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989).

[5] *See id.*

The lower courts that evaluate use-of-force scenarios and wrestle with difficult fact patterns to see if they run afoul of the Constitution accomplish tremendous work as a result of this undertaking.[6] The reality, however, is that the Supreme Court of the United States has decided only three cases to help determine the scope and extent of appropriate force: *Tennessee v. Garner*,[7] *Graham v. Connor*,[8] and *Scott v. Harris*.[9]

Many lower court opinions that discuss use-of-force mention at least one, if not all three, of these cases.[10] These precedents comprise the body of law from which the notion of reasonableness is derived.[11] Do these cases alone, however, adequately define the use of force? Is that standard, as a tool, definitive enough to evaluate whether an officer's actions on the side of a road at three o'clock in the morning are good or bad?

Rachel Harmon, Associate Professor of Law at the University of Virginia, recently wrote an article entitled *When is Police Violence Justified?*[12] Professor Harmon takes the stance that the "reasonableness" standard is indeterminate:

> Criminal law already provides a well-established conceptual structure for deciding when, how, and why one person may justifiably use force against another. It does so in the context of justification defenses—such as self-defense, defense of others, and the public authority defense—each of which differentiates instances of legitimate force from impermissible exercises of violent will. Justification law provides a mechanism for balancing individual interests with our moral obligations to each other: It limits the interests

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[6] *See, e.g.*, Oliver v. Fiorino, 586 F.3d 898, 901 (11th Cir. 2009); Kuha v. City of Minnetonka, 328 F.3d 427 (8th Cir. 2003); Robinette v. Barnes, 854 F.2d 909, 911 (6th Cir. 1988).

[7] 471 U.S. 1 (1985).

[8] 490 U.S. 386.

[9] 550 U.S. 372 (2007).

[10] *See, e.g.*, Sanchez v. Fraley, 376 F. App'x 449, 451-54 (5th Cir. 2010) (discussing *Garner* and *Scott*); Landis v. Phalen, 297 F. App'x 400, 404-05 (6th Cir. 2008) (discussing *Scott*); Brewer v. City of Napa, 210 F.3d 1093, 1097-98 (9th Cir. 2000) (discussing *Garner* and *Graham*).

[11] *See generally Overview of the Fourth Amendment*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 3 (2007).

[12] Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119 (2008).

> we may defend, measures our need to respond to attacks, balances the difficulty of responding quickly to threats with the costs of our errors, and incorporates deontic limits on our permissible responses to wrongdoing. Assessing the constitutionality of police uses of force requires balancing precisely the same kinds of considerations. As a result, the law of justification provides a natural and powerful framework for evaluating the force used by law enforcement officers.[13]

II. SEIZURE UNDER THE FOURTH AMENDMENT

The fundamental question in any use-of-force analysis is whether the Fourth Amendment is even applicable.[14] To determine the admissibility of evidence—for example, contraband or real evidence—that was recovered as a result of a search or seizure, four factors are evaluated: (1) whether there has been government action;[15] (2) whether the defendant has a reasonable expectation of privacy;[16] (3) whether the defendant has standing;[17] and (4) whether there is evidence of a waiver, such as voluntary consent or abandonment?[18]

Once applicability has been determined, the next question is whether the case falls within the parameters of the Fourth Amend-

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[13] *Id.* at 1120.

[14] *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 551-52 (1980).

[15] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (holding that the protections of the Fourteenth Amendment are "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official' " (quoting Walter v. United States, 447 U.S. 649, 652 (1980) (White, J., concurring)).

[16] *See* Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (noting that a defendant must have a reasonable expectation of privacy in order to receive protection under the Fourth Amendment).

[17] *See* United States v. Taketa, 923 F.2d 665, 669-70 (9th Cir. 1991) ("The term 'standing' is often used to describe an inquiry into who may assert a particular fourth amendment claim. Fourth amendment standing is quite different, however, from 'case or controversy' determinations of article III standing. Rather, it is a matter of substantive fourth amendment law; to say that a party lacks fourth amendment standing is to say that *his* reasonable expectation of privacy has not been infringed. It is with this understanding that we use 'standing' as a shorthand term." (citations omitted)).

[18] *See* United States v. Garcia, 56 F.3d 418, 422 (2d Cir. 1995) (noting that it is "well established that the concept of knowing and intelligent waiver, which is strictly applied to rights involving a fair criminal trial, does not govern in the Fourth Amendment context").

ment.[19] The Fourth Amendment requires the existence of probable cause and the existence of a valid and duly authorized warrant.[20] However, there are certain exceptions to the warrant requirement that may also be considered by the court.[21]

Following a Fourth Amendment analysis, only one question remains: Did a seizure occur?[22] There are three cases that we look to in making this determination. Although *United States v. Mendenhall*[23] is the oldest of the three, it will be discussed last for purposes of explanation.[24]

The first case I will discuss is *Brower v. County of Inyo*.[25] In *Brower*, the perpetrator stole a car, ran away from the cops, and refused to stop.[26] The police implemented a roadblock by commandeering a tractor trailer.[27] Local police situated an 18-wheeler across the road behind a blind curve and flashed their lights as if to blind him.[28] When Brower came around the curve, he came to a screeching halt.[29] With that, Brower was seized "by the physical obstacle of the roadblock."[30] The Court held that the police officers' conduct was considered a seizure within the meaning of the Fourth Amendment.[31] The Court went on to state that a physical seizure occurs when there is an "intentional acquisition of physical control" to stop a person.[32]

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[19] *See* Arizona v. Gant*,* 129 S. Ct. 1710, 1716-18 (2008).

[20] *See* U.S. CONST. amend. IV.

[21] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (establishing that search incident to an arrest is lawful so long as the search is within the arrestee's "grab area"); Carroll v. U.S., 267 U.S. 132 (1925) (establishing an automobile exception to the warrant requirement).

[22] *See Mendenhall*, 446 U.S. at 553-54.

[23] 446 U.S. 544.

[24] *Id.* (holding that a person is seized when "by means of physical force or a show of authority, his freedom of movement is restrained").

[25] 489 U.S. 593 (1989).

[26] *Id.* at 594.

[27] *Id.*

[28] *Id.* ("Petitioners alleged that 'under color of statutes, regulations, customs and usages,' respondents . . . positioned a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be 'blinded' on his approach.").

[29] *See id.*

[30] *Brower*, 489 U.S. at 599.

[31] *Id.* ("[R]espondents, under color of law, sought to stop Brower by means of a roadblock and succeeded in doing so. That is enough to constitute a 'seizure' within the meaning of the Fourth Amendment.").

[32] *Id.* at 596-97 ("It is clear . . . that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally caused and governmentally *desired* termination

The second case is *California v. Hodari D.*[33] Jerry Pertoso and his partner were patrolling Oakland, California in a high-crime area, heavily saturated with drug activity.[34] They came across a group that was gathered around a car and they saw what appeared to be activity consistent with drug distribution.[35] The officers exited their unmarked police car with their badges of authority visibly displayed, which then prompted Hodari D. and his friends to get into their car and try to escape.[36]

At the delinquency hearing, Hodari D. moved to suppress the evidence seized, asserting a Fourth Amendment violation.[37] California's highest court agreed, holding that at the point he saw Officer Pertoso running towards him, Hodari D. had been seized for Fourth Amendment purposes.[38] However, the California Attorney General appealed to the Supreme Court, and the Supreme Court ruled otherwise.[39] The Court held that a seizure occurs when there is submission to a show of authority.[40] If Hodari D. came to a stop and submitted to Officer Pertoso's commands, he would have been seized for Fourth Amendment purposes—but that was not what happened here.[41] Hodari D. was not seized until he was tackled to the ground.[42]

The third and final Supreme Court case defining seizure of a person is *United States v. Mendenhall*,[43] which is a garden-variety drug interdiction case.[44] The Court held that when the facts and circumstances of a case are such that a reasonable person would feel

of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied*.").

[33] 499 U.S. 621 (1991).

[34] *Id.* at 622.

[35] *Id.*

[36] *Id.* at 622-23.

[37] *See id.* at 623.

[38] *See Hodari D.*, 499 U.S. at 623.

[39] *Id.* at 629.

[40] *Id.* at 625 (explaining that "a seizure occurs 'when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen' " (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968))).

[41] *Id.* (noting that "[i]f . . . Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest").

[42] *See id.*

[43] 446 U.S. 544.

[44] *Id.* at 546-47 (noting that Mendenhall was charged with possession of heroin with intent to distribute).

like he or she is no longer free to leave, it amounts to a seizure for Fourth Amendment purposes.[45] Once it has been determined whether a person has been seized for Fourth Amendment purposes, the next issue is whether the amount of force used was reasonable under the circumstances.[46]

III. REASONABLENESS OF THE USE OF FORCE

At this point in the analysis, the three Supreme Court cases mentioned earlier become applicable. The first, *Garner*, involved the constitutionality of a Tennessee law.[47] In *Garner*, the Court held that the exercise of deadly force to stop, arrest, and apprehend a fleeing felon was a seizure under the Fourth Amendment.[48]

Edward Garner was fifteen years old when he was shot in the back of the head by a Memphis police officer.[49] Garner broke into a house at around 10:45 one evening.[50] A neighbor called 911 and the police arrived shortly thereafter.[51] One police officer went to the rear of the house where he noticed a young man running across the back-yard, attempting to climb over a fence.[52] The officer commanded him to stop, but Garner continued to climb the fence and was ulti-

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[45] *Id.* at 553-54.

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."

Id. (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

[46] *See id.* at 554.

[47] *See Garner*, 471 U.S. at 4. The Tennessee statute in question provided that an officer "may use or threaten to use force that is reasonably necessary to accomplish the arrest" after giving notice of the officer's identity as a police officer. TENN. CODE ANN. § 40-7-108 (West 2010).

[48] *Garner*, 471 U.S. at 7 (holding that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment").

[49] *Id.* at 24 (O'Connor, J., dissenting).

[50] *Id.* at 3 (majority opinion).

[51] *Id.*

[52] *Id.*

mately shot in the back of the head and died.[53] Garner had merely ten dollars on his person and a purse that he had just stolen from inside.[54] Eleven years later, Garner's case made its way to the United States Supreme Court.[55]

The Court held that when balancing the government's interest against the individual's interest in being free from excessive, unreasonable uses of force, the interest of the citizen must prevail when the felon is nonviolent.[56] The rule of law that comes out of *Garner* is limited to deadly force, and only in the context of the fleeing felon.[57]

Graham, on the other hand, pertains to all uses of force.[58] In fact, *Graham* lays the foundation for the loose framework used to determine reasonableness of force.[59] The Court considered three fundamental questions in assessing use-of-force scenarios: (1) What is the nature or the severity of the offense?; (2) Did the suspect pose an immediate threat to the officers or others?; and (3) Is the suspect actively resisting or attempting escape?[60]

Dethorne Graham was a diabetic.[61] He was not feeling well one afternoon so he went to see his neighbor, William Berry, and asked for a ride to a convenience store to get orange juice because he was feeling ill and was unable to drive.[62] Berry put Graham into the

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[53] *Garner*, 471 U.S. at 4.

[54] *Id.*

[55] *Id.* at 3, 7.

[56] *Id.* at 11.

> It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

Id.

[57] *Garner*, 471 U.S. at 11-12.

[58] *Graham*, 490 U.S. at 388.

[59] *Id.* (holding that the "objective reasonableness" standard applies in excessive force analyses).

[60] *Id.* at 397 (noting that a pivotal "question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation").

[61] *Id.* at 388.

[62] *Id.* at 388.

car and they went to a Pilot Gas Station down the street.[63] However, when Graham got to the store, he saw that it was very crowded and decided to leave immediately because he felt increasingly ill.[64] A police officer saw him run out of the store.[65]

The officer followed Graham and Berry and eventually made an investigatory traffic stop.[66] Berry then notified the officer of Graham's medical problems.[67] As a result, the officer directed them to stay in the car while he ordered another unit to go to the convenience store to investigate.[68] However, Graham got out of the car.[69] He started to go into a diabetic shock and was, consequently, mimicking the behavior of a person who is under the influence.[70] At some point Graham got out of the car, ran around the car a few times, sat down on the curb, and briefly passed out.[71] Responding back-up units placed Graham in handcuffs and, at some point, threw him head first into the front of the police car.[72] Ultimately, as a result of his encounter with the police, Graham suffered injuries and brought a lawsuit under § 1983.[73]

When the matter reached the Supreme Court, the Court aptly categorized the case as a use-of-force issue, and looked to the Fourth Amendment reasonableness standard.[74] The Court considered the totality of the circumstances, albeit without perfect hindsight.[75] In its reasoning, the Court attempted to stand in the shoes of the officer.[76] The Court found it particularly noteworthy that the circumstances officers find themselves in are often "tense, uncertain, and rapidly

[63] *See Graham*, 490 U.S. at 388.
[64] *Id.* at 388-89.
[65] *Id.* at 389.
[66] *Id.*
[67] *Id.* (informing the officer that Graham was "suffering from a 'sugar reaction' ").
[68] *Graham*, 490 U.S. at 389.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Graham*, 490 U.S. at 390 (noting that "Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder" and also claimed to have suffered "a loud ringing in his right ear").
[74] *Id.* at 397.
[75] *Id.* at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").
[76] *Id.*

evolving."[77] All the Court did, however, was define the standard; it then remanded the case back to the lower court.[78] The Court ordered the lower court to apply an "objective" Fourth Amendment analysis on remand.[79]

Graham laid down the framework under which all uses of force by the police are analyzed.[80] It also provided guiding principles as to how police officers, and the courts, will evaluate objective reasonableness.[81] Then, in 2007, *Scott* was decided.[82] While widely viewed as a victory for law enforcement in the context of vehicle pursuits, one could easily conclude that in reaching its holding, the Court failed to apply, or even consider, *Graham's* very useful three prong test. In fact, *Graham* is not even mentioned in a footnote in *Scott*, and *Garner* is mentioned only by analogy.[83] While the facts in *Scott* lend themselves perfectly to the *Graham* analysis, the Court reasoned that all that mattered was whether the deputy's actions in *Scott* were reasonable.[84] I suppose that this type of reasoning is precisely what Professor Harmon means when she writes that the current standard is "indeterminate."[85]

What does the Court mean when it says that all that matters is whether the deputy's conduct was reasonable? In *Scott*, the defendant was driving seventy-three miles per hour in a fifty-five mile-per-hour zone in Coweta County, Georgia.[86] The sheriff's deputy clocked the defendant's vehicle speeding and activated his emergency lights so the defendant would pull over, but the motorist did

[77] *Id.* at 396-97 ("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.").

[78] *Graham*, 490 U.S. at 399.

[79] *Id.* The Court noted that by using the new "objective" standard, the officer's credibility and any evidence of the officer's ill-will toward the citizen may be used in the court's assessment. *See id.* at 399 n.12. However, since courts often defer to the judgment of law enforcement personnel, this may prove to be a difficult undertaking.

[80] *See supra* text accompanying note 60.

[81] *Graham*, 490 U.S. at 396.

[82] *Scott*, 550 U.S. 372.

[83] *See id.* at 393.

[84] *Id.* at 383 ("Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable.").

[85] Harmon, *supra* note 12, at 1119.

[86] *Scott*, 550 U.S. at 374.

not pull over and a high-speed pursuit commenced.[87] The high-speed chase happened to be caught on camera, and the United States Supreme Court watched the video.[88] Ultimately, the Court held that the perpetrator put himself, as well as the police and other innocent motorists, at risk.[89] The fact that the deputy used a precision immobilization technique, for which he was not trained to use, was immaterial to the Court.[90] What truly mattered, according to the Court, was whether the deputy's conduct was reasonable for the purpose of stopping reckless driving behavior.[91]

Perhaps, the Court should have taken the opportunity to apply the *Graham* analysis to the facts in *Scott* and balance them with the nature of the offense. It was not the speeding that was dangerous—it was the reckless driving behavior that resulted from the speeding that was dangerous.[92] The reckless conduct was going the wrong way down one-way streets, driving at high rates of speed, and generally putting others at risk.[93] The threat to the officers was caused Victor Harris's driving behavior.[94] Similarly, the level of resistance, indicated by the "flight," is also evidenced through the reckless driving.[95] Finally, the threat to the general public was the erratic driving.[96] Nonetheless, the Court reasoned that it was the reasonableness of Deputy Scott's conduct that was significant.[97] Thus, the Court held that the procedure used to stop Victor Harris's car was reasonable for Fourth Amendment purposes.[98]

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[87] *Id.*

[88] *Id.* at 379.

[89] *Id.* at 383-84 (noting the difficulty in actually quantifying the risks involved).

[90] *See id.* at 375 n.1.

[91] *See Scott*, 550 U.S. at 381.

[92] *See id.* at 379 n.6 ("Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.").

[93] *Id.* at 379.

[94] *Id.* at 383-84.

[95] *See id.* at 384 (noting that Deputy Scott was forced to confront Harris's choice to flee the scene which ultimately brought about the pursuit).

[96] *See Scott*, 550 U.S. at 385 (demonstrating reluctance, however, "to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger").

[97] *Id.* at 383 ("Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable.").

[98] *Id.* at 386.

IV. DEFINING DEADLY FORCE

At the other end of the use-of-force continuum is the definition of deadly force.[99] The use of such force is not based on whether it could result in death; rather, it is based on the circumstances surrounding the force and whether the use of this type of force creates a substantial risk of death or serious bodily injury.[100] This definition has both a subjective and objective element. For Fourth Amendment purposes, the only thing of particular import is stated in the last two lines—that is, whether the instrumentality of force creates a substantial risk of causing death or serious bodily injury.[101]

One issue is whether the use or deployment of police canine and the electronic control device ("ECD") falls within the parameters of deadly force.

A. Canine Deployment

The first case dealing with canine deployment is *Kuha v. City of Minnetonka*.[102] In *Kuha*, Jeffrey Kuha went to a bar to drink with his friends and then returned to a friend's house.[103] Upon leaving his friend's home, he damaged a tire on his vehicle, which took some time to repair.[104] Kuha continued home around 5:30 in the morning, but failed to dim his headlights as he passed oncoming traffic.[105] Un-

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[99] *Compare* MODEL PENAL CODE § 3.07(2)(a) (2010) (defining use of force), *with* MODEL PENAL CODE § 3.07(2)(b) (2010) (defining use of deadly force).

[100] *See* MODEL PENAL CODE § 3.07(2)(b). Section 3.07(2)(b) of the Model Penal Code states, in pertinent part:

> The use of deadly force is not justifiable under this Section unless: (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that: (A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (B) there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

[101] *See* MODEL PENAL CODE § 3.07(2)(b)(iv)(B).

[102] 328 F.3d 427 (8th Cir. 2003). Notably, this case has been abrogated with respect to Part II.C., which is not applicable to this discussion. *See* Szabla v. City of Brooklyn Park, Minn., 486 F.3d 385, 395-96 (8th Cir. 2007).

[103] *Kuha*, 328 F.3d at 432.

[104] *Id.*

[105] *Id.*

beknownst to Kuha, the oncoming traffic included a police car, which doubled back and pulled up behind Kuha's car with activated emergency equipment.[106] Kuha stopped, but when the officer got out of the vehicle, Kuha fled to a grassy area with a good deal of foliage.[107] Meanwhile, a canine officer and "Arco," the officer's canine partner, responded to assist with the search.[108] After about thirty minutes, the dog found Kuha in the grassy area.[109]

Before proceeding further, it is helpful to comment on the manner in which police canines are trained. In the "find and bark" method, also known as "circle and bark," the canine is trained to bark so that the officer is alerted to a particular location where a subject may be hiding, or is otherwise concealed.[110] However, "find and bark" does not remove the possibility that the canine will actually engage the suspect, particularly if the suspect makes any abrupt movement.[111] In the "bite and hold" method, the canine is trained to actually engage the suspect.[112] The engagement has the practical effect of either reducing or removing any tactical advantage the suspect might have had over the officer.[113]

The "bite and hold" technique was used against Kuha.[114] Arco, the canine, grabbed hold of Kuha by biting his upper leg, while Kuha instinctively held Arco's head in an attempt to release the hold.[115] The canine officer ordered Kuha to release his grip before the dog would be called off.[116] After Kuha released his grip, Arco did as he was trained to do when the canine handler called him back.[117] However, the dog's engagement had already pierced Kuha's leg, resulting in an injury to his femoral artery.[118]

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[106] *Id.*
[107] *Id.*
[108] *Kuha*, 328 F.3d at 432.
[109] *Id.*
[110] *See Jarrett*, 331 F.3d at 143.
[111] *See id.*
[112] *See id.*
[113] *See id.*
[114] *Kuha*, 328 F.3d at 432.
[115] *Id.*
[116] *Id.* The officers wanted Kuha to raise his arms in the air in order to be sure that he was unarmed. *Id.*
[117] *Id.* at 432-33.
[118] *Kuha*, 328 F.3d at 432-33.

Despite a significant loss of blood, Kuha survived.[119] His position was much like the position of the plaintiff in the Sixth Circuit case, *Robinette v. Barnes*,[120] who alleged that the use of a canine dog under similar circumstances was, in fact, deadly force.[121] The court in *Kuha* rejected this argument, as had *Robinette*, based on the Model Penal Code definition of "substantial risk of causing death or serious bodily harm."[122] Notably, death is statistically rare in canine cases.[123] Despite this finding, the court in *Kuha* held that a jury could reasonably find an unreasonable use of force where a police dog is trained in the "bite and hold" method without giving someone a warning to surrender.[124]

The suspect was not so lucky in *Robinette*, a case that occurred approximately fifteen years earlier.[125] In *Robinette*, police responded to a burglar alarm in a car dealership.[126] Officer Barnes arrived on the scene with his dog Casey.[127] Officer Barnes gave two warnings as he went into the building and gave another warning once inside, commanding surrender.[128] Mr. Briggs, the suspect in this case, did not heed these warnings.[129] Barnes then followed Casey to the bay area of the used-car dealership, where he discovered that Casey had engaged Mr. Briggs, who was hiding by concealing himself under a vehicle.[130] By the time Officer Barnes was able to shine his light on the vehicle, he noticed that Casey had his mouth around the suspect's neck.[131] Barnes called the dog off and called for an ambulance, but Mr. Briggs died on the scene.[132] The court held that even

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[119] *See id.* at 433.
[120] 845 F.2d 909 (6th Cir. 1988).
[121] *Id*. at 911.
[122] *Kuha*, 328 F.3d at 434 (quoting MODEL PENAL CODE § 3.11(2) (2010)). "[U]nder the [Model Penal Code] definition our ultimate conclusion remains unchanged: the use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force." *Id.* at 435 n.3.
[123] *Id.* at 434-35 (noting that, as of the time of *Kuha*, *Robinette* was "the only published case where a suspect was actually killed by a police dog").
[124] *Id.* at 435.
[125] *Robinette*, 845 F.2d at 910.
[126] *Id.* at 911.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Robinette*, 845 F.2d at 911.
[131] *Id.*
[132] *Id.*

though the suspect died as a result of the bite, use of a canine dog is not deadly force because its use does not create a substantial risk of death or serious bodily harm.[133]

Despite the court's holding in *Robinette*, the Department of Justice has continued to take the position that best practice is achieved by training police canines in the "find and bark" method.[134] Notwithstanding such guidance, some police departments continue to train canines on the "bite and hold" method. The rationale is both practical and compelling. When a fleeing suspect takes a position of concealment, and thus cannot be seen by the officer or officers in pursuit, the suspect achieves a tactical advantage that may have dangerous consequences. When a canine trained in "bite and hold" is deployed, locates, and engages the hiding suspect, whatever tactical advantage that may have previously been achieved is neutralized and the handler and pursuing officers have the ability to react.[135]

B. Electronic Control Devices

Taser, the most widely known brand of ECDs, have become quite typical as a law enforcement tool, specifically because of their less-lethal capacity.[136] Presently, no court has concluded that use of an ECD constitutes deadly force.[137]

In *Oliver v. Fiorino*,[138] Anthony Carl Oliver was standing on the side of the road—on the median strip—when he flagged down an Orlando, Florida police officer by the name of Lauren Fiorino.[139] Office Fiorino got out of her car with an ECD in her hand at her side

[133] *Id.* at 912.

[134] *See* U.S. DEP'T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 5 (2001).

[135] *See Robinette*, 845 F.2d at 913-14.

[136] *See* Estate of Gilliam v. City of Prattville, 667 F. Supp. 2d 1276, 1293 (M.D. Ala. 2009) ("The use of a firearm against a person is presumptively the use of deadly force, while the use of a taser is not presumptively the use of deadly force. Indeed, tasers are marketed by their manufacturer and purchased for use by police departments precisely because they are a nonlethal alternative to firearms. In this respect, tasers are more similar to police batons than firearms: although a rogue police officer might unreasonably apply a taser with deadly force, when used properly by a reasonable police officer, a taser is designed to avoid death and not cause it.").

[137] Most courts, with the exception of the Ninth Circuit, acknowledge the risk, but have concluded that the use of electronic control devices by law enforcement is only a moderate use of force. *See id.*

[138] 586 F.3d 898 (11th Cir. 2009).

[139] *Id.* at 901.

because she was flagged down in an animated manner, and because Oliver attempted to enter her car once she had stopped.[140] Oliver told Fiorino that someone was shooting at him, however, Fiorino did not hear any shots fired and the dispatcher confirmed that a shooting had not taken place.[141]

Meanwhile, another officer who arrived at the scene began to assess whether or not Oliver's actions were such that may have warranted some type of emergency committal or involuntary detention.[142] At some point during this engagement, Oliver began to wander out into the street.[143] Although the officers tried to stop him, the decision was made, without warning, to employ the ECD; the device was activated against Oliver "eight times over a two-minute period."[144] When Oliver arrived at the hospital emergency room, he was pronounced dead on arrival with a body temperature of 107 degrees.[145]

The court said "The force employed was so utterly disproportionate to the level of force reasonably necessary that any reasonable officer would have recognized that his actions were unlawful."[146] The court applied the three-prong approach from *Graham* and found that Oliver was not accused of or suspected of any crime, let alone a violent crime, that he did not act belligerently or aggressively, but instead complied with most of the officer's directions, and finally, that he made no effort to flee.[147] Therefore, there was simply no justification for force under these circumstances.[148]

Bryan v. MacPherson[149] was a case reheard in June 2010. Carl Bryan had previously been issued a speeding ticket and was driving through the seatbelt-detection zone when he was pulled over by a police officer.[150] An ECD was activated on Bryan, which caused him to fall to the ground and resulted in four fractured teeth.[151] The

[140] *Id.* at 902.
[141] *Id.*
[142] *Id.*
[143] *Oliver*, 536 F.3d at 902.
[144] *Id.* at 902-03.
[145] *Id.* at 904.
[146] *Id.* at 908.
[147] *See id.* at 905-07.
[148] *See Oliver*, 536 F.3d at 905-07.
[149] 608 F.3d 614 (9th Cir. 2010).
[150] *Id.* at 618.
[151] *Id.* at 618-19.

court held that the officer was entitled to qualified immunity, but found that the use of the ECD constituted an intermediate significant level of force that must be justified by a strong governmental interest.[152] The court determined the "intermediate" level to be warranted because of the psychological effects, the higher levels of pain, and foreseeable risk of physical injuries associated with ECDs, placing them at a greater level of intrusion than other non-lethal methods of force.[153]

The court in *Bryan* considered two additional factors that most other courts have not taken into consideration in assessing an officer's reasonableness: the failure to give a warning of impending force and the officer's failure to consider less-intrusive means.[154] The Supreme Court has never held that consideration of less intrusive means is necessary, but rather that the officer must act reasonably.[155] Ultimately, the bottom line comes down to the fact that the use of a dangerous law enforcement tool is not, per se, a use of deadly force.

The Model Penal Code and our courts have provided sufficient guidance for determining what constitutes an instrumentality of deadly force. The answer simply comes down to whether the use of the instrument results in a substantial risk of death or serious bodily harm.

V. CONCLUSION

Body strikes, balance displacement, or use of chemical irritants, and more, all have inherent risks associated with their use. These risks increase when the tactic or instrumentality is used improperly or in a manner that is inconsistent with established policy, training, and law. Furthermore, use of these tactics and instrumentalities are oftentimes the means by which officers control an encounter and respond to acts of resistance. Without them, officers would be left to go "hands on" with violent, resistant, or otherwise "out-of-control" suspects. If this occurs, the results are almost always adverse.

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[152] *Id.* at 622.

[153] *See id.*

[154] *See Bryan*, 608 F.3d at 627.

[155] *See Garner*, 471 U.S. 1 (suggesting, but not mandating, that the police administer a warning).

Ideally, given an officer's force continuum, verbal commands and instructions will serve to accomplish the important mission of de-escalating a situation and establishing control. However, when they fail in their effectiveness, the tactics and tools in which a law enforcement officer is trained become the mechanisms by which they establish control and restore safety and order to a given situation.

Although the instruments that have been the subject of this Article have the *potential* to cause death or serious bodily injury, they may, and oftentimes do, aid police officers in resolving situations that may well escalate into a deadly force encounter.