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A PACK OF WILD DOGS? *CHEW V. GATES* AND POLICE CANINE EXCESSIVE FORCE

I. INTRODUCTION

The Fourth Amendment of the United States Constitution requires “[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures.”¹ The scope and interpretation of this Amendment has been debated in volumes of legal opinions, yet it is beyond argument that the Constitution applies to all citizens and every individual has the right to have any violation of it reviewed by a court of law.² Nevertheless, decisions involving police canine excessive force have robbed individuals of this fundamental opportunity³ and perpetuate a constitutional wrong without any chance for review.⁴

Police canines are not at the front of people’s minds as an extreme constitutional danger. This unexpected source has mushroomed in the Ninth Circuit, specifically Southern California, and has spread throughout the federal system.⁵ Police dog excessive force claims are similar in theory to other types of indirect police force,⁶ but police dog force is unique in several important respects.

1. U.S. CONST. amend. IV.

2. *See generally* Washington v. Davis, 426 U.S. 229 (1976) (stating that the rights of the individual are paramount).

3. “For more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard.’” Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. 223, 234 (1863)).

4. The recognition of the constitutional injury is taken up in Part II and Part III, *infra*.

5. *See* David G. Savage, *Necessary Weapons, or Excessive Force? A First of Two Parts*, L.A. TIMES, Feb. 29, 1996, at A1 (“Southern California leads the nation in police dog-bite lawsuits . . .”).

6. Indirect police force is force not directly caused by the officer himself. For example, shootings or pepper spray qualify as indirect force whereas a ba-

First, police canines are used primarily to detect as well as seize suspects. Second, canine force is frequently applied while the dog is out of sight of the deploying officer. Third, the canine, not the officer, determines and applies the amount of force.

Generally, police dog force arises under a typical scenario. A police dog handler (or "K-9 unit") is called by other officers to ferret out a hidden suspect in a building or junkyard. The handler and other officers warn the suspect to surrender or a trained police dog will be released and the suspect may be bit. If the cloaked person does not comply, the handler deploys the dog which uses its keen sense of smell to find the person. The dog then bites the suspect and holds him or her until the handler arrives and orders the animal off. The suspect is then taken into custody.

The typical police dog lawsuit occurs when the detainee is not resisting arrest, not dangerous, not violent, or not the intended suspect, but is bitten anyway. In that context, the dog bite constitutes excessive force and violates the Fourth Amendment guarantee of reasonableness.⁷ However, it is this author's contention that police dogs are per se unreasonable and, therefore, a violation of the Fourth Amendment. Yet, judicial illogic and bias protects police dogs from a fair review.

The judicial protection of police dogs typically begins when the injured detainee brings a lawsuit against the individual police officer and the municipality employing the police officer. Municipal employees enjoy a degree of qualified immunity, yet they can still be held liable under certain circumstances.⁸ The municipality itself cannot be held liable under any vicarious liability or respondeat superior theory, but may be held liable for any constitutional violations the city itself caused via its official practices and policies.⁹

The Ninth Circuit addressed the general issue of municipal liability in the police canine context in the aptly named *Chew v.*

ton does not.

7. See *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Terry v. Ohio*, 392 U.S. 1 (1968). The standard of review and reasonableness in excessive force cases is taken up in Part II.A, *infra*.

8. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664 (1978). The liability of a city and its employees is discussed in Part II.B, *infra*.

9. See *id.* at 690.

Gates.¹⁰ The court agreed with the general rule handed down by the U.S. Supreme Court that a city could be held liable for its police dog policy if a constitutional injury was found.

However, in *Chew*, the leading police dog bite case, the court set a high threshold for finding a constitutional injury. Trial courts must bifurcate the issue of individual police officer liability from the broader issue of municipal liability.¹¹ Therefore, unless a verdict has been rendered against the individual defendant police officer, the courts will presume that no injury occurred.¹² This results in two denials to the victims of police dogs. First, they cannot sue the municipality independently from the individual officer, despite the municipality standing as a separate defendant.¹³ Second, on the rare occasion when a constitutional injury is found, the victim is fully compensated for his or her harm and the city is only exposed to liability for nominal damages.¹⁴ These two denials have resulted in insulation from facial attacks on the police dog policy itself. This stance is contrary to U.S. Supreme Court and Ninth Circuit holdings.¹⁵

As devastating as the bifurcation procedure has been to litigating police dog use, it is not the only tactic employed by the courts to protect police dogs. By using an incomplete definition of deadly force, courts have labeled police dogs as nondeadly and denied the more rigorous standard of review that deadly force requires and victims of police dogs deserve.¹⁶ Further, courts rely on unsubstantiated policy arguments to protect police dogs from any honest or critical review.¹⁷ This shortsighted law and order attitude not only harms

10. 27 F.3d 1432 (9th Cir. 1994).

11. See *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998); *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995).

12. See *Watkins*, 145 F.3d at 1091; *Fikes*, 47 F.3d at 1015; *Chew*, 27 F.3d at 1436.

13. See *Watkins*, 145 F.3d at 1092; *Fikes*, 47 F.3d at 1014; *Chew*, 27 F.3d at 1437.

14. See *Watkins*, 145 F.3d at 1092; *Fikes*, 47 F.3d at 1014; *Chew*, 27 F.3d at 1437.

15. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 662-66 (1978); *Chew*, 27 F.3d at 1437.

16. See *Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997) (en banc); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

17. See *Chew*, 27 F.3d at 1462 (Trott, J., concurring and dissenting).

innocents, but is unnecessary since police dogs can be trained to make them safer and more efficient.

Unfortunately, the tainted review currently used means rampant unconstitutional police dog use. This Article addresses these problems and explores some solutions. Section II addresses the existing law involved in this issue, particularly Fourth Amendment excessive force precedent, municipal liability precedent and 42 U.S.C. § 1983,¹⁸ and *Chew*—the case that embodies the frequent errors made in this area. Section III critiques the faults of police dog jurisprudence. Section IV suggests recommendations to solve the current state of affairs.

II. EXISTING LAW

Chew v. Gates,¹⁹ as indicated above, is the leading police dog bite case and an excellent example of the problematic situation that has developed with police dog actions. In order to understand the issues and problems in *Chew*, it is important to appreciate the law surrounding the decision itself. The legal backdrop for *Chew* can be separated into two distinct parts: (1) excessive force and (2) municipal liability.

A. Excessive Force Doctrine

The first step for all police force related claims is to determine which constitutional right is at issue. In the current state of the law, the obvious answer seems to be the Fourth Amendment and its prohibition against “unreasonable searches and seizures.”²⁰

However, this was not always the case. At one time, police force cases were construed to be among the general bundle of rights associated with the Due Process Clause of the Fourteenth Amendment.²¹ Judge Friendly, basing his interpretation on *Rochin v. California*,²² held that “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers

18. 42 U.S.C. § 1983 (1994 & Supp. 1999).

19. 27 F.3d 1432 (9th Cir. 1994).

20. U.S. CONST. amend. IV.

21. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

22. 342 U.S. 165 (1952).

deprives a suspect of liberty without due process of law.”²³ He set forth four factors to determine “whether the constitutional line has been crossed.”²⁴ The factors were:

- (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used;
- (3) the extent of the injury inflicted; and (4) “[w]hether the force was applied in a *good faith effort* to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.”²⁵

The Supreme Court rejected this test and the “notion that all excessive force claims . . . are governed by a single generic standard.”²⁶ The Court also took issue with Friendly’s test in that it examined neither the “Fourth Amendment nor the Eighth [Amendment], the two most textually obvious sources of constitutional protection against physically abusive governmental conduct.”²⁷

23. *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). This denial of certiorari led to “the vast majority of lower federal courts . . . [applying the] . . . ‘substantive due process’ test indiscriminately to all excessive force claims lodged against law enforcement . . . under § 1983 . . .” *Graham v. Connor*, 490 U.S. 386, 393 (1989).

24. *Johnson*, 481 F.2d at 1033.

25. *Graham*, 490 U.S. at 390 (quoting *Graham v. City of Charlotte*, 644 F. Supp. 246, 248 (W.D.N.C. 1986)) (emphasis added). Note that the last factor requires a “good faith effort” and is a subjective component of the test. This is a subtle way of creating a significant threshold for excessive force claims. Short of a “malicious or sadistic” intent, the police officer applying the force would not violate any provisions of the Constitution. Note the incongruity with an example—a police officer uses a choke hold on a drunken, noncomplying suspect. The officer’s intent is clearly to “maintain and restore discipline.” The good intent would prevent the finding of a constitutional injury and immunize the officer from any excessive force claim. This would be true no matter how long the choke hold was applied.

Granted, the three other factors are pure objective tests, but it is important to remember that this test is weighed by the jury, not the judge. Any good faith prong will allow the lay person to defer to the police officers “just doing my job” mentality. In a system that is already stacked against victims of excessive police force, this subjective test would raise the bar even higher.

26. *Id.* at 393.

27. *Id.* at 392. In Judge Friendly’s defense, using substantive due process was not a ridiculous notion. The Court had only recently incorporated the Fourth Amendment coverage into the Fourteenth Amendment. See *Ker v. California*, 374 U.S. 23, 30-34 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The leading standards of review for Fourth Amendment violations

If a police officer denies a person's freedom to move, the police officer has seized that person.²⁸ Police canines are trained and employed to find and capture hidden suspects. This clearly brings police canine force within the auspices of the Fourth Amendment's language forbidding "unreasonable searches and seizures."²⁹ However, debate lingers over whether police dogs are deadly force or not.³⁰ This question is relevant since different standards apply for deadly force and general force.

1. Deadly force

Modern deadly force law frequently has its own special set of rules and restrictions compared to other forms of force used by police officers.³¹ However, when the Framers drafted the Fourth Amendment, the common law did not make a distinction between deadly and nondeadly force;³² therefore, it is possible that if the

were set in *Tennessee v. Garner*, 471 U.S. 1 (1985), twelve years after Judge Friendly set his four factor test. The standard of review set forth in *Garner* would be further refined in *Graham*.

28. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

29. U.S. CONST. amend. IV.

30. The topic of dogs as objects of deadly force will be discussed more closely in Parts II.C.1, III.B, III.C.2, and IV.B, *infra*.

31. The Model Penal Code is a fine example of the extra limitations on deadly force. "The [general] use of force is not justifiable under this Section unless: the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested . . ." MODEL PENAL CODE § 3.07(2)(a)(i) (Official Draft and Revised Comments 1985). Interpreting this section in an antipolice force stance would merely require the police to give the arrestee an opportunity to surrender. Compare this to the deadly force provision:

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

Id. § 3.07(2)(b)(i)-(iv) (emphasis added). Note that all four of these prongs must be satisfied for a police officer to be justified in using deadly force. A dramatic difference.

32. See *Garner*, 471 U.S. at 12-13. The common law "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon"; therefore,

Framers considered the use of deadly force reasonable to arrest resisting or fleeing felons, then the Court should also accept deadly force as reasonable per se. The Supreme Court rejected this notion recognizing that it arose at a time "when virtually all felonies were punishable by death."³³ The Court noted that with modern criminal codes, the difference between felonies and minor infractions were insignificant and arbitrary.³⁴ Furthermore, in light of modern firearms and improved apprehension techniques, it is no longer acceptable nor necessary to shoot fleeing felons. "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally *unreasonable*. It is not better that all felony suspects die than that they escape."³⁵

The Court set forth ground rules with which to analyze deadly force use. "To determine the constitutionality of a seizure '[a court] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"³⁶ This interest balancing is of vital importance to the Fourth Amendment,³⁷ and it is clear that the reasonableness test of the Fourth Amendment is concerned with how the seizure is conducted.³⁸

The Court then went on to balance the individual's Fourth Amendment rights with the state's interests in making seizures with deadly force.³⁹ "The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon."⁴⁰ In contrast to this powerful individual interest, the state's interest in the use of deadly force was

the differences between general and deadly force were nonfactors. *Id.* at 12.

33. *Id.* at 13. "[I]f persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly . . . so that they cannot be otherwise apprehended, and are upon necessity slain therein . . . it is no felony [for the officers]." *Id.* at 12 (quoting 2 M. HALE, *HISTORIA PLACITORUM CORONAE* 85 (1736)).

34. *See id.* at 14.

35. *Id.* at 11 (emphasis added).

36. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

37. *See Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981).

38. *See United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968).

39. *See Garner*, 471 U.S. at 9-12.

40. *Id.* at 9.

not nearly as broad or as compelling as the state claimed.⁴¹ The state interest in reducing crime by discouraging suspects from fleeing was an important goal, but did not “justify the killing of nonviolent suspects.”⁴²

The Court pointed to two reasons why the state’s interest was lacking.⁴³ First, if police officers were successful in seizing a suspect with deadly force, the criminal justice system would not be used.⁴⁴ Second, many law enforcement agencies across the country were banning the practice of seizing nonviolent suspects with deadly force.⁴⁵ These two interests were why the Court was “not persuaded . . . that [using deadly force on] nondangerous fleeing suspects is so vital as to outweigh the suspect’s interest in his own life. . . . [T]he fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.”⁴⁶

The Court then outlined when deadly force would be appropriate: “Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”⁴⁷ Deadly force would be justified if the suspect brandished a weapon, caused serious bodily harm, or was thought to have caused serious bodily harm.⁴⁸ Furthermore, deadly force required a warning when at all practical.⁴⁹ As a result, deadly force is more likely to be held unreasonable in a Fourth Amendment analysis.

2. General use of force

“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”⁵⁰ In analyzing general use of force claims, the

41. *See id.* at 10.

42. *Id.*

43. *See id.* at 10-11.

44. *See id.* at 10 (explaining that a dead suspect is not better than a suspect within the “criminal justice mechanism”).

45. *See id.* at 10-11.

46. *Id.* at 11.

47. *Id.*

48. *See id.*

49. *See id.* at 11-12.

50. *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 22-27).

Fourth Amendment reasonableness standard is applied.⁵¹ The Court expanded on the interest balancing test laid out in *Garner* and gave a more generalized outline of how to handle force claims of all kinds in *Graham*.⁵²

Since “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,”⁵³ the precise details and happenings of the seizure take on great importance and demand careful scrutiny.⁵⁴ In fact, specific parts of the seizure’s circumstances must be analyzed, “including 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.”⁵⁵ The Court reemphasized a statement made in *Garner*, “the question was whether the totality of the circumstances justified a particular sort of . . . seizure.”⁵⁶

Graham went a step further to point out that when judging an excessive force claim under the Fourth Amendment, “[t]he ‘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.”⁵⁷ This perspective of judging reasonableness protects police officers’ use of force even when they are incorrect in seizing a suspect.⁵⁸ The Court deemed reasonableness

51. *See id.* at 395. The *Graham* Court explained:

Today we make explicit what was implicit in *Garner*’s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct.

52. *See id.* at 396.

53. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

54. *See Graham*, 490 U.S. at 396.

55. *Id.*

56. *Garner*, 471 U.S. at 8-9. This “totality of the circumstances test” came on the heels of a laundry list of cases applying the same test to other Fourth Amendment issues. *See id.*

57. *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 20-22).

58. *See Maryland v. Garrison*, 480 U.S. 79, 87-89 (1987); *Hill v. California*, 401 U.S. 797, 803-04 (1971).

judged from the police officer's point of view as necessary because of their need "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."⁵⁹

The Court also stressed objectivity as paramount in determining if the force used was reasonable.⁶⁰ "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" is automatically unreasonable.⁶¹ No matter how good or bad the police officer's intent, if the force appears to be objectively reasonable, it will pass constitutional muster.⁶² Therefore, nondeadly excessive force cases must be examined by an on the scene objective reasonableness test that takes into account the totality of the circumstances.

B. *Municipal Liability Doctrine*

Historically, for a government to be held liable for its torts was simply unthinkable. English common law held that the King was above all wrong and to sue him in tort would be to question his divine right.⁶³ This belief was incorporated into American common law and resulted in the same absolute immunity for state government.⁶⁴ This absolute immunity had a trickle down effect to state agencies and chartered local municipalities that took their authority from state rule.⁶⁵

59. *Graham*, 490 U.S. at 397.

60. *See id.*

61. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

62. *See Graham*, 490 U.S. at 397. This purely objective test may have as many flaws as the subjective test discussed *supra* at note 25. Detractors would argue that this insulates police officers who use force with the evil intention of harming suspects, simply because the force appears reasonable. True, wrongful intent should be combated. Yet, if the force is judged to be reasonable, then the evil intent lacks an evil result, and the harm the police officer has caused is not as dangerous. Furthermore, short of mind reading, subjective wrongful intent is nearly impossible to prove in the context of a reasonable seizure. Perhaps police officer training is the better method to battle wrongful intent than judicial review. The public should be satisfied with stopping evil results compared to the vague and hard to prove evil intentions.

63. *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 387 (3d ed. 1997).

64. *See id.*

65. *See id.*

Unlike the state government, municipalities did not have complete immunity historically. Municipalities could be held in tort for nuisance, improper maintenance of streets, and other nongovernmental or proprietary functions.⁶⁶ Despite this small difference, municipalities enjoyed substantial immunity in regards to their principal governmental functions. Understandably, states and local governments were slow to eliminate this favored status.⁶⁷ Nevertheless, once state and municipal liability was imposed, significant restrictions were left in place. For example, almost every state and local government retained a discretionary function immunity for governmental decisions.⁶⁸ As a result, plaintiffs who wanted to win complete verdicts, or, for the right to bring a suit at all, had to seek protection in the federal courts.

The route to federal courts was usually via section 1983 actions.⁶⁹ While section 1983 allows federal redress for violations of

66. *See id.* at 387-88. For example, a local government's control over a garbage dump or other utility that resulted in wrongful conduct would create governmental liability as any other market participant. The government's participation in functions that could also be accomplished by private individuals was generally outside traditional municipal immunity.

67. The first state to eliminate its special immunity was New York, which waived the privilege in 1929. *See id.* at 388. For better or worse, this was interpreted to include all municipalities as well. *See id.* (citing *Bernardine v. City of New York*, 62 N.E.2d 604 (N.Y. 1945)). Other states were reluctant to follow New York's lead. In 1954, no other state had abolished sovereign immunity. *See DOBBS & HAYDEN, supra* note 63, at 388. It was not until the 1960s and 1970s that state legislatures and courts began to change this policy. *See id.*

68. *See DOBBS & HAYDEN, supra* note 63, at 388. For example, a discretionary government policy of having all police cars fixed by government employees could not be challenged. However, if the repairs were done negligently, the government would be exposed to a tort suit.

This example seems innocuous, but the notion of discretion is not limited to broad government decisions and can be amazingly expansive. In particular, police officials were acting within their discretion when they released a known pedophile, who threatened to murder a child, from custody. *See Thompson v. County of Alameda*, 27 Cal. 3d 741, 758, 614 P.2d 728, 738, 167 Cal. Rptr. 70, 80 (1980) (stating that after the child molester fulfilled his promise and murdered a five-year-old boy, the police department was held immune from suit because the decision to release was discretionary). Clearly, police discretion remains immune.

69. *See* 42 U.S.C. § 1983 (1994 & Supp. 1999). The statute directs:

Every person who, under color of any statute, ordinance, regulation,

constitutional rights under the "color of law," the constitutional injury must be done by a "person."⁷⁰ The Supreme Court did not consider municipalities to be persons for the purposes of applying section 1983.⁷¹ "The sole basis for this conclusion was an inference drawn from Congress' rejection of the 'Sherman amendment'⁷² to the bill which became the Civil Rights Act of 1871, the precursor of § 1983."⁷³ The Sherman amendment dealt with protecting slaves from Klu Klux Klan riots and lynchings by holding the municipality where the riot took place accountable. In particular, the Court explained:

Although the Sherman amendment did not seek to amend § 1 of the Act, which is now § 1983, and although the na-

custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

70. *Id.*

71. See *Monroe v. Pape*, 365 U.S. 167, 187 (1961) ("Congress did not undertake to bring municipal corporations within the ambit of [§ 1983].").

72. See *id.* at 188. The Sherman amendment stated:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, *in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damaged by such offense* if living, or to his widow or legal representative if dead; *and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed*, to be in the name of the person injured, or his legal representative, and against said county, city, or parish.

Id. at 188 n.38 (emphasis added).

73. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664 (1978) (citation omitted).

ture of the obligation created by that amendment was vastly different from that created by § 1, the Court nonetheless concluded . . . that Congress must have meant to exclude municipal corporations from the coverage of § 1 because “the House [in voting against the Sherman amendment] had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.” This statement, we thought, showed that Congress doubted its “constitutional power . . . to impose civil liability on municipalities,” and that such doubt would have extended to any type of civil liability.⁷⁴

Once the Sherman amendment was removed, both Houses of Congress quickly passed the provisions.⁷⁵ With this, it appeared that Congress did not expressly intend that municipalities should be liable under section 1983.⁷⁶

However, the Court corrected this mistaken notion with a more careful examination of the legislative history surrounding the Sherman amendment.⁷⁷ There was a great deal of ambiguity in the use of the word “obligation.” Did it mean “liability,” in the civil tort sense, or “mandated,” in a federal proclamation sense?⁷⁸ Were the municipalities “obliged” to pay for their wrongs or were they “obliged” to obey federal orders? The Court determined that the opponents to the Sherman amendment had the latter definition in mind when they sought its removal.⁷⁹ The exclusion of the Sherman

74. *Id.* (quoting *Monroe*, 365 U.S. at 190) (emphasis removed).

75. *See id.* at 668-69.

76. *See id.* at 669.

77. *See id.* at 670-91.

78. *See id.*

79. *See id.* This realization came about by examining the debate over the Sherman amendment. In explaining the Sherman amendment, the closest analog was ironically a runaway slave statute. When slaves fled to the North, there was a chance that slave owners would be denied their property rights—the slaves—by states that were hostile to slavery. *See id.* at 672 (discussing *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842)). To protect these individual property rights guaranteed by the Constitution, Congress passed a statute that would impose a remedy against the municipality that denied a slave owner’s property. *See id.* This simply was a Contract Clause rationale.

The Court next examined those opposing the Sherman amendment and

amendment from the Civil Rights Act (and by extension, section 1983) was not done with the intention to exclude municipalities and, therefore, municipalities were "persons" under section 1983.⁸⁰

This finding hardly left municipalities wide open to civil liability.

[T]he same legislative history compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, . . . a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.⁸¹

The Court held that a municipality was immune to section 1983 actions when government employees inflicted injuries purely of their

their reasoning. The opposition's rationale had little to do with municipal liability in the sense explained above, but instead dealt with obligating police force behavior and other federalism concerns. *See id.* at 672-79. In fact, the Court noted:

[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State

. . . .
Id. at 678 (citations omitted).

Furthermore, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Id.* at 687.

80. *See id.* at 690-91.

81. *Id.* at 691. The legislative history behind this finding again involved the debate around the Sherman amendment, with supporters proclaiming that "the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection." *Id.* at 692 n.57. Nevertheless, this sentiment did not foreclose all vicarious liability potential in the Sherman amendment. There was liability without fault in that the Sherman amendment still punished a municipality that was powerless to prevent a riot. *See id.* The Court was not dissuaded by this interpretation and believed "the inference that Congress did not intend to impose such liability is quite strong." *Id.* This certainty may have come from Congress's considering and rejecting the traditional justifications for respondeat superior, spreading the costs of harm to the community as a whole and considering injuries as a cost of doing business. *See id.* at 692-94.

own volition.⁸² “Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”⁸³

Therefore, if government employees execute official policy or custom and harm another person, he or she will be open to a section 1983 claim. Further, if a supervisor who implements policy for the municipal corporation is personally involved or has established a “custom” of behavior for his or her employees, this too will allow a section 1983 claim.⁸⁴ “Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.”⁸⁵

A municipality can be liable for formal and informal policies and customs that harm individuals through their ratified execution by a municipal actor.

C. *Analysis of Chew v. Gates*⁸⁶

The three distinct opinions rendered in *Chew* must now be examined in light of the above background information. The facts in *Chew* are typical of police canine force cases. Thane Carl Chew was stopped for a traffic violation and, after an innocuous exchange, the detaining officer executed a routine background check.⁸⁷ The officer

82. *See id.* at 689-94.

83. *Id.* at 694.

84. *See id.* at 690-91. According to the *Monell* Court:

[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 “person,” by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decision making channels.

85. *Id.* at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

86. 27 F.3d 1432 (9th Cir. 1994).

87. *See id.* at 1436.

discovered three outstanding felony warrants for Chew and, before he was able to take Chew into custody or frisk him for weapons, the suspect fled.⁸⁸ The officer pursued Chew to a scrapyard, and due to its size and dangerous nature, called for backup officers.⁸⁹ The police quickly set up a perimeter and deployed a helicopter and police canine units to search for the fugitive.⁹⁰

“Officer Bunch and his charge, police dog Volker, were among those dispatched to assist in the search of the scrapyard. Officer Bunch unleashed Volker and, approximately two hours after Chew had fled to the yard, Volker found him crouching between two metal bins.”⁹¹

Unfortunately, and all too common, the officer’s and the suspect’s versions of the facts diverge because Volker was well out of sight of his master, Officer Bunch.⁹² Chew contended that once he saw Volker he immediately tried to surrender and offered no resistance.⁹³ Nevertheless, “Volker bit Chew several times and then seized him, [whereby] Chew sustained severe lacerations to his left side and left forearm.”⁹⁴ Officer Bunch bitterly denied this version and described Chew as actively resisting arrest by “hitting the dog with a pipe.”⁹⁵ In light of this resistance, Officer Bunch “acknowledge[d] that he may have kicked Chew in the head, face, or body” while Volker continued to seize Chew by biting him.⁹⁶

After the incident, Chew sued the City of Los Angeles and the chief of police, Darryl Gates, as an individual and in his official capacity.⁹⁷ The district court dismissed all of the claims, except for the one against Officer Bunch, on qualified immunity grounds and the fact that the plaintiff was unable to prove that a City of Los

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.* In addition to Officer Bunch, Chew also sued “Sergeants Donald Yarnall and Mark Mooring (who trained the L.A.P.D. canines), and Captain Patrick McKinley (who had overall supervisory responsibility for the K-9 unit) as defendants in their individual capacities.” *Id.*

Angeles policy or custom was responsible for his harm.⁹⁸ At trial, the jury awarded “a \$13,000 general verdict in Chew’s favor,” but the city paid the judgment and all court costs.⁹⁹

Two fundamental questions were raised on appeal. First, “whether the Los Angeles Police Department’s policy governing the use of dogs to seize fleeing or hiding suspects [was] unconstitutional” and second, if “the officers who are responsible for promulgating that policy enjoy[ed] qualified immunity.”¹⁰⁰ The court answered these two questions with the three appellate judges employing three distinct rationales. The court answered the first question by concluding “that the district court erred in holding the police department’s policy governing the use of dogs constitutional.”¹⁰¹ However, those officers who implemented the policy were immune because “the law with respect to the use of police dogs to seize and bite concealed suspects was not sufficiently established that a reasonable officer would have known that the Los Angeles Police Department’s policy was unconstitutional.”¹⁰²

In reaching this conclusion, each judge applied a different rationale. It is important to examine each judge’s opinion to appreciate the ramifications and flaws in the law that have developed. In turn, Judge Reinhardt’s broad excessive force approach, Judge Norris’s deadly force approach, and Judge Trott’s policy approach will be addressed.

1. Judge Reinhardt’s excessive force approach

Chew claimed that his constitutional rights were violated by Officer Bunch in three ways: deploying Volker to search the scrap yard, ordering Volker to attack as Chew tried to surrender, and

98. *See id.*

99. *Id.* The defendants contended that the claim against the city was improper because the plaintiff was fully compensated for his injuries at trial. *See id.* at 1436-37. However, the jury did not specify which wrongful act they were compensating Chew for, the dog bites or Bunch’s punches and kicks. *See id.* at 1437-38. Since the jury award could have been exclusively for the officer’s individual wrongful behavior, the city would still be liable for the injuries caused by Volker and the city’s police dog training policy. *See id.*

100. *Id.* at 1435.

101. *Id.*

102. *Id.* at 1436.

stomping Chew while he was down.¹⁰³ Chew also alleged that the city “violated his rights by adopting and implementing a policy of training and using police dogs in an unreasonable manner.”¹⁰⁴ “The district court granted summary judgment in favor of the remaining defendants on the ground that the use of Volker for the purpose of apprehending Chew was an objectively reasonable act.”¹⁰⁵

To reverse on appeal, Chew had to prove “that his seizure by Volker was unconstitutional” and that “the city was responsible for that constitutional wrong.”¹⁰⁶ Chew set forth two distinct theories of municipal liability: First, “Bunch’s [unreasonable] action was caused by a city policy, custom, or usage” and resulted in Chew’s exposure to excessive force.¹⁰⁷ Second, “regardless of the reasonableness of Officer Bunch’s action in releasing the dog . . . the city’s policy of training police dogs such as Volker to apprehend unarmed and non-resistant suspects by biting, mauling, and seizing them was itself unreasonable and unconstitutional.”¹⁰⁸ Simply put, the first claim “depend[ed] upon an assessment of the objective facts and circumstances bearing on the reasonableness of Officer Bunch’s decision to release Volker.”¹⁰⁹ The second claim “turn[ed] on the reasonableness of the city’s general policy of training dogs to bite and seize all suspects.”¹¹⁰

In addressing the first claim, Judge Reinhardt noted that there was “little doubt that a trier of fact could find that Chew’s injury was caused by city policy.”¹¹¹ The city policy was to use police dogs to restrain all types of concealed suspects, regardless of the danger they presented, and Officer Bunch clearly acted pursuant to that policy.¹¹² Therefore, if Officer Bunch acted unreasonably and caused a constitutional harm in executing the city’s policy, the city should be liable.

103. *See id.* at 1437.

104. *Id.*

105. *Id.* at 1439.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 1440.

110. *Id.*

111. *Id.* at 1444.

112. *See id.* at 1445.

Judge Reinhardt used the three part test in *Graham v. Connor*¹¹³ to determine the reasonableness of Officer Bunch's decision to release Volker:¹¹⁴ (1) the threat the suspect posed to the officers or others, (2) the severity of the suspect's crime, and (3) whether the suspect was resisting or evading arrest.¹¹⁵

Judge Reinhardt held that Chew did not satisfy the most important *Graham* factor—he did not pose a threat to others or to the officers.¹¹⁶ Judge Reinhardt took note that the officer originally stopped Chew for a traffic violation, where they engaged in conversation, and the officer did not feel the need to search him for the officer's own safety.¹¹⁷ Chew did flee from the police, but he never physically resisted arrest and the dog handler had no reason to believe Chew would be physically violent when he released his dog.¹¹⁸ Finally, the severity of the crime was unclear, since Chew was wanted for a generalized felony and not a specific one.¹¹⁹ The wide variety of felonies that exist cover both violent and nonviolent crimes, therefore, being wanted for a felony was not de facto "severe."¹²⁰ Consequently, Officer Bunch could have violated Chew's constitutional rights in releasing Volker.¹²¹ By extension, the city would also be liable for the harm.¹²²

In order to find the city liable under the second claim, the police dog policy had to be unconstitutional on its face.¹²³ In other words, there would be no reasonable way to enforce the policy. Judge Reinhardt did not believe it necessary to "determine the constitutionality of the Department's policy"¹²⁴ on appeal, but encouraged Chew to fully explore the matter on remand.¹²⁵ It is likely, considering the

113. 490 U.S. 386, 396 (1989). The three part test was discussed in Part II.A, *supra*.

114. *See Chew*, 27 F.3d at 1440.

115. *See id.*

116. *See id.* at 1441-42.

117. *See id.* at 1442.

118. *See id.*

119. *See id.* at 1442-43.

120. *See id.* at 1442.

121. *See id.* at 1443.

122. *See id.* at 1444.

123. *See id.*

124. *Id.* at 1444 n.12.

125. *See id.* at 1444-46.

focus of Judge Reinhardt's opinion on the first claim, that he would consider a facial constitutional challenge to be unsuccessful. Nevertheless, he left the option open as a possibility.

2. Judge Norris's deadly force approach

In contrast to Judge Reinhardt's opinion, Judge Norris's concurrence and dissent considered a facial challenge to the city's police dog policy to be very possible.¹²⁶ His concern was whether police dogs should be labeled as instruments of deadly force; "the critical question whether the use of LAPD dogs, as trained and deployed, constitutes the use of deadly force cannot be decided as a matter of law on the summary judgment record before us."¹²⁷ Judge Norris considered this deadly force determination to be one of fact,¹²⁸ but necessary to follow the law established in *Tennessee v. Gardner*.¹²⁹ To employ deadly force, be it a dog or gun, against a nondangerous, nonresisting, or nonviolent offender would violate the precepts of *Gardner* and the Constitution.¹³⁰ Stated simply, to allow deadly force dogs to root out hidden suspects would be tantamount to permitting police officers to use their weapons to search and destroy.

3. Judge Trott's policy approach

Where the above plurality would allow a city to be held liable for its unconstitutional police dog policy, Judge Trott's emotional dissent would give the police carte blanche to use police dogs as they see fit.¹³¹ Pointing to unsubstantiated proselytizing and hysteria in lieu of precedent, Judge Trott declares police dogs constitutional because crime is out of control:

At this moment in history, criminals are succeeding in doing what no foreign power has ever been able to

126. *See id.* at 1451-56 (Norris, J., concurring and dissenting).

127. *Id.* at 1453 (Norris, J., concurring and dissenting).

128. *See id.* at 1453 & n.6 (Norris, J., concurring and dissenting).

129. 471 U.S. 1 (1985).

130. *See Chew*, 27 F.3d at 1453 (Norris, J., concurring and dissenting).

131. *See id.* at 1462-75 (Trott, J., concurring and dissenting). Judge Trott would agree with Judge Reinhardt's holding that a constitutional policy could be used in an unconstitutional manner. However, he did not believe that Officer Bunch's use of his police dog in this circumstance was unreasonable. *See id.* (Trott, J., concurring and dissenting).

accomplish: they have invaded our streets, parks, beaches, and backyards and made many feel like prisoners in their own homes. . . . This appalling condition is a matter of common knowledge and concern. . . .

. . . [The] battle has been lost. As crime grows arithmetically, fear grows geometrically. . . .

. . . Even a time-honored cultural tradition like flipping the bird to some idiot driver is now in jeopardy. Instead of just screaming back, he might blow your head off.¹³²

This anecdotal justification, effective as a stirring call to arms, is Judge Trott's way of saying police dogs are constitutional because cops need them in their war against crime.¹³³ Judge Trott believes that "[b]ecause of fear of lawsuits and liability, this decision may be fatal to canine units, and by their demise, the ability of police to combat criminals will be seriously hampered."¹³⁴ Although not listed among his factors for finding police dogs constitutional, this "crime is out of control" paranoia is clearly his greatest motivator and rationale.

Judge Trott lists four factors why police dogs are reasonable and, therefore, constitutional.¹³⁵ "First, a biting dog is not a bullet from a firearm. A trained dog is much less dangerous than a shotgun."¹³⁶ Second, police dogs protect police officers from hidden criminals.¹³⁷ Third, warnings and opportunities for surrender are given before any police dog is deployed.¹³⁸ Fourth, the cost of searching for concealed suspects with police dogs is lower than searching with police officers.¹³⁹ The sentiments behind these factors are not without merit, but all contain flaws in their facts,

132. *Id.* at 1462-63 (Trott, J., concurring and dissenting) (quoting Jonathan Alter, *There's a War On at Home*, NEWSWEEK, Sept. 27, 1993, at 42). The right to "flip the bird" is irrelevant to the issues at hand in *Chew*.

133. *See id.* at 1463 (Trott, J., concurring and dissenting).

134. *Id.* (Trott, J., concurring and dissenting) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1992)).

135. *See id.* at 1471-72 (Trott, J., concurring and dissenting).

136. *Id.* at 1471 (Trott, J., concurring and dissenting).

137. *See id.* (Trott, J., concurring and dissenting).

138. *See id.* (Trott, J., concurring and dissenting).

139. *See id.* at 1471-72 (Trott, J., concurring and dissenting).

application, and logic. The problems with Judge Trott's analysis will be addressed in Part III.C of this Article.

III. CRITIQUE OF THE LAW

The flaws of *Chew v. Gates*¹⁴⁰ exhibited in its three different opinions of police dog force are highly representative of the logic used in other circuits.¹⁴¹ The errors essentially categorize into three schools: (1) municipal liability held secondary to individual officer's liability; (2) erroneously labeling police dogs as nondeadly force; and (3) incorrect policy justifications.

A. Municipal Liability Secondary to Officer Liability

The most insidious of the wrongs in police canine cases is the practice of bifurcating the individual officer's trial from that of the city. Judge Reinhardt's opinion gives lip service to the possibility that the city police dog policy can be held unconstitutional of its own accord.¹⁴² However, he subjugates this possibility by instructing the lower court to assess the individual officer's liability prior to and separately from the city's liability.¹⁴³ This first-phase procedure can end in only one of two ways—the individual officer is found liable or is found not liable. However, neither conclusion ever results in the city being held liable in its separate capacity.

The first conclusion is that the individual officer is acquitted of all wrongdoing and the plaintiff is unable to prove a constitutional injury against the officer. The existence of a constitutional injury is obviously a threshold issue. Without a constitutional injury, even a clearly unconstitutional policy will not establish a prima facie case. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is

140. 27 F.3d 1432 (9th Cir. 1994).

141. See, e.g., *Kopf v. Skyrn*, 993 F.2d 374 (4th Cir. 1993); *Gill v. Thomas*, 83 F.3d 537 (1st Cir. 1992); *Kopf v. Wing*, 942 F.2d 265 (4th Cir. 1991); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988); *Marley v. City of Allentown*, 774 F. Supp. 343 (E.D. Pa. 1991).

142. See *Chew*, 27 F.3d at 1437.

143. See *id.* at 1436-39.

quite beside the point."¹⁴⁴ This stance turns the two separate entities, the individual officer and the city, into one whole.

For example, in *Quintanilla v. City of Downey*,¹⁴⁵ the court held: Prior to trial, the district court, over Quintanilla's opposition, bifurcated the claims against the three individual line officers and the . . . city, so that the first phase of the trial would address the excessive force claim against the individual officers, and the second phase the *Monell* claim against the . . . city.¹⁴⁶

In an attempt to combat this problem, the plaintiff "voluntarily dismissed the three individual officers so that he could offer evidence of the policy during the first phase."¹⁴⁷ Nevertheless, the trial court defeated this sacrificial gesture. The court would not permit any evidence regarding the city's police dog policy and excluded experts prepared to testify on the matter.¹⁴⁸ The appellate court upheld this decision stating "counsel offered the evidence to show that the . . . city's policy of using police dogs, rather than the individual officers' use of this particular police dog, was unconstitutional. As such, the evidence was premature. The . . . city's liability . . . was not yet at issue."¹⁴⁹

Unfortunately, the appellate court missed the point. The individual officers were separate defendants. The plaintiff was not given an opportunity to show that the *city itself* was liable. By denying an opportunity to sue the city directly, there is no separate cause of action against the city. There is only a derivative one.

As shown in *Quintanilla*, even where the plaintiff tries to clear the extra hurdle bifurcation creates, and surrenders the most obvious claim and source of his or her injury, the court will not permit it.¹⁵⁰

144. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (emphasis removed).

145. 84 F.3d 353 (9th Cir. 1996).

146. *Id.* at 354.

147. *Id.* at 355.

148. *See id.*

149. *Id.* at 356.

150. Furthermore, without the companion suit against the officer, the suit against the city may lack the necessary causation to meet the prima facie case. It would be all too easy for the city to claim the police dog policy was not the proximate cause of the plaintiff's harm and declare the plaintiff unable to meet

Admittedly, if the plaintiff is unable to prove a constitutional injury against the individual, the plaintiff will rarely be successful against the city. Nevertheless, the plaintiff should be afforded the opportunity to bring his or her claim against all of the defendants that could possibly have caused the harm. This basic right is compromised by a misconceived trial practice.

The second possible conclusion in the first phase of the bifurcated trial is that the individual officer is found liable and the court acknowledges the existence of the plaintiff's constitutional injury. As instructed in *Chew* and its progeny, if the individual officer is found liable for the constitutional injury, the plaintiff has two grounds on which to proceed against the city: in its independent capacity (a facial attack of the police dog policy) and via the individual officer's wrongful conduct (a specific application attack).¹⁵¹ As explained previously, this threshold should not be necessary for the facial attack claim to proceed.

However, even with the injury judicially recognized,¹⁵² the city remains insulated from any liability because of the bifurcation process. By proceeding against the individual officer first, the successful plaintiff is fully compensated for his injuries before the city can be found responsible. Despite *Chew*'s promise of "free[dom] to pursue . . . claims against [the city] for nominal damages,"¹⁵³ the reality is that once the plaintiff is fully compensated, all litigation will cease.

Police canine excessive force cases end because they are usually handled on a contingency fee basis.¹⁵⁴ No contingency fee lawyer will proceed with an expensive and difficult facial challenge with only nominal damages awaiting at the end. This is especially true

his or her burden of proof.

151. See *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998); *Chew*, 27 F.3d at 1446.

152. This victory is, in and of itself, no small feat. Considering that plaintiffs in most police dog excessive force claims are criminal suspects, if not actually convicted of the crime they were seized for, they face considerable jury prejudice in their claims. Juries are all too willing to use "law and order" notions and other irrelevant rationales to disregard legitimate excessive force claims. See *infra* Part III.C.1.

153. *Chew*, 27 F.3d at 1437.

154. See, e.g., *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998); *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994).

when both the lawyer and client have been fully compensated in their claim in the first phase of the trial against the individual officer.

Furthermore, the city often will pay the officer's legal fees and damages.¹⁵⁵ This action eliminates any need for the plaintiff and his or her lawyer to continue the legal claim to find a "deep pocket." The fact that the city bankrolls the individual officer in the first phase of the trial makes the second phase of the bifurcation procedure superfluous. This perpetuates police dog use without any broad or exacting constitutional review. The bifurcation procedure essentially makes a facial challenge to a police dog policy impossible.

Admittedly, it is possible for constitutional claims to be undertaken pro bono or for nominal damages to correct a glaring constitutional wrong. However, police dogs, except for their misuse against African Americans in the 1960s,¹⁵⁶ are not a high priority for most crusaders. Moreover, the likelihood to achieve success against the individual officers in the first phase of the trial creates a catch-22 situation. Because the claims are so readily handled by contingency fee lawyers, pro bono organizations will not spend their limited resources to mount a facial attack on police dog policies. It is important to remember that this is an unpopular issue. The general perception, which is incorrect, is that police dogs do not pose a grave danger. Police dog abuses are unlikely to capture the same emotional support as, say, the death penalty. In fact, police dogs are so popular that any organized sentiment against them might further alienate already embattled and underfunded public interest groups.

155. See, e.g., *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998); *Fikes v. Cleghorn*, 47 F.3d 1011 (9th Cir. 1995); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994); Samuel G. Chapman, *Police Dogs Versus Crowds*, 8 J. POLICE SCI. & ADMIN. 316, 321 (1980).

156. See Chapman, *supra* note 155, at 316 (noting that in 1963, Eugene "Bull" Connor, the Birmingham Police Commissioner, released police dogs on defenseless black protesters, remarking: "I want them to see the dogs work. Look at those niggers run."). Not coincidentally, most canine units ban the use of police dogs for the purposes of crowd control. See *id.* at 319-320. The racial overture of police dog misuse continues with the LAPD using police "dogs with abandon in poor and minority neighborhoods" and "injuring far more black and Latino suspects than white suspects." Jim Newton, *L.A. Finds Mixed Results in Curbing Police Dog Bites*, L.A. TIMES, Mar. 1, 1996, at A1. The abuse of police dogs grew so pervasive that "some officers referred to black suspects as 'dog biscuits.'" *Id.*

The bifurcation procedure renders the decision in *Chew* that the city can be separately liable utterly meaningless. The result of these misused trial practices is contrary to the letter and spirit of *Chew*.

B. Erroneously Labeling Police Dogs as Nondeadly Force

Judges Norris and Reinhardt declined to take up the issue of whether police dogs constituted deadly force, explaining that the issue should be analyzed further on remand.¹⁵⁷ Despite this encouragement, it is unlikely police dogs will be considered instruments of deadly force. Only two cases have addressed the issue of police dogs as instruments of deadly force, and both declined to find dogs as such. Nevertheless, these decisions used flawed reasoning to reach the wrong decision.

In *Robinette v. Barnes*,¹⁵⁸ a wrongful death suit was brought on behalf of a victim who was killed by a police dog.¹⁵⁹ While hiding under a car, a burglary suspect was bitten on the neck by a police dog and quickly bled to death.¹⁶⁰ This is the only reported case of a police dog killing a suspect while in the course of searching for the suspect.¹⁶¹

The court looked to the Model Penal Code¹⁶² and removed two independent factors to determine if a police dog constituted deadly force.¹⁶³ The first factor was intent of the officer to inflict death or serious bodily harm.¹⁶⁴ The second factor was "the probability . . . regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a 'substantial risk of causing death or serious bodily harm.'"¹⁶⁵

157. See *Chew*, 27 F.3d at 1435.

158. 854 F.2d 909 (6th Cir. 1988).

159. See *id.* at 911.

160. See *id.*

161. While this may be the only reported case of a police dog killing a suspect, the case does not speak to a police dog's propensity to kill.

162. See MODEL PENAL CODE § 3.11(2) (Official Draft and Revised Comments 1985).

163. See *Robinette*, 854 F.2d at 912.

164. See *id.*

165. *Id.* (quoting MODEL PENAL CODE § 3.11(2) (Official Draft and Revised Comments 1985)).

The court determined that the officer released the police dog, the officer did so without the intent to kill.¹⁶⁶ This may be true, but that only accounts for part of the Model Penal Code's definition of deadly force. The court should also ask if the K-9 officer released the dog with the intent to cause serious bodily harm. This question must be answered in the affirmative. These dogs are trained to bite their suspects.¹⁶⁷ Every time K-9 officers deploy their dog, the officers intend to find the suspect, therefore, they intend the dog to bite the suspect as well. Furthermore, police dogs bite suspects forty percent of the time,¹⁶⁸ with up to 2000 pounds per square inch of pressure¹⁶⁹ that result in horrible puncture wounds and lacerations.¹⁷⁰ If these type of injuries do not qualify as serious bodily harm, then what will? *Robinette's* logic would call a gun nondeadly force if the officer aims to wound a suspect in the leg instead of trying to kill him.

As far as the probability factor, *Robinette* again failed to use the complete Model Penal Code definition. Perhaps the death of the suspect in that particular case "was an extreme aberration from the outcome intended or expected,"¹⁷¹ but serious bodily harm is very probable and expected. To say that it is unlikely for police dogs to cause serious bodily harm is willful blindness by the court. The only

166. *See id.*

167. *See* Ken Wallentine, *Find & Bite versus Find & Bark*, at http://www.policek9.com/Trainers_Digest/wallen1/body_wallen1.html (last visited Sept. 26, 2000).

168. *See Chew*, 27 F.3d at 1454 n.8 (Norris, J., concurring and dissenting).

169. *See* Robert Ferrigno, *Guard Dogs Muscle in on Hulking Jobs*, CHI. TRIB., Aug. 6, 1985, at C1. This figure is for a Rottweiler's bite. German Shepherds and Doberman Pinschers bite with 1200 to 1500 pounds per square inch of force. *See id.*

170. A small sample of typical police dog wounds include bites on the head, neck, scrotum, torso, legs, and arms, which have resulted in surgery, lengthy hospital stays, and even death. *See generally* *Vera Cruz v. City of Escondido*, 139 F.3d 659, 660-61 (9th Cir. 1997) (victim bitten on upper arm requiring surgery and eight day hospitalization); *Chew*, 27 F.3d at 1436 (victim bitten on side of torso and arm); *Kopf v. Wing*, 942 F.2d 265, 266-67 (4th Cir. 1991) (victim bitten on arm, groin, thigh, and described as "frightfully mauled" and in critical condition after arrest); *Robinette*, 854 F.2d at 911 (victim bitten on neck causing death).

171. *Robinette*, 854 F.2d at 912.

way police dogs will not fit the Model Penal Code definition of deadly force is to use an incomplete definition.

The second case addressing the issue of police dogs as instruments of deadly force was *Vera Cruz v. City of Escondido*. Although the court rejected the use of the Model Penal Code definition of deadly force,¹⁷² it recognized that deadly force is difficult to define. “[W]hat the phrase means is far from obvious. Given the frailty of the human body, and the wide variety of conditions under which the police must operate, almost any use of force is potentially deadly”¹⁷³

Considering this difficulty, the court defined deadly force as “force which is reasonably likely to cause death.”¹⁷⁴ In other words, the force must “pose more than a remote possibility of death.”¹⁷⁵ The *Vera Cruz* court did not establish police dogs as nondeadly force, rather it simply held that the plaintiff failed to present evidence that police dogs were reasonably likely to kill.¹⁷⁶ However, the court did establish two factors to determine when force is reasonably likely to kill: “(1) the degree of force and (2) the accuracy with which it is directed at a vulnerable part of the human anatomy.”¹⁷⁷

No matter what the court’s disposition of this specific case, the *Vera Cruz* factors do not preclude police dogs from being labeled deadly force in other contexts. As noted above, police dogs are a significant source of force—able to inflict dismembering and lethal bites. Yet, the incongruous *Vera Cruz* factors seemingly keep this force from being labeled deadly because dogs are *less* controllable. The converse should be true. The extreme force presented by dogs should be more restricted because the handler has less control over the dog than the officer has over his or her firearm.¹⁷⁸ The

172. See *Vera Cruz*, 139 F.3d at 662. The Ninth Circuit is in the minority. Of the circuit courts that have addressed this issue, the Sixth, Eighth, Tenth, and Eleventh Circuits all use the Model Penal Code definition for deadly force. See *id.* The Ninth Circuit felt that the police should not be limited by the Model Penal Code standards, intended as criminal penalties. See *id.*

173. *Id.* at 661.

174. *Id.* at 663.

175. *Id.*

176. See *id.*

177. *Id.* at 663 n.4.

178. The illogic of this proposition is exhibited by the absurd example used

Vera Cruz logic would say that the more out of control the force, the less likely it is to be deadly. That suggestion is ridiculous. What is more deadly: a carefully driven car, or one that is out of control?

The only explanation for the gaps in logic demonstrated in *Robinette* and *Vera Cruz* is the desire of the courts to protect the use of police dogs. This partisanship is not only a dereliction of judicial duty, but flies in the face of the police dog victim's rights. Nevertheless, the courts willfully turn a blind eye to this unconstitutional use of deadly force.

C. *Incorrect Policy Justifications*

For the reasons discussed in Parts III.A and B, the continued use of police dogs to search for and seize suspects is practically assured. Perhaps in recognition of the inconsistencies and illogic used, the courts vainly scramble for justifications to continue police dog use. Although more hysteria than public policy, these justifications should not carry the day over the detainee's civil rights. The sentiments exhibited in Judge Trott's opinion¹⁷⁹ are representative of the policy rationales posited by courts to defend police dogs.

1. Crime is out of control

The hostility and near paranoia displayed by Judge Trott is more suitable for a Dirty Harry movie¹⁸⁰ than a judicial opinion. Crime needs to be controlled, but the local evening news perspective of the problem is neither accurate nor a reason to deny constitutional rights. If it were, we would effectively have a police state.

Bluntly, crime is not out of control. In fact, crime rates are at a thirty-year low.¹⁸¹ These results do not necessitate the further

by the court. "[A] bullet shot in the air as a warning will not be deemed deadly even if it accidentally hits a tree branch which falls and kills the suspect below." *Id.* Simply stated, a firearm is deadly force, no matter how it is discharged. This rationale allows the same officer firing his warning shot to hit an innocent bystander and yet escape fault because this particular use of his gun was not deadly. Judicially protecting patent deadly weapons would make an already aggressive police force even more dangerous.

179. See *supra* text accompanying notes 132-40.

180. Dirty Harry, the take-the-law-into-his-own-hands prototypical detective made famous by Clint Eastwood, endorsed a shoot 'em all philosophy to "make his day." See *SUDDEN IMPACT* (Warner Brothers 1983).

181. The homicide rate in the United States has declined every year since

militarizing of our police force. In light of the recent highly publicized police brutality and corruption cases,¹⁸² police forces should be more sensitive to criticism. The entrenchment and intractability of police to do away with dangerous techniques will only lead to further public alienation.

The falsity of rampant crime is only part of the problem with using high crime rates to justify police dogs. More disturbing is the inappropriate jingoism and factionalism Judge Trott exhibits with his justification. Judge Reinhardt phrased it best when he reminded Judge Trott that “[j]udges are not correspondents for *Newsweek*. We do not campaign for office Judges are supposed to be calm, dispassionate, and committed to the principles of law.”¹⁸³ It is all too easy, especially with such an emotional and partisan topic as crime, for the civil rights of detainees to be ignored beneath the majority’s fears. Courts, as a rule, are antimajoritarian:

When public concern rises dramatically over an issue like crime, and politicians in the highest offices throughout the land rush to abandon any pretense of a commitment to fundamental constitutional principles, it is essential that judges keep their cool—that we, at least, remain determined to fulfill our role as the objective, steadfast guardians of individual liberty. First and foremost, it is our obligation to resist all temptations to succumb to hysteria, all inclinations to ignore our responsibilities and simply to join the pack.¹⁸⁴

If the courts fail to protect the least powerful members of our society, no one will.

1994, while the current homicide rate, as of 1999, is the lowest since 1967. See U.S. Department of Justice, *Bureau of Justice Statistics: Additional Crime Facts at a Glance*, at <http://www.ojp.usdoj.gov/bjs/gvc.htm> (last visited Aug. 27, 2000). In fact, robbery, assault, burglary, and theft rates have all fallen since 1994. See *id.*

182. In addition to the celebrated Rodney King and New York plunger abuse cases, police departments across the nation are still plagued by brutality charges. The recent Rampart scandal has resulted in twenty officers being disciplined or fired. See Scott Glover & Matt Lait, *LAPD Asks D.A. to Prosecute Three Officers in Probe*, L.A. TIMES, Jan. 15, 2000, at A1. If the police admit they have problems and are willing to reexamine their procedures, why should the courts drag their feet?

183. *Chew v. Gates*, 27 F.3d 1432, 1450 (9th Cir. 1994).

184. *Id.*

2. Dogs are not as deadly as guns

Another misleading policy justification for police dogs is their portrayal as nondeadly instruments. It is beyond all doubt that guns are more dangerous than police dogs, but, as noted above in Part III.B, guns and police dogs are not mutually exclusive. Clearly, both police dogs and guns can rank as deadly force. However, denying the deadly force label is not the only manner in which police dog supporters try to downplay police dogs' dangerousness.

It is a widely held misconception that police dogs are not as dangerous as police batons,¹⁸⁵ yet, as explained above in Part III.B, police dogs are likely to cause serious bodily harm. Force rankings aside, common sense would dictate that police dogs are at least as much force as a baton, if not more so.¹⁸⁶ Nevertheless, this inaccuracy persists because police departments consider police dogs to be tools, not weapons, and do not include them in departmental analyses of force.¹⁸⁷ By sweeping the truth of canine force under the rug, police departments perpetuate the myth that police dogs are less dangerous than they are in actuality.

3. Police dogs protect police officers

It is a truism that police officers' work is very dangerous and every precaution should be taken to protect these brave people from harm. However, this utilitarian use of police dogs does not have to

185. See *Retired K-9 Handler Van Bogardus The Use of Police Dogs Constitutes Deadly Force, He Says*, at http://www.policek9.com/Trainers_Digest/bogardus/body_bogardus.html (last visited Sept. 26, 2000) [hereinafter *Bogardus*] (explaining that "dogs have been either level with or just below the use of the baton"); *United States Police Canine Association*, at [http://www.uspcak9.com/caselaw/patrol\(a\).shtml](http://www.uspcak9.com/caselaw/patrol(a).shtml) (last visited Oct. 5, 2000) [hereinafter *Force Continuum*].

In fact, the requirement that police dog deployment be accompanied by a prior warning is a tacit admission that police dogs carry more force than a baton. See *infra* Part III.C.4.

186. All one need do is compare the striking force of a nightstick—the brute force the officer can generate—with the substantial crushing power of a police dog's jaws.

187. See *Bogardus*, *supra* note 185 (noting that Police Officers Standards and Training have not included K-9s in with their use of force guidelines); see also *Force Continuum*, *supra* note 185 ("Typically, canines are not classified as 'weapons.'").

be abandoned to make police dog use safer and police departments more accountable. We cannot ignore the constitutional rights of others purely in the name of protecting police officers. If we did so, the sentiments of *Tennessee v. Garner*,¹⁸⁸ *Graham v. Connor*,¹⁸⁹ and all other excessive force cases, would receive an absolute defense if the force was executed in the name of "protecting police officers." An important practical desire should not override all others. In fact, if police officer safety is so important, detainee safety should be equally as important. This is especially so when considering innocent or inadvertent victims of police dogs.

4. Police dogs are accompanied by warnings before deployment

Generally, police canine policy mandates that a warning must be given before the police dog is released.¹⁹⁰ This is a factor in reducing potential liability for police dogs by reducing accidental and avoidable bites.¹⁹¹ This is a commendable policy, but, contrary to what Judge Trott and his followers believe, it does not go far enough to protect police dog victims.

Consider the circumstances in *Chew* where a suspect was within a huge scrap yard.¹⁹² Police dog warning announcements in that context are a difficult proposition. A warning shouted before the dogs enter the scrap yard would not be effective due to the size of the property. Similar problems would exist with warnings announced over helicopter loudspeakers, which have a limited range in which the warnings can be understood.

The same problems exist when doing indoor searches. Warnings announced from outside the building to be searched are ineffective when mistaken victims or those willing to surrender simply cannot hear the warnings given outside.¹⁹³ Also, searches frequently

188. 471 U.S. 1 (1985).

189. 490 U.S. 386 (1989).

190. See, e.g., *Chew*, 27 F.3d at 1436 (the police dog handler called out warning before deploying dog); *Kopf v. Wing*, 942 F.2d 265, 268 (4th Cir. 1991) (experts explaining that warnings are required to allow suspect chance to surrender).

191. For example, a suspect that does not receive a warning that he or she would have otherwise have heeded, would be unnecessarily bitten.

192. See *Chew*, 27 F.3d at 1436.

193. See, e.g., *Kopf v. Wing*, 942 F.2d 265, 266 (4th Cir. 1991) (the suspect

occur at night and people who are asleep may not hear the warnings. Regardless of Judge Trott's feelings that these warnings are sufficient protection against accidental bites, avoidable bites continue to occur.¹⁹⁴

5. Police dogs search more cheaply than police officers

Training police dogs is not a cheap process, especially considering the weekly reinforcement training they require.¹⁹⁵ It is not a given that K-9 units are cheaper to use than regular police officer searches. Consider the following Rialto Police Department statement: "[M]aintaining police dogs is an expensive task. . . . 'If we didn't have Friends of Rialto Police K-9s, we wouldn't have a program. . . . They have paid for every dog we ever had.'"¹⁹⁶ Despite expensive purchase, training, and equipment costs, these are not the only expenses to consider with police dogs.

First, K-9 units are special tactical units that do not normally patrol a designated area as would other beat cops.¹⁹⁷ K-9 units are special response units that are deployed primarily at the request of regular patrol officers.¹⁹⁸ K-9 units do not replace regular patrols, but supplement them and, therefore, are an added cost.

did not hear the warning).

194. See, e.g., David Beers, *A Biting Controversy*, L.A. TIMES, Feb. 9, 1992, (Magazine), at 22 (noting that the victim was bitten on the testicle while reading a book in the park because "the dog just got too far out in front [of the handler]"); Tina Dirmann, *Police Dog Sinks Teeth into Arm of Rialto Bystander During Chase*, PRESS-ENTERPRISE (Riverside), Nov. 19, 1997, at B3; Henry K. Lee, *Richmond Police Dog Fired for Attack*, S.F. CHRON., Oct. 18, 1997, at A15 (noting that a three-year-old boy and his aunt were attacked by police dog that escaped from his handler).

195. Purchase costs of police dogs are between \$9000 and \$12,000, excluding ongoing training expenses. Police K-9 vehicles cost upwards of \$30,000. See Scott Hadly, *Bark for Backup Police Canines Show Their 'Ruff' and Gentle Sides as They Do the Duty of Protecting and Serving*, L.A. TIMES, Nov. 11, 1996, at B1.

196. Charlene S. Engeron, *Canine Unit Thrives with Friends' Aid*, PRESS-ENTERPRISE (Riverside), Aug. 19, 1999, at B2 (quoting K-9 officer Jim Gibbons).

197. See U.S. POLICE CANINE ASSOC., *A Manual for Back-up Officers & Supervisors*, at <http://www.uspcak9.com/training/k9manual.shtml> (last visited Oct. 11, 2000).

198. See, e.g., *Chew*, 27 F.3d at 1436.

Second, in the situation that existed in *Chew*, a “massive deployment of police officers” was used despite the presence of K-9 units.¹⁹⁹ Multiple patrol units and police helicopters were used to find the suspect.²⁰⁰ K-9 units were just part of the routine police deployment that procedures require in scenarios of that nature.²⁰¹

Third, K-9 units costs should not be compared to regular patrol officers, but to other specialty units—such as SWAT teams, bomb squads, or CRASH units—which exist because of skills uniquely suited to particular situations. It is misleading to say that K-9 units, like other specialized police forces, were developed because they were cheaper than regular patrol officers. In fact, they exist despite their added costs.

Finally, K-9 units would not be so cheap if not for the artificial liability protection they receive from courts. If police dog victims were actually given their constitutional right to find cities liable for their police dog policies, the added costs of litigation and payouts would make police dogs a great deal more expensive than they are today. It is highly doubtful that Judge Trott took police dogs’ proper potential for liability into account when figuring his cost analysis.

6. Police dog reputations

“Fearsome toothed avengers or soft cuddly puppies—the image of police canines seems to vary depending on which side of the law you stand.”²⁰² When courting the law-and-order crowd, police dogs are highly valued as a deterrent. “Their mere presence on the street, even the knowledge that they may be lurking near, exerts a powerful restraint upon lawbreakers.”²⁰³ ““They have a tremendous psychological effect on people,”” a curious result for a so-called low-force instrument.²⁰⁴

However, “[p]olice] dogs are used for a tremendous amount of public relations work, at local schools and community events.”²⁰⁵

199. *Id.* at 1471.

200. *See id.* at 1436.

201. *See id.* at 1444-45.

202. Hadly, *supra* note 195, at B1.

203. Robert L. O’block et al., *The Benefits of Canine Squads*, 7 J. POLICE SCI. & ADMIN. 155, 157 (1979).

204. Hadly, *supra* note 195, at B1.

205. *Id.*

This is done to combat their otherwise fierce reputation, as one commentator noted, “we’re still trying to overcome the image of these dogs being turned loose on civil rights demonstrators in the 1960s’ [and the] flood of excessive-force claims.”²⁰⁶ It appears to be working, with community groups raising money for police departments to purchase and train more dogs.²⁰⁷ This aggressive marketing campaign has swayed the public and judiciary alike. Fostering this warm and fuzzy image inhibits juries and the public at large from taking an objective look at police dog harms. The proof is in the pudding in the fact that there are many groups raising money for police dogs, but none raising money for police dog victims.

IV. RECOMMENDATIONS

The motive for the above listed illogic and blindness by the courts is simple—fear. The fear of losing an effective police tool; fear of appearing soft on crime; fear of change. However, to use a phrase, “the only thing we have to fear is fear itself.”²⁰⁸ The judicial overreaction is not only legally and morally dishonest, but unnecessary. In fact, all of these problematic issues can be tweaked in such a way as to eliminate the negatives and still retain the full effectiveness of police dogs.

A. Individual Officer Liability Should be Secondary to Municipal Liability

The most obvious solution to finding cities liable for their police dog policies is to eliminate the bifurcation procedure used by trial courts. This would allow the plaintiff to proceed directly against the city without regard to the individual officer’s fault.

In other words, a facial attack on the city police dog policy would be possible after a victim was bitten. For example, a K-9

206. *Id.* (quoting Ventura Police Department Lt. Dave Inglis).

207. *See id.* (“In Simi Valley, a group of residents set up a Friends of the K-9 group that has raised money to pay for the newest dog.”); Engeron, *supra* note 196, at B2 (The Friends of Rialto Police K-9s raised nearly \$6000 for police canine program.). Similar groups have been formed in Santa Paula, Thousand Oaks, and Ventura. *See id.*

208. President Franklin D. Roosevelt, Address at his First Presidential Inauguration (Mar. 4, 1933).

officer releases his or her charge and the detainee is bitten. Whether or not this was found to be reasonable within the context of the police dog policy, the victim would be permitted to challenge the policy itself. Similar to a facial attack on state abortion regulations,²⁰⁹ the victim could challenge the use of police dogs in their specific situation and how the general police dog policy affects other individuals. This approach would expand the admissible evidence and allow the plaintiff to go beyond the particulars of the case and make the city accountable for the fundamental flaws within its police dog policy.

Eliminating the bifurcation procedure would be a good start, but it seems unlikely to occur. Although not as comprehensive a solution, instituting punitive damages or attorney's fees for victorious section 1983 actions would also be helpful. This would eliminate the vexing problem where the plaintiff is fully compensated in his or her case against the individual officer, but thereafter is unable to pursue a claim against the city because the contingency fee lawyer will not continue for only nominal damages.²¹⁰ If punitive damages or attorney's fees were a possibility, then the city police dog policy would likely receive a vigorous challenge in court. Unfortunately, the economics of law require a carrot to satisfy the spirit of the law.

Although punitive damages may seem more appropriate in a personal injury context like police dog bite victims, statutorily fixed attorney's fees are a better solution. Attorney's fees are more practical since juries will be reluctant to return a large award when the plaintiff has already been compensated for his or her injuries. A second phase against the city will already result in biasing the jury—thinking that the plaintiff has already gotten what he or she deserves and is simply looking for more. Statutory attorney's fees will remove the lawyer's compensation from the juror's hands. Therefore, the jury will only decide the nominal damage issue and hopefully realize that more is at stake than the plaintiff's desire to "cash in" on his or her injuries.

209. See generally *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (expanding the notion of facial attacks on abortion regulations).

210. See *supra* Part III.A.

B. Police Dogs Should be Labeled as Deadly Force

Considering the recent *Vera Cruz v. City of Escondido*²¹¹ decision and the general tenor of the courts,²¹² police dogs will likely remain classified as nondeadly force for the foreseeable future. This error in jurisprudence is compounded by the fact that police dogs can be trained to eliminate their lethal tendencies and still retain all of their effectiveness.

There are currently two theories of police dog use: “find and bite” (also known as “bite and hold”) and “find and bark” (also known as “circle and bark”).²¹³ Unfortunately, neither of these philosophies goes far enough to mitigate the dangers of police dogs so as to take them out of the realm of deadly force.

Find and bite is as simple as it sounds. A police dog is sent into the area to be searched and, upon finding the suspect, bites him or her.²¹⁴ The dogs are trained to continue biting until the K-9 handler orders the dog to release.²¹⁵ This kind of training is hailed by some police groups as more effective because it disables the suspect more quickly and directly.²¹⁶ However, the qualities that make it a more “effective” training technique are also what make it more deadly. The Los Angeles Police Department was a huge proponent of this technique, but the fifteen dog handlers sent more detainees to “the hospital each year than the rest of the 8,450- member LAPD combined.”²¹⁷ The find and bite technique was used until a \$3.6 million legal settlement forced the LAPD to change their practices.²¹⁸ The LAPD’s change of heart is hardly unanimous. Even within the same county, the Sheriff’s Department continues to use the find and bite policy.²¹⁹

211. 139 F.3d 659 (9th Cir. 1998) (en banc).

212. See *supra* Part III.B.

213. See *Savage, supra* note 5, at A1; Wallentine, *supra* note 167.

214. See *Savage, supra* note 5, at A1; Wallentine, *supra* note 167.

215. See *Savage, supra* note 5, at A1; Wallentine, *supra* note 167.

216. See R.S. Eden, *Handler Control vs Bark and Hold Apprehension Techniques*, at http://www.policek9.com/Trainers_Digest/bitevsbk/body_bitevsbk.html (last visited Sept. 26, 2000); Wallentine, *supra* note 167.

217. *Savage, supra* note 5, at A1.

218. See *id.*

219. See *Newton, supra* note 156, at A1.

The find and bark technique is theoretically less violent. The police dog searches out the suspect, barks when the suspect is found, and will only bite when attacked or threatened.²²⁰ This technique has reduced the number of bites from the more ruthless find and bite method.²²¹ This progress is excellent and shows the effectiveness of retraining police dogs. However, it does not go far enough, especially when analyzing the flaws of find and bark training and the ability to lower police dog bites to zero.

The official policy is that find and bark police dogs will only bite if threatened or attacked. However, the words threatened or attacked have a very broad meaning. The dog may well think it is being "attacked" if the suspect simply moves. In fact, the dogs are "trained to bite at movement, and they will bite if the suspect moves."²²² The average person's most probable reaction to a snarling dog is to move. This natural reaction may trigger bites that could be avoided.

For example, consider the case of *Kopf v. Wing*.²²³ There, a find and bark dog bit a suspect who wished to surrender and a struggle ensued in which the suspect was "frightfully mauled,"²²⁴ and required thirty-seven days in the hospital to treat bites to the upper lip, chest, knee, leg, and scrotum.²²⁵ Needless to say, find and bark dogs carry the same deadly force potential as find and bite dogs.

The only way to turn dogs from deadly force into nondeadly force is to eliminate the dog's bite. An innovative solution is equipping police dogs with a muzzle-like stun gun device. "The dog's going in for a bite, but he can't bite" and the suspect is zapped by the "stun gun [which] have long been considered safe."²²⁶ Police

220. See Wallentine, *supra* note 167.

221. See Savage, *supra* note 5, at A1 (reducing LAPD bites from more than 300 a year to less than 30).

222. Newton, *supra* note 156, at A1 (quoting L.A. Sheriff's Department dog handler, Sgt. William Thompson).

223. 942 F.2d 265 (4th Cir. 1991).

224. *Id.* at 267.

225. See Debbie M. Price, *P.G. Officer in Brutality Case was Drunk Drivers' Nemesis*, WASH. POST, July 16, 1989, at D1.

226. Jeff Kramer, *No Bark, Lots of Arc*, ORANGE COUNTY REG., Feb. 13, 1997, at A1 (quoting co-inventor Harvey S. Allen).

departments find the product promising, but demand more testing before it is more widely instituted.²²⁷

Perhaps police dogs should not seize suspects at all. This seems incongruous, but it is the dog's nose that makes it so useful as a tracker of hidden suspects. "A dog's sense of smell is 100,000 times stronger than that of man's."²²⁸ David Reaver, the lead trainer of the Adlerhorst Police Dog Training School, admits that "[w]e use police dogs for their sense of smell—to find people and things."²²⁹

If the dog's nose is the primary rationale for using police dogs to search for hidden suspects, then it should be the primary use of police dogs as well. If police dogs only track and "alert" to hidden suspects without engaging the suspect at all, then we have a perfect situation. The police get the full use of the dog's uncanny nose to find its quarry, and the suspect is only faced with the amount of force that is appropriate for the situation.

Using the same rationale, a change in the type of dog used would also improve matters. Instead of Rottweilers or German Shepherds, a more passive breed with equally effective noses should be used. Perhaps Retrievers or Bloodhounds, who "have the Cadillac of noses in the dog world,"²³⁰ would be better suited. Bloodhounds have another benefit in that "[t]hey don't bite . . . only drivel."²³¹ By changing not only how police dogs are used, but the breed of dog used, the result would be the elimination of all concerns of police dog deadly force.

V. CONCLUSION

Dogs used for enforcement purposes have a very long pedigree. Police dogs have their roots in ancient Egypt, Greece, and Persia where the "dogs of war" were used in military campaigns to attack war horses.²³² They were first used in a police capacity to control

227. *See id.*

228. O'block et al., *supra* note 203, at 157.

229. Ferrigno, *supra* note 169, at C1. The name of Reaver's training school—Adlerhorst—is German for "eagle's nest," the same name of Adolf Hitler's retreat. *See* Newton, *supra* note 156, at A1.

230. Louise Roug, *Crime-Sniffers are on the Scent*, L.A. TIMES, Sept. 21, 1999, at B1.

231. *Id.* (quoting Orange County Sheriff Mike Corona).

232. *See* Wallentine, *supra* note 167.

gangs in Paris and found their way to New York in 1907.²³³ In all of this time, from armor wearing dogs of the middle ages to the border patrols of East Germany up through the modern police K-9s of today, the manner in which the dogs are used has remained exactly the same. While police dogs must be modernized, they do not have to be abolished.

“This is never a problem with the dogs It’s a cop problem.”²³⁴ The dogs are simply a product of training. They do not “go over the line” or have malicious intent, they simply respond to what they are taught. They can be retrained to make them safer and to fall within constitutionally acceptable limits. Eliminating the seizure role of their duties will end police dog abuses and lawsuits. If the nose is the true purpose for using the dog, then there should be no problem eradicating dogs as implements of restraint. However, when police departments resist this change, their true intentions for the dogs are revealed. Unfortunately, the courts permit the police to remain intractable.

The courts’ reasons for protecting police dogs as enforcement tools are the same as the police departments’: fear of change and public opinion. This is an improper role for the courts. They should protect the least powerful members of our society, not lay down with police dogs. If the courts abandon their duties and take sides with the executive branch, then our whole basis of government fails.

The bifurcation procedure used by courts to deny proper review of police dog policies is a most cryptic and shameful method. Even when the plaintiff’s injury is recognized, and the police dog use is found improper, courts have established procedure to prevent any facial attacks. By removing the possibility of damages for a lawsuit directly against the police dog plan, there can be no exacting review. The question will always be focused on the specific circumstances of the police dog assault and never on the police dog’s greater role. Even when a wrong is established, nothing will be done.

This closer scrutiny would be possible if police dogs were considered deadly force, but here too the courts fail to do what is

233. *See id.*

234. Newton, *supra* note 156, at A1 (quoting plaintiff’s lawyer Donald W. Cook).

expected of them. Incomplete and self-serving narrow definitions are used to calculate whether police dogs constitute deadly force. The past military history of dogs and the damage they inflict is not enough for the courts to be moved. Perhaps a higher death toll is what they desire.

A closing comparison may be useful to illustrate the problems with the courts' and police departments' behavior. It used to be common place for arrested suspects to be denied counsel and coerced into confessions. The Supreme Court took aims to correct this problem with *Miranda v. Arizona*.²³⁵ The case ignited fierce resistance by police groups and even presidents, but nevertheless instituted the change in the long-standing traditional police practice.²³⁶ The *Miranda* decision has recently come under fire, but, surprisingly, police groups are now in favor of the judicially imposed warnings.²³⁷ Now the "new procedure" is the established practice. Police departments may not like change, but they are more than capable of implementing it. Perhaps, with the courage of the courts, the same story can be written for police dogs.

*Mark Weintraub**

235. 384 U.S. 436 (1966).

236. See GREAT AMERICAN TRIALS 505-08 (Edward W. Knappman ed., 1994).

237. See Michael Hedges, *Police Say Miranda Here to Stay*, ORANGE COUNTY REG., Apr. 20, 2000, at A31.

* J.D. candidate, May 2001. I would like to thank the *Loyola Law Review* staff for their very helpful suggestions, Mike Purleski for his vast knowledge of police dogs, and my lovely wife Laura and beautiful daughter Kayleigh for their love, understanding, and patience.

