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Elizabeth Olsen

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PAWS UP, DON'T SHOOT: PREVENTING OFFICER-INVOLVED SHOOTINGS OF COMPANION CANINES

By
Elizabeth Olsen*

This Article discusses situations in which an officer has shot a companion canine, and evaluates the efficacy of the different potential civil claims that an owner may have against the individual officer, his supervisor, the department, or the municipality. It then goes on to suggest that the relief granted, even for successful claims, is insufficient to alter municipal policies governing officer's interactions with canines because such relief is typically retrospective in nature. Additionally, this Article discusses the serious problems that arise in relying on civil litigation as a mechanism for addressing officer-involved canine companion shootings because of the status of dogs as property, and seeks to identify alternative legal strategies which could yield prospective relief in the form of an injunction or writ of mandamus. Although attempting to seek prospective relief pre-deprivation presents difficulties in establishing standing, under the right circumstances, a plaintiff's status as a municipal taxpayer is sufficient to establish standing. Finally, this Article sets forth a potential legal framework for bringing suit against a municipality or police department seeking prospective changes to police department policy, based on standing as a municipal taxpayer rather than as an aggrieved individual whose companion canine has already been harmed.

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I. INTRODUCTION	66
A. <i>When and Why Are Officers Shooting Dogs?</i>	67
II. POST-DEPRIVATION RELIEF: LEGAL REMEDIES AFTER YOUR COMPANION CANINE HAS BEEN HARMED	71
A. <i>Lack of Consequences for Police Officers Who Have Shot Companion Canines</i>	79
B. <i>Section 1983 Suits Are an Ineffective Mechanism for Change or to Hold Officers and Departments Accountable</i>	84
III. PREVENTION: MUNICIPAL TAXPAYER STANDING AS AN ALTERNATIVE APPROACH	86
A. <i>Common Goal of Preventing the Shootings, Not Just Compensating Victims After the Fact</i>	87
B. <i>The Lack of Officer Training and Its Consequences</i>	91
IV. PRACTICAL PREVENTION: CALIFORNIA TEST CASE....	93
A. <i>Claims That a Police Policy Violates State Law</i>	96
B. <i>Claims That a Municipality Is Expending Funds Paying the Salaries of Officers Carrying Out Policies in Violation of the Constitution</i>	99
V. CONCLUSION	101

I. INTRODUCTION

In the United States, nearly half of all households have a pet dog.¹ Given the nature and scope of law enforcement officers' responsibilities, it is inevitable that they will encounter companion canines in the course of attempting to execute their duties. Despite this inevitability, most police departments do not require that their officers undergo any type of training on canine behavior, nor do they require that non-deadly instrumentalities, such as a Taser or baton, be the default mechanism (as opposed to a firearm) for subduing a companion canine whom a police officer believes poses a threat.² Accordingly, excepting pressures exerted by the media and civil litigation, there is minimal

¹ See *New Survey Reveals Pet Ownership at All Time High*, AM. PET PRODUCTS ASS'N (Feb. 21, 2013), <http://media.americanpetproducts.org/press.php?include=144262> [<https://perma.cc/28NC-5FW8>] (accessed Dec. 24, 2016) (finding that in 2012, 46.7% of all households had a pet dog). Some studies suggest the percentage is slightly less. See, e.g., *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N (2012), <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> [<https://perma.cc/5LKK-DQNY>] (accessed Dec. 24, 2016) (reporting that 36.5% of households owned dogs in 2012).

² It is worth noting that other government employees who regularly come into contact with companion canines, such as U.S. Postal Service employees, are subjected to mandatory annual training on canine behavior and interactions. See Conor Friedersdorf, *Police Officers Who Shoot Dogs*, ATLANTIC (Feb. 12, 2014), <http://www.theatlantic.com/national/archive/2014/02/police-officers-who-shoot-dogs/283764/> [<https://perma.cc/P6HZ-3PZ2>] (accessed Dec. 24, 2016) (naming several major cities that do not provide regular training to police officers). See generally CYNTHIA BATHURST ET AL., CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *THE PROBLEM OF DOG-RELATED INCIDENTS AND ENCOUNTERS* 15 (2011) (listing inadequate aspects of police training to deal with dogs).

oversight of officer-involved canine companion shootings, and practically no accountability either for the individual officer or the department.

In situations where an officer has shot a companion canine, the dog's owner may have a number of different potential claims against the individual officer, his supervisor, the department, or the municipality.³ However, even where a dog's owner is able to prevail on her claims, the relief granted is typically retrospective in nature,⁴ such that the inadequate municipal policies governing officers' interactions with canines may remain unchanged. This Article discusses the serious problems that arise because of the status of dogs as property, and seeks to identify alternative legal strategies that could yield prospective relief in the form of an injunction or writ of mandamus. Although attempting to seek prospective relief pre-deprivation presents difficulties in establishing standing,⁵ under the right circumstances, a plaintiff's status as a municipal taxpayer is sufficient to establish standing.

A. *When and Why Are Officers Shooting Dogs?*

Situations in which police officers shoot companion canines are fairly common. In fact, the majority of shooting incidents by police involve animals, and nearly all of the animals victimized are dogs.⁶ One would tend to think that all of these shootings occur during dangerous police endeavors, that canine victims are always large, physically intimidating dogs, or that the canine victim is unrestrained and running

³ Pamela L. Roudebush, *Overview of Police Shooting Pets*, ANIMAL LEGAL & HIST. CTR. (2002), <https://www.animallaw.info/article/overview-police-shooting-pets> [https://perma.cc/K6UF-9Y8F] (accessed Dec. 24, 2016).

⁴ In limited circumstances, a plaintiff suing under 42 U.S.C. § 1983 may seek equitable relief in the form of an injunction; however, in order to prevail the plaintiff must demonstrate with near certainty that he is likely to be subjected to the same unconstitutional practice of which he complains at some later point in time. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983) (finding that a plaintiff who had been unreasonably subjected to a chokehold was entitled to seek damages in a § 1983 action, but that he could not prove a sufficient likelihood that he would be subjected to the chokehold again so he could not seek an injunction requiring the department to cease using the chokehold generally).

⁵ Article III, § 2 of the Constitution requires that courts only adjudicate actual "cases" or "controversies." U.S. CONST. art. III, § 2. In order for a plaintiff to have standing such that his case or controversy may properly be before the court, he must allege that he has suffered, or imminently will suffer, an injury, that the injury is fairly traceable to the defendant's conduct, and that a favorable court decision is likely to redress the harm. *Valley Forge Christian Coll. v. Ams. United*, 454 U.S. 464, 472–73 (1982).

⁶ *See BATHURST ET AL.*, *supra* note 2, at 10 (reporting that approximately 75% of shooting incidents in Milwaukee from January 2000 through September 2002 were shots fired at dogs (killing forty-four dogs) and that in California, 50% of the shooting incidents reported from 2000–2005 involving officers were animal shootings); Mike Carter, *Half of Intentional Shooting by Police Involve Dogs, Study Says*, SEATTLE TIMES (Dec. 2, 2012, 11:14 AM), <http://www.seattletimes.com/seattle-news/half-of-intentional-shootings-by-police-involve-dogs-study-says/> [https://perma.cc/Y65N-H6QC] (accessed Dec. 24, 2016) (reporting that half of intentional shooting incidents from 2000–2005 involving police officers also involved dogs).

loose, but this is simply not the case.⁷ Instead, police have killed dogs while going to notify a murder victim's family of the victim's death,⁸ while questioning neighbors about crime in the area,⁹ while responding to a false alarm,¹⁰ while pursuing a DUI suspect and cutting across an unrelated individual's private backyard,¹¹ while stopping to ask for directions,¹² while executing a warrant on or otherwise responding to the wrong house, and in a variety of other non-violent situations.¹³ Police officers have also shot and killed Jack Russell terriers,¹⁴ senior-

⁷ Approximately 40% of officer-involved canine shootings occur when the dog is on its own property. Elisa Black Taylor, *Dog Shot with Terminally Ill Child Present by Police at Wrong Address*, ELISA'S EXAMINER (June 19, 2013), <https://elisasexaminer.wordpress.com/2016/07/02/dog-shot-with-terminally-ill-child-present-by-police-at-wrong-address/> [<https://perma.cc/VMS4-UETB>] (accessed Dec. 24, 2016).

⁸ Bill McKelway, *Henrico Police Shoot Pet As They Notify Family of Son's Homicide*, RICH. TIMES-DISPATCH (July 12, 2012), http://www.richmond.com/news/article_9e2c4d25-e4bc-51c7-ba1a-c03da22888f5.html [<https://perma.cc/ZW3Q-QZ3A>] (accessed Dec. 24, 2016) (quoting the victim's sister as saying, "[The Police] had told me my brother was dead and I'd come out back to cry on the porch and [my dog] Tiger must have heard them. He ran into the front yard and the officer shot him.").

⁹ Emily Nipps, *Dog's Shooting by Deputy Leaves Hard Feelings*, TAMPA BAY TIMES (Feb. 2, 2009, 9:01 PM), <http://www.tampabay.com/news/publicsafety/dogs-shooting-by-deputy-leaves-hard-feelings/972763> [<https://perma.cc/5B3V-GTTH>] (accessed Dec. 24, 2016) (recounting how an officer shot a dog named Smoke while responding to a call of burglary and interviewing neighbors).

¹⁰ Erik Waxler, *Body Camera Captures Pasco Deputy Shooting Dog*, ABC ACTION NEWS (Apr. 24, 2015, 8:15 AM), <http://www.abcactionnews.com/news/region-pasco/body-camera-captures-pasco-deputy-shooting-dog> [<https://perma.cc/DT88-J9UE>] (accessed Dec. 24, 2016) (noting the irony of an officer's killing of a pet dog in the course of responding to a false burglary alarm and attempting to protect a person's property, considering a pet dog is an irreplaceable and priceless item, and quoting the individual whose dog was shot and killed as having said, "If he's coming to protect my property, he took my more valuable property away from me. I can replace a TV. I can replace a microwave. I can't replace my dog. That's my family. That's my son.").

¹¹ Lawrence Mower & Maggie Lillis, *Family's Pet 'Coco' Killed by Police*, L.V. REV. J. (Feb. 7, 2009), <http://www.reviewjournal.com/news/familys-pet-coco-killed-police> [<https://perma.cc/D25N-J8KK>] (accessed Dec. 24, 2016) (describing a situation in which "Coco" was shot and killed by police officers while inside its dog-house shed, after the police cut through "Coco's" backyard in pursuit of a DUI suspect who had fled on foot). It is worth noting that a DUI is a misdemeanor in Las Vegas, even if it is not a first offense. See NEV. REV. STAT. § 484C.400 (2016) (listing penalties for first, second, and third offenses). Coco was killed on private property, in pursuit of an unrelated, non-violent, misdemeanor suspect.

¹² Radley Balko, *Dogs in Deadly Crossfire*, DAILY BEAST (July 19, 2009, 10:49 AM), <http://www.thedailybeast.com/articles/2009/07/19/dogs-in-a-deadly-crossfire.html> [<https://perma.cc/X5UN-Y5UW>] (accessed Dec. 24, 2016).

¹³ See *infra* note 107 (discussing a number of incidents where canine companions were killed when officers went to the wrong house).

¹⁴ Domingo Rameriz Jr., *Haltom City Officer Cleared in Shooting of Dog*, STAR-TELEGRAM (Oct. 15, 2008, 11:35 AM), <http://www.star-telegram.com/incoming/article3824411.html> [<https://perma.cc/KRY4-MCAX>] (accessed Dec. 24, 2016).

aged cocker spaniels,¹⁵ miniature dachshunds,¹⁶ Chihuahuas¹⁷ and other breeds of dog that are so small as to render claims of their dangerousness specious.¹⁸ The prevalence of officer-involved shootings of companion canines can be attributed largely to the classification of dogs as property, which means that they are not entitled to the same protections against the use of force as are people.¹⁹ However, close analysis of the treatment of companion animals by the legal system²⁰ suggests a schizophrenic approach to our classification of them as property, which is reflected in police departments' policies and procedures for the handling of companion canines.

Dogs are conceived of as property after they have been shot, for purposes of determining whether an individual's permanent depriva-

¹⁵ Alan Wang, *Concord Police Officer Shoots Elderly Dog*, ABC7 News (June 24, 2013), <http://abc7news.com/archive/9151142/> [<https://perma.cc/ERC5-FKVA>] (accessed Dec. 24, 2016).

¹⁶ *VA Police Officer Fired for Dog's Shooting Death*, WHSV3 (July 10, 2009, 12:00 AM), <http://www.wHSV.com/home/headlines/50493927.html> [<https://perma.cc/EC7V-3GX4>] (accessed Dec. 24, 2016).

¹⁷ Friedersdorf, *supra* note 2.

¹⁸ Even in these situations, it is particularly troubling that a court may still decide that an officer behaved reasonably and was justified in shooting a dog that was clearly not dangerous. *Grant v. City of Houston*, No. 4:11-CV-3278, 2014 WL 4966224, at *18 (S.D. Tex. Sept. 30, 2014). In this case, police officers shot and killed a dog that was recovering from surgery after having had its leg amputated, but the court still deferred to the officer's judgment at the time, and dismissed the suit against the officer on qualified immunity grounds. *Id.*

¹⁹ William C. Root, *Man's Best Friend: Property or a Family Member? An Examination of the Legal Classification of Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 423 (2002) (discussing historical treatment of companion animals as chattel).

²⁰ State animal anti-cruelty laws provide protection for animals irrespective of whether they are owned, such that they have protections despite not being property. See, e.g., N.Y. AGRIC. & MKTS. LAW § 350(1), (defining "Animal" as used throughout the anti-cruelty law as "[E]very living creature except a human being," without reference to ownership); VT. STAT. ANN. tit. 13, § 351(1) (2013) (same, but worded as "all living sentient creatures, not human beings"). Some courts have permitted individuals to sue for emotional distress over the loss of a pet. *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 97 Misc. 2d 530 (1979) (recognizing that the emotional anguish suffered by an individual resulting from the loss of a pet is also actionable, and explaining that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property. . . . To say it is a piece of personal property and no more is a repudiation of our humaneness.") Compare *Burgess v. Taylor*, No. 1999-CA-002262, 44 S.W.3d 806 (Ky. App. 2001) (allowing woman to sue for intentional infliction of emotional distress when defendants had boarded her horses but then sold them for slaughter), and *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Hawaii 1981) (awarding family \$1,000 as compensation for mental anguish damages resulting from the death of their dog when a state agency left the dog in an unventilated van in hot weather), with *Rabideau v. City of Racine*, No. 99-3263, 627 N.W.2d 795 (Wis. 2001) (acknowledging that "[l]abeling a dog 'property' fails to describe the value human beings place upon the companionship that they enjoy with a dog," but still declining to permit a negligent infliction of emotional distress claim against officers who had killed the woman's dog).

tion of her dog will go un-remedied.²¹ In the assessment of whether an officer's actions were justified at the time of a shooting, however, an officer will typically assert that dogs are individual, thinking, feeling, emotive beings capable of unpredictable behavior not unlike their human masters.²² A dog's individuality serves to justify killing it, but the legal system then denies that sentient individuality when it classifies that same dog as property. If dogs are not perceived by officers as property in the traditional sense at the moment they shoot them, officers should not get to later benefit from their classification as property to justify employing a lesser level of scrutiny in analyzing whether their conduct was appropriate.

If all dogs are properly categorized as property, then there is no reasonable justification for laws providing greater protections for police dogs compared to 'civilian' canines or for greater penalties for harming police canines when that harm does not interfere with a police officer's execution of his official duties.²³ Presently, every state has laws specifically protecting police canines that surpass those protections afforded to companion canines, and in most states those protections exist even when the dog is off duty or even after the dog has retired.²⁴ Thus, it would seem that dogs are instrumentalities controlled by their owners, their interests and rights inure from their relationship to their master.

²¹ Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001).

²² Officers often assert that a dog made them feel threatened as their justification for shooting it. See Carroll v. Cty. of Monroe, No. 07-CV-6123P, 2012 WL 826996 (W.D.N.Y. Mar. 9, 2012), *aff'd*, 712 F.3d 649 (2d Cir. 2013) (upholding a jury verdict that accepted an officer's assertion that a dog was a threat to officer safety during a 'no-knock' search); Viilo v. Eyre, 547 F.3d 707, 708–09 (7th Cir. 2008) (involving testimony from officers who shot a dog that it was growling and exposing its teeth); Brown v. Muhlenberg Twp., 269 F.3d 205, 210–11 (3d Cir. 2001) (reviewing testimony of officers justifying their harming companion canines).

²³ This author recognizes that the interest in protecting a police canine is heightened in situations where harming the police canine would also endanger a human police officer or otherwise jeopardize the legitimate objectives of law enforcement. However, that does not mean that an individual's interests in the safety and well-being of her own dog are inferior or entitled to any less protection.

²⁴ See Craig Ian Scheiner, *Statutes with Four Legs to Stand On: An Examination of Cruelty to Police Dog Laws*, 5 ANIMAL L. 177 (2001) (surveying and discussing state laws protecting police dogs). Many of these laws provide heightened protections to police K-9s even when the police K-9 is off duty, meaning that the dog could be at home with its master. See, e.g., 18 U.S.C. § 1368 (providing that harming a dog used by any federal agency for "aiding in the detection of criminal activity, enforcement of laws, or apprehension of criminal offenders" whether on or off duty can be punished by up to ten years in prison); IOWA CODE ANN. § 717B.9 (West 2016) (providing that harming a police dog is a class D felony, and that "police service dog means a dog used by a peace officer or correctional officer in the performance of the officer's duties, *whether or not the dog is on duty*") (emphasis added). See also Boy, 17, *Sentenced to 23 Years for Fatally Shooting a Retired Police Dog*, DAILYMAIL.COM (July 11, 2014, 5:30 PM), <http://www.dailymail.co.uk/news/article-2689248/Teen-17-sentenced-23-years-jail-fatally-shooting-retired-police-dog.html> [<https://perma.cc/87KM-45W7>] (accessed Dec. 24, 2016) (discussing a situation where a boy was sentenced to twenty-three years for killing a retired police K-9).

Although courts have recognized that the killing of a companion canine may be justified where the only threat present is the canine itself,²⁵ this author contends that the use of deadly force against a companion canine should be limited to those circumstances in which the canine so exacerbates the serious risk of injury posed by the presence of another person, and because of the serious nature of the threat posed by the person, expedience necessitates the shooting of the companion canine. As is discussed below, empirical evidence seriously undermines any claim that an officer may reasonably believe an apparently aggressive companion canine would seriously harm him. When officers are confronted with a dog that they believe may be aggressive, their failure to pull out their gun and shoot the dog immediately will not result in a loss of their own life. A growling or barking dog, by itself, cannot harm a police officer until the moment that its teeth make contact with the officer's skin. Unlike when officers are facing a suspect armed with a gun, when officers encounter a potentially dangerous dog, they often have the luxury of distance and time. Essentially, when officers shoot a dog before it has even gotten close enough to harm them, or before it has actually attacked them, they are deciding that their interest in not being bitten by a dog outweighs an owner's possessory interest in their dog as well as the interest that a dog has in being free from suffering and avoiding untimely death. However, the calculus is not so straightforward, because a police officer's use of more force than is either reasonable or necessary can have far-reaching, deleterious impacts on society beyond just those experienced by the individual who has been irrevocably deprived of her companion canine.²⁶

II. POST-DEPRIVATION RELIEF: LEGAL REMEDIES AFTER YOUR COMPANION CANINE HAS BEEN HARMED

The harming of a canine companion by an officer is recognized as a seizure within the meaning of the Fourth Amendment.²⁷ Even where a

²⁵ See *Carroll*, 712 F.3d 649 (holding that the jury was entitled to believe an officer's testimony of a dog's aggression and the need to use lethal force to subdue it); *Viiilo*, 547 F.3d at 709 (describing conflicting testimony about the behavior of a dog shot by police officers); *Muhlenberg Twp.*, 269 F.3d at 210–11, 228 (finding an officer's killing of a dog was appropriate).

²⁶ See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 Nw. U.L. REV. 1119, 1157 (2008) (discussing the circumstances under which police officers use force and explaining, "[M]oral constraints pose an upper limit on permissible force used to defend police officers as well as a lower one. Moreover, while the state has a significant interest in the safety of its officers, police violence also imposes a significant cost on the public. Excessive uses of force have a deleterious effect on public confidence in the police, and may also undermine public adherence to criminal laws and cooperation with police activities related to law and order.").

²⁷ Every circuit that has considered the issue has held that the killing of a companion canine constitutes a 'seizure' within the meaning of the Fourth Amendment. See *Carroll*, 712 F.3d 649 (finding that the unreasonable killing of a companion animal was a Fourth Amendment seizure); *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009)

person's dog is not killed, and only sustains injuries from which he will recover, the person may still have been subjected to a Fourth Amendment seizure.²⁸ Thus, in situations where an officer shoots a person's dog, that person may be able to bring a claim against the officer, the officer's supervisor, the municipality, or the police department under 42 U.S.C. § 1983, which covers civil actions for the deprivations of constitutional rights.²⁹ The Supreme Court has repeatedly indicated that "searches and seizures inside a home without a warrant are presumptively unreasonable."³⁰ When an officer shoots a companion canine, the officer is effectuating a warrantless seizure.³¹ However, not all instances in which an officer shoots a canine companion are considered unlawful seizures.³² Rather, a seizure becomes unlawful when it is

(holding that "dogs are 'effects' for purposes of being secure from unreasonable seizure under the Fourth Amendment"); *Viilo*, 547 F.3d 707, at 710 (explaining that, under the Fourth Amendment, the state cannot destroy a pet when it poses no immediate danger and the owner is looking on); *Altman v. City of High Point, N.C.*, 330 F.3d 194, 204–05 (4th Cir. 2003) (explaining that the analysis of unreasonably killed pets is consistent with animals' status as property in common and statutory law); *Muhlenberg Twp.*, 269 F.3d at 210–11 (finding that it necessarily follows from an owner's possessory interest in their pet and pets' status as property that they are effects under the Fourth Amendment); *Leshner v. Reed*, 12 F.3d 148, 150 (8th Cir. 1994) (adding that a search or seizure carried out in an individual's home is per se unreasonable unless it falls within one of the well-defined exceptions).

²⁸ See *Esterson v. Broward Cty. Sheriff's Dep't*, No. 09-60280-CIV., 2010 WL 4614725, at *3 (S.D. Fla. Nov. 4, 2010) ("Injury to a pet dog is the type of damage that would be protected under the Fourth Amendment from an unreasonable seizure."); *McCarthy v. Kootenai County*, No. CV08-294-N-EJL., 2009 WL 3823106, at *5 (D. Idaho Nov. 12, 2009) (rejecting defendants' contention that merely injuring or maiming a dog does not constitute a seizure, emphasizing the dog's reduction in value and significant alteration of plaintiff's possessory interest); *Brooks v. Jenkins*, 104 A.3d 899, 910 (Ct. Spec. App. Md. 2014) (plaintiffs recovered and officer was liable where family dog shot and injured but recovered).

²⁹ Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, 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 . . ." 42 U.S.C. § 1983 (2012).

³⁰ *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) (citing *Payton v. New York*, 445 U.S. 573 (1980)). Searches without a warrant demand exceptional circumstances. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352–53 (1977) (following precedent of this established presumption); *Camara v. Municipal Court*, 387 U.S. 523, 528–29 (1967) (holding that unless there are exceptional circumstances, searches and seizures without consent or a valid warrant are unreasonable); *McDonald v. United States*, 335 U.S. 451, 454 (1948) (holding that warrantless searches and seizures require exceptional circumstances to be valid); *Johnson v. United States*, 333 U.S. 10, 14–15 (1948) (holding that there were no exceptional circumstances to excuse the warrantless search of a residence by a police officer).

³¹ This is true even when an officer is carrying out a valid search warrant because a search warrant will not provide for the 'seizure' or destruction of a canine companion animal by shooting. The search warrant will usually be unrelated to the seizure of the canine companion animal.

³² See, e.g., *Esterson*, 2010 WL 4614725, at *4 (holding no unreasonable seizure under the Fourth Amendment where companion canine charged twice and officer was

“more intrusive than necessary.”³³ In order for a warrantless seizure to be constitutional, it must have been reasonable, meaning that the governmental interests justifying the seizure must outweigh the deprivation caused by its intrusion.³⁴ The inquiry into reasonableness and the balancing test that courts engage in varies depending on whether the state official used deadly force in effectuating the seizure.³⁵ Although the status of dogs as property provides the basis for an individual to state a violation of her constitutional rights, applying the traditional reasonableness test to evaluate situations where an officer has killed a companion canine presents a plethora of conceptual difficulties.

Despite the continued classification of dogs as property, a number of courts have consistently acknowledged that an individual has a qualitatively different interest in a companion animal than in other forms of property.³⁶ Indeed, “dogs are more than just a personal effect[,] . . . [t]he emotional attachment to a family’s dog is not comparable to a possessory interest in furniture.”³⁷ The recognition that companion animals are different in kind from other things traditionally recognized as property has led to the passage of laws protecting animals³⁸ even absent any human possessory interest in their wellbe-

carrying twenty pounds of gear and unable to retreat); *McCarthy*, 2009 WL 3823106, at *6 (holding no unreasonable seizure under the Fourth Amendment where officer felt threatened, made verbal commands to two dogs to stop attacking, and plaintiffs did not witness the attack).

³³ *Florida v. Royer*, 460 U.S. 491, 504 (1983).

³⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

³⁵ *Id.* at 395.

³⁶ *See, e.g.*, *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J., concurring) (“The law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.”); *Rabon v. City of Seattle*, 34 P.3d 821, 826 (Wash. Ct. App. 2001) (recognizing “merit to the argument that a person’s relationship with a dog deserves more protection than a person’s relationship with, say, a car”).

³⁷ *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005).

³⁸ All fifty states have some form of felony animal anti-cruelty statute. For a complete list of state anti-cruelty laws, see *Anti-Cruelty: Related Statutes*, ANIMAL LEGAL & HIST. CTR., https://www.animallaw.info/filters?topic=14605&species=all&type=statute&country=all&jurisdiction=All&combine_op=contains&keyword= [https://perma.cc/5G37-R5AK] (accessed Dec. 24, 2016).

ing.³⁹ Accordingly, our society regards those who abuse and harm animals as particularly repugnant.⁴⁰

In situations when officers have killed a companion canine, they will typically assert that they acted in self-defense and that the government's interests in the safety of its officers justified their destroying the dog.⁴¹ It is anomalous then, that when officers specifically instruct their police canine to bite or otherwise apprehend an individual, their use of force will almost always be deemed neither deadly⁴² nor excessive.⁴³ In fact, many police departments consider the deployment of a police canine as either a low or intermediate level of force in their use-of-force policies.⁴⁴

³⁹ Most state anti-cruelty laws protect domestic animals such as dogs or cats from cruelty irrespective of whether they have an owner. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 10-602(2), (4) (West 2002) (including protection against intentional cruelty towards “animals that are . . . strays . . . [or] feral”); WASH. REV. CODE § 16.52.117(e) (2015) (providing that taking, leading away, or receiving an animal for use in animal fighting is a felony); Allie Phillips, *The Hierarchy of Anti-Cruelty Laws: Prosecuting the Abuse of Stray and Feral Cats*, NAT'L DIST. ATTORNEYS ASS'N: NAT'L CTR. FOR PROSECUTION OF ANIMAL ABUSE 1, (Nov. 3, 2003), <http://www.ndaa.org/pdf/Tales%20of%20Justice%20vol%203%20no%203.pdf> [<https://perma.cc/B3S7-G7GC>] (accessed Dec. 24, 2016) (“prosecutors recognize . . . that the abuse of animals on its own . . . with its own set of laws, is unacceptable in a civilized society.”).

⁴⁰ John Platt, *FBI Classifies Animal Abuse as a ‘Crime Against Society,’* TAKEPART (Sept. 25, 2014), <http://www.takepart.com/article/2014/09/24/fbi-classifies-animal-abuse-crime-against-society> [<https://perma.cc/Q6J2-7B6P>] (accessed Dec. 24, 2016) (reporting that the FBI classifies “animal abuse as a ‘crime against society’ [placing animal abuse] on the same level of offense as murder, drug trafficking, arson and assault”).

⁴¹ *See Muhlenberg Twp.*, 269 F.3d at 210–11 (reviewing testimony of officers justifying their actions when harming companion canines).

⁴² *See Kuha v. City of Minnetonka*, 365 F.3d 590, 598 (8th Cir. 2003), *abrogated by Szabla v. City of Brooklyn Park*, Minn., 486 F.3d 385 (8th Cir. 2006) (holding that the deployment of a police dog trained to bite and hold a fleeing suspect was not deadly force); *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 150 (1st Cir. 2003) (holding that under a reasonableness inquiry, the use of police dogs trained to “bite and hold” did not constitute deadly force); *Robinette v. Barnes*, 854 F.2d 909, 910 (6th Cir. 1988) (holding that “use of a properly trained police dog to seize a felony suspect does not constitute deadly force” despite suspect’s death from bite wounds); *Thompson v. Cty. of Los Angeles*, 142 Cal. App. 4th 154, 167 (Cal. Dist. Ct. App. 2006) (holding that in light of the evidence presented, the “use of a trained police dog to locate appellant [did not] constitute deadly force”). *See generally* Maria A. Audero, Note, *From Man’s Best Friend to Deadly Force?*: *Vera Cruz v. City of Escondido*, 29 Sw. U. L. REV. 139, 151 (1999) (“[E]very circuit that addressed the issue decided that apprehension by [police canines] does not constitute deadly force as a matter of law.”).

⁴³ *See* Mark Weintraub, Note, *A Pack of Wild Dogs: Chew v. Gates and Police Canine Excessive Force*, 34 LOY. L.A. L. REV. 937, 939 (2001) (“[C]ourts have labeled police dogs as nondeadly and denied the more rigorous standard of review that deadly force requires.”).

⁴⁴ *See, e.g.*, GARRY F. MCCARTHY, CHI. POLICE DEP’T, GEN. ORD. G03-02-04(IV)(A)(1), (B)(1), CANINES AS A FORCE OPTION (July 24, 2014), <http://directives.chicagopolice.org/lt2015/data/a7a57be2-1290de63-7db12-90f1-b181409048792ba2.html> [<https://perma.cc/432K-GBV3>] (accessed Dec. 24, 2016) (providing that a police canine may be deployed against an “assailant,” which includes a person “who is using or threatening the imminent use of force against the canine,” or “an active resister,” which includes individuals “alleged to have committed either a felony or violent misdemeanor”); GARRY F. MCCAR-

In 2012, the Las Vegas Police Department (LVPD) initiated a new use of force policy in response to a series of controversial shootings, which was intended to encourage LVPD officers to “respect the value of every human life.”⁴⁵ The new policy considers the deployment of police canines on an individual to be a use of force that “is not intended to and has a [low probability] of causing injury” and is “neither likely nor intended to cause death.”⁴⁶ Although one could point to the training that police canines receive as providing a basis for treating them as less of a threat compared with an ordinary companion canine, this training does not change the extent of a canine’s ability to injure an individual.⁴⁷ If anything, police canines are *more* capable of causing serious injury than are average companion canines, *because* of their

THY, CHI. POLICE DEP’T, GEN. ORD. G03-02-02(III)(C)(1), FORCE OPTIONS (2015), <http://directives.chicagopolice.org/lt2015/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.html> [<https://perma.cc/5UMB-AD7Z>] (accessed Dec. 24, 2016) (defining “assailant” to include individuals without weapons but who appear to be acting aggressively). Seattle Police Dep’t, *Seattle Police Department Manual*, SEATTLE.GOV (Nov. 1, 2015), <http://www.seattle.gov/police-manual/title-8---use-of-force/8300---use-of-force-tools#Canine%20Deployment> [<https://perma.cc/DKN9-5EPJ>] (accessed Dec. 24, 2016) (allowing officers to deploy police canines as force where suspect is “escaping”). Some police departments do not even include reference to the use of police canines in their use of force policies at all. *See, e.g.*, RIVERSIDE POLICE DEP’T, RIVERSIDE POLICE DEPARTMENT POLICY MANUAL (2016), <https://www.riversideca.gov/rpd/ChiefOfc/manual.pdf> [<https://perma.cc/LD4F-WDBM>] (accessed Dec. 24, 2016) (failing to address canines); WICHITA POLICE DEP’T, REG. 4.1, WICHITA POLICE DEPARTMENT POLICY MANUAL (2013), <https://intvksnw.files.wordpress.com/2015/01/regulation-4-weapons-and-use-of-force-requirements.pdf> [<https://perma.cc/LYN3-4XTE>] (accessed Dec. 24, 2016) (failing to mention canines). *See also* R. PAUL McCauley et al., IND. UNIV. OF PA. CTR. FOR RESEARCH IN CRIMINOLOGY, THE POLICE CANINE BITE: FORCE, INJURY AND LIABILITY 3 (2008), <http://www.iup.edu/criminology/research/policek9/default.aspx> [<https://perma.cc/GXM9-Q5GV>] (accessed Dec. 24, 2016) (discussing how a police canine is sometimes considered to be a “tool,” comparable to a flashlight or siren, rather than a weapon).

⁴⁵ Lawrence Mower and Brian Haynes, *Sheriff Announces New Use of Force Policy*, L.V. REV. J. (July 9, 2012, 10:02 AM), <http://www.reviewjournal.com/news/crime-courts/sheriff-announces-new-use-force-policy> [<https://perma.cc/S9AK-WZZR>] (accessed Dec. 24, 2016).

⁴⁶ LAS VEGAS POLICE DEP’T, GEN. ORD. GO-021-12, USE OF FORCE (2012), <http://www.lvmpd.com/Portals/0/OIO/GO-021-12%20Use%20of%20Force%20Signed%20Copy.pdf> [<https://perma.cc/9ZSW-PAQD>] (accessed Dec. 24, 2016). The Las Vegas Police Department use of force policy considers the deployment of a canine that does not result in bites to be “low level force.” *Id.* Other examples of low-level force are officer presence, verbal communication, and pinching. Low-level force is defined as “[t]he level of control necessary to interact with a subject that is compliant or displaying [p]assive or [a]ctive [r]esistance.” *Id.* The policy considers canine deployment where bites occur to be “intermediate force.” Other examples of intermediate force are empty hand tactics (meaning takedowns), OC pepper spray, and lateral vascular neck restraints. Intermediate force is defined as “[t]he level of force necessary to compel compliance by a subject displaying [a]ggressive [r]esistance.” *Id.*

⁴⁷ *See generally* Louis P. Dell, *Police Attack Dogs: A Dogmatic Approach to Crime Control*, 13 WHITTIER L. REV. 515, 521–23 (1992) (discussing how police dogs are encouraged to be exceptionally aggressive).

training.⁴⁸ Police canines are unlike other “force tools” employed by officers. No amount of training will transform a canine into the functional equivalent of a senseless firearm, capable of consistent performance with virtual certainty⁴⁹ when handled properly by a trained officer. Indeed, some police department policies explicitly acknowledge the reality that police K-9s are living beings, and thus capable of unpredictable behavior no matter how much training they receive.⁵⁰ As Lt. Michael Carodine, head of the Los Angeles Metropolitan Division’s K-9 unit recently stated, “Even though the dogs are trained a particular way, the bottom line is it’s still an animal and animal instinct does have a tendency to kick in.”⁵¹

Even assuming, arguendo, that non-police canines are less predictable and therefore more dangerous, they are still not properly categorized as presenting “a significant threat of death or serious physical

⁴⁸ Police canines are “trained to exert bite forces up to 1,500 pounds per inch (psi),” whereas a large non-police companion canine exerts pressure of up to 450 psi. Furthermore, police canines are trained to bite down hard, bite with their full mouth using all the teeth, and bite multiple times/places. McCauley et al., *supra* note 44, at 44 (citing R. John Presutti, *Bite Wounds: Early Treatment and Prophylaxis Against Infectious Complications*, 101 POST GRADUATE MED. 243 (1997); H. Range Hutson et al., *Law Enforcement Canine Bites: Injuries, Complications and Trends* 29(5) ANNALS OF EMERGENCY MED. 637 (1997); P.C. Meade, *Police and Domestic Dog Bite Injuries: What Are the Differences? What Are the Implications About Police Dog Bites?*, 37(11) INJ. EXTRA 395 (2006)).

⁴⁹ Firearms perform consistently absent mechanical failures or design flaws in the firearm, which are highly unusual. Of course, “accidental discharges” occur as well, wherein an officer accidentally discharges his firearm without any intent. See RAYMOND W. KELLY, N.Y.C. POLICE DEP’T, 2011 ANNUAL FIREARMS DISCHARGE REPORT, at x (2012), http://www.nyc.gov/html/nypd/html/analysis_and_planning/reports.shtml [<https://perma.cc/ALD2-FCRH>] (accessed Dec. 24, 2016) (defining an unintentional firearm discharge, commonly known as an accidental discharge). This may happen as a result of officer error in loading or unloading the gun, holstering the gun, an officer tripping, or a variety of other circumstances. See Al Baker, *11 Years of Police Gunfire, in Painstaking Detail*, N.Y. TIMES (May 8, 2008), <http://www.nytimes.com/2008/05/08/nyregion/08nypd.html> [<https://perma.cc/3ZG5-YPD2>] (accessed Dec. 24, 2016) (listing reasons for accidental discharges).

⁵⁰ See Karen Grigsby Bates, *In Los Angeles County, It’s ‘Bark and Hold’ Vs. ‘Find and Bite’*, NPR (Oct. 9, 2013, 4:29 PM), <http://www.npr.org/blogs/codeswitch/2013/10/08/230550397/in-los-angeles-county-its-bark-and-hold-vs-find-and-bite> [<https://perma.cc/A23A-6UXD>] (accessed Dec. 24, 2016) (discussing the use of police canines and how “police ‘dogs are initially trained, but they’re not programmable, like computers’”); Beatriz Valenzuela, *Long Beach Police K-9s Bite Less Often than LAPD, LASD*, PRESS-TELEGRAM (Dec. 10, 2013, 1:13 PM), <http://www.presstelegram.com/general-news/20131210/long-beach-police-k-9s-bite-less-often-than-lapd-lasd> [<https://perma.cc/7PLS-GTQM>] (accessed Dec. 24, 2016) (quoting the immediate supervisor in charge of LASD’s K-9 Services Detail, Lt. Bruce Chase as having said that “[r]egardless of the method used to train the dogs, the deployment criteria and the actions of the suspects being sought will always have a far greater impact on [whether a suspect is bitten]”).

⁵¹ Brittny Mejia, *Los Angeles Police Accused of Allowing Search Dog to Attack Woman’s Cat*, L.A. TIMES (Apr. 12, 2015, 8:37 PM), <http://www.latimes.com/local/crime/la-me-adv-k9-unit-attack-20150413-story.html> [<https://perma.cc/WSB5-UR6Q>] (accessed Dec. 24, 2016).

injury.”⁵² Indeed, even where a dog was used by his handlers deliberately as a threatening instrumentality in the commission of a crime, courts have found the dog not to be deadly force.⁵³ Dog-bite-related fatalities are exceedingly rare⁵⁴—it is more likely that you will die from being struck by lightning than from a dog attack.⁵⁵ Indeed, this author was unable to find a single reported incident of an on-duty police officer having been killed by a companion canine.⁵⁶ In addition to being unlikely to result in death, injuries from dog attacks are typically not serious.⁵⁷ Although in 1994 there were approximately 4.7 million dog bites in the United States,⁵⁸ only about .0013% of those

⁵² *Tennessee v. Garner*, 471 U.S. 1, 1 (1985).

⁵³ See *People v. Torrez*, 382 N.Y.S.2d 233, 234 (N.Y. Spec. Term 1976) (finding “a German Shepherd dog cannot be a ‘deadly weapon’” though a dog could be a dangerous weapon where the defendant used the dog to commit robbery); *People v. Kay*, 328 N.W.2d 424, 426 (Mich. Ct. App. 1983) (finding a dog to be a dangerous weapon and noting that a horse becomes a dangerous weapon when used as an instrumentality to cause harm, similar to an automobile).

⁵⁴ Of those individuals who are bitten by a dog, only about .000003% die from it. To put the risk of dying from a dog bite into perspective, for every one dog bite fatality, four people are killed by a *forklift*. See JANIS BRADLEY, *DOGS BITE, BUT BALLOONS AND SLIPPERS ARE MORE DANGEROUS* 21 (2005) (noting that over a fifteen-year period, there were sixteen fatalities caused by dogs and sixty-eight caused by forklifts).

⁵⁵ Between fifteen and twenty people die in the United States from dog-bite related injuries every year. In comparison, an average of sixty-two persons in the United States die from lightning strikes each year. Compare Nelson Adekoya & Kurt B. Nolte, *Struck-by-Lightning Deaths in the United States*, J. ENV'TL HEALTH 45, 49 (2005), http://stats.bls.gov/iif/oshwc/foi/jeh5_05_45-50.pdf [<https://perma.cc/FL6C-6VC6>] (accessed Dec. 24, 2016), with Ricky L. Langley, *Human Fatalities Resulting from Dog Attacks in the United States, 1979–2005*, 20(1) WILDERNESS & ENVTL. MED. 19, 19 (2009); BATHURST ET AL., *supra* note 2, at 9 (“[M]ore people are killed by lightning each year than by dogs.”).

⁵⁶ See BATHURST ET AL., *supra* note 2 (discussing U.S. Department of Justice findings and recommendations for “agencies to improve their dog encounter processes,” with no mention of on-duty officer killings by companion canines). Furthermore, fatal dog attacks on postal service workers almost never occur. Although the Postal Service releases comprehensive data regarding the total number of dog ‘attacks’ on letter carriers, it provides little breakdown regarding severity or fatalities. A review of a number of sources suggests that there have only been two dog-attack-related fatalities for postal services workers in recent years. *Dog Bites Man: USPS Ranks the Worst Cities in the U.S. for Dog Attacks*, POSTAL REC., 20, 22 (Jan. 2015), https://www.nalc.org/news/the-postal-record/2015/january-2015/01-2015_dogs.pdf [<https://perma.cc/J7QX-FDS4>] (accessed Dec. 24, 2016).

⁵⁷ A comprehensive study of medical treatment for dog bites in 2008 found that although there were only 316,000 emergency room visits related to dog bites in 2008, only 9,500, or 2.5%, were actually admitted to the hospital. 84.9% of those hospitalized resulted in a routine discharge, as compared to a routine discharge rate of only 50.4% for the average injury related hospitalization. Laurel Holmquist & Anne Elixhauser, *Emergency Department Visits and Inpatient Stays Involving Dog Bites, 2008*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Nov. 2010), <http://www.ncbi.nlm.nih.gov/books/NBK52650/> [<https://perma.cc/ZJX8-QAN6>] (accessed Dec. 24, 2016).

⁵⁸ *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States 2001*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 4, 2003), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm> [<https://perma.cc/HJJP-28UN>] (accessed Dec. 24, 2016).

bitten were hospitalized for their injuries.⁵⁹ Furthermore, in 2008, less than .0001%⁶⁰ of the dogs in the United States were involved in a biting incident that resulted in hospitalization of an individual.⁶¹

The Supreme Court has articulated that an officer's decision to use deadly force against an individual is unreasonable where the individual does not pose a "significant threat of death or serious physical injury to the officer or others."⁶² Discharging a firearm constitutes deadly force⁶³ whether or not the discharge results in an individual actually being shot or killed. Thus, given a police department's own classifications of police canines as non-lethal force, and the overwhelming statistical evidence that where an individual is attacked by a dog he is unlikely to be seriously harmed, if the same legal analysis is applied to the use of deadly force against a canine companion that is used when an individual is shot, the use of lethal force against a threat that is neither likely nor intended to cause death or serious injury (a companion canine) would be disproportionate and unjustified.

However, when officers use lethal force in shooting a companion canine, in the eyes of the law they are merely destroying property, and their use of deadly force becomes substantially easier to 'justify.' Officers who discharge their firearm at a dog are using deadly force,

⁵⁹ See Holmquist & Elixhauser, *supra* note 57 (finding that 9,500 individuals were actually admitted to the hospital for dog bite related injuries in 2008).

⁶⁰ *Id.* (assuming that each bite incident involved a different dog, and that each bite incident involved a dog that was "owned" rather than a stray, and is therefore likely higher than the actual percentage).

⁶¹ In 2008, there were 305 million people living in the United States. *2008 World Population Data Sheet*, POPULATION REFERENCE BUREAU (Aug. 19, 2008), <http://www.prb.org/Publications/Datasheets/2008/2008wpds.aspx> [<https://perma.cc/JX4U-H3N2>] (accessed Dec. 24, 2016). Of those 305 million, 9,500 were hospitalized for a dog bite. See Holmquist & Elixhauser, *supra* note 57 (finding a rate of 3.1 hospital stays per 100,000 household dogs in 2008). In 2008, there were approximately 77,500,000 dogs owned in the United States. See *U.S. Pet Ownership Statistics*, HUMANE SOC'Y U.S., (Dec. 2009), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html [<https://perma.cc/X5GG-TK94?type=image>] (accessed Dec. 24, 2016) (reporting annual dog ownership statistics).

⁶² *Garner*, 471 U.S. at 1.

⁶³ The Model Penal Code defines deadly force as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury." (emphasis added) MODEL PENAL CODE § 3.11(2) (AM. LAW INST., Proposed Official Draft 1962). Around the time that *Tennessee v. Garner* was decided, many states adopted the Model Penal Code approach to the use of deadly force, so the Model Penal Code's provisions regarding the definition of deadly force can be seen as generally representative of a large proportion of states. See JOHN DEMPSEY & LINDA FORST, AN INTRODUCTION TO POLICING 154 (2015) (explaining the elements of "use of force" in the instance of using a firearm as a police officer). Similarly, the Department of Defense defines deadly force as "force that a person uses causing, or that a person knows or should know would create a substantial risk of causing, death or serious bodily harm or injury." U.S. DEP'T DEF., DIRECTIVE NO. 5210.56, CARRYING OF FIREARMS AND THE USE OF FORCE BY DoD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER, OR COUNTERINTELLIGENCE ACTIVITIES 10 (2011), <https://www.hsdl.org/?view&did=6651> [<https://perma.cc/YB7J-X2QT>] (accessed Dec. 24, 2016).

(which can and does kill both canines and people),⁶⁴ but the deadly force is considered to be somehow qualitatively different when directed at a canine rather than a human.⁶⁵ Officers should not be using deadly force against dogs where they would not be able to use it against humans. This is not because of the privileged status that our canine companions enjoy, or even because so many owners regard their dogs as family. Put simply, when officers discharge their weapon, there is a very real chance that they will strike a person.⁶⁶ Departmental policies or practices that allow officers excessive discretion and seemingly unyielding deference to their decisions to shoot dogs are properly understood as enabling officers to act recklessly, or at the bare minimum negligently, indifferent to *human* life.⁶⁷

The status of companion animals as property may be understood as both blessing and blight in situations where an owner's beloved companion has been shot by a police officer. On the one hand, it is the dog's status as property that allows an individual whose dog has been harmed by an officer to state a cognizable claim under 42 U.S.C. § 1983, because it is the unjustifiable destruction of the owner's property that is violative of the Constitution.⁶⁸

On the other hand, it is precisely this classification of dogs as property that allows for broad deference to an officer's discretion to 'destroy' companion canines, lax or non-existent reviews of canine shootings, and minimal or no training requirements for officers on how to interact with dogs. Dogs are not people, so officers are not expected to follow the same use of force protocol that they would use if they were dealing with another person.

A. *Lack of Consequences for Police Officers Who Have Shot Companion Canines*

Those who enforce the law are bound by it too. This is a basic tenant of civil society that engenders respect for both police officers' au-

⁶⁴ See BATHURST ET AL., *supra* note 2, at 10 (stating that the majority of animal shooting incidents involve dogs).

⁶⁵ See *id.* at 31 (applying the police's use of force continuum to incidents and encounters with dogs).

⁶⁶ *Id.*

⁶⁷ The Model Penal Code considers a reckless killing to be analogous to a purposeful or knowing killing where the perpetrator manifests "extreme indifference to human life." MODEL PENAL CODE § 210.6 (1980). Reckless indifference to human life has been a sufficient basis for the imposition of the death penalty even where the perpetrator had no intent to kill. See *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that the Eighth Amendment does not prohibit the death penalty where the defendant was recklessly indifferent); Jennifer Beth Rubin, *Reckless Indifference as Intent to Kill: The Disproportionality of Punishment After Tison v. Arizona*, 20 CONN. L. REV. 723 (1988) (discussing reckless indifference to human life).

⁶⁸ See 42 U.S.C. § 1983 (2010) ("Every person who . . . 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 . . .").

thority and that of our government. In 1882, the Supreme Court articulated this long-standing principle,

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.⁶⁹

By virtue of the authority vested in them by the state, police officers are entrusted with a tremendous amount of responsibility. They can demand to be allowed into our homes,⁷⁰ take possession of our property,⁷¹ and in certain circumstances are entitled to kill us.⁷² However, this discretion is not supposed to be left unchecked, as the mandates of our laws and constitution apply with equal if not greater force to law enforcement officers precisely because of the breadth of their authority.⁷³ Certainly, police officers are entitled to protect themselves from serious threats to their lives and to utilize some degree of force in order to effectuate their duties,⁷⁴ but that should not mean that their judgments regarding the threat posed by a companion canine and the degree of force necessary to assuage the threat should be insulated from review and thus entitled to absolute deference.

When a police officer discharges his firearm, police departments are expected to have policies in place that provide for reporting and investigating the circumstances surrounding the discharge. In many cases, when an officer kills a person's pet dog, it is reported and 'reviewed' the same way that accidental discharges that do not harm any-

⁶⁹ *United States v. Lee*, 106 U.S. 196, 261 (1882).

⁷⁰ *See Spinelli v. United States*, 393 U.S. 410 (1969) (addressing the police power to obtain warrants to enter the homes of citizens).

⁷¹ *See Andresen v. Maryland*, 427 U.S. 463, 478–80 (1976) (addressing the ability and threshold requirements for police to lawfully seize property).

⁷² *See Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (discussing the constitutional limits on the use of deadly force by police).

⁷³ *See Terry v. Ohio*, 392 U.S. 1, 14 (1968) (holding that it is the role of the court to guard citizens against police conduct that is overbearing or harassing).

⁷⁴ *See Brosseau*, 543 U.S. at 197 (discussing the constitutional limits on the use of deadly force by police).

one are,⁷⁵ if the department requires the killing to be reported at all.⁷⁶ As a practical matter, this makes it very difficult to obtain accurate statistics and information regarding officer-involved shootings of companion canines from police departments. More significantly, it suggests that an officer is extremely unlikely to be held accountable or otherwise disciplined for the shooting of a companion canine unless a civilian initiates an action against the officer.⁷⁷ This is particularly problematic given that many such suits end up being settled, which allows the department and officer to resolve the issue without admitting that the officer was unreasonable in his decision to shoot a companion canine.⁷⁸ This also makes it difficult to assess the adequacy of

⁷⁵ See, e.g., FULLERTON POLICE DEP'T, POLICY MANUAL (2013), <https://www.cityoffullerton.com/civicax/filebank/blobload.aspx?BlobID=8112> [<https://perma.cc/8NDQ-XZB9>] (accessed Dec. 24, 2016) (instructing that an officer's shooting of companion canine is considered a "firearm discharge" requiring an officer to make a verbal report to supervisor "as soon as circumstances permit" rather than an "officer-involved shooting" requiring further reporting on the incident and a determination by the use-of-force review board regarding whether an officer's actions were outside of the department's policies); S.F. POLICE DEP'T, GENERAL ORDER 3.10 (2005), <http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14802> [<https://perma.cc/2S5Q-8EXY>] (accessed Dec. 24, 2016) (classifying an officer's shooting of a companion canine as "officer involved discharges," which are only subject to review four times a year by the Firearm Discharge Review Board, as opposed to "officer involved shootings," which are required to be reviewed within thirty days of the incident and have special reporting requirements); CHI. POLICE DEP'T, SPECIAL ORDER S04-12, INCIDENTS INVOLVING ANIMALS (2015), <http://directives.chicagopolice.org/directives/data/a7a57be2-12a7b762-50c12-a7be-080a81fec745ad60.pdf> [<https://perma.cc/X5T2-2T65>] (accessed Dec. 24, 2016) (instructing that an officer "destroying" an animal is classified the same as an unintentional discharge that caused no harm and subject to minimal review or reporting requirements); COLUMBUS POLICE DEP'T, DIRECTIVE NO. 2.02, DISCHARGED FIREARMS 3 (2014), <http://www.columbuspolice.org/FormsPublications/Directives/Directives/DirectivesNew2015/2.02.pdf> [<https://perma.cc/GG87-L6Y9>] (accessed Dec. 24, 2016) (instructing the department to investigate an officer killing of an animal in the same way as an unintentional discharge resulting in no harm to a person); BERNARD D. ROSTKER ET AL., RAND CTR. ON QUALITY POLICING, EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM DISCHARGE REVIEW PROCESS 42 (2008), http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf [<https://perma.cc/4PE4-HLHC>] (accessed Dec. 24, 2016) ("Lesser cases, typically shootings against dogs or simple accidental discharges, are not decided by the full board; instead, the department chief delegates those to one member for review and decision.")

⁷⁶ The Minneapolis Police Department does not currently have an internal affairs reporting requirement in place for when an officer shoots a companion canine. See *Policy and Procedure Manual: Internal Affairs Process 2-100*, MINNEAPOLIS POLICE DEP'T (April 5, 2016), http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_2-100_2-100 [<https://perma.cc/WGS6-UGQT>] (accessed Dec. 24, 2016) (excluding "the discharge of a firearm with the intention of dispatching an animal, unless it results in injury to a person" from those situations in which the discharge of a firearm must be reported and reviewed promptly by internal affairs).

⁷⁷ This could be in the form of a civil lawsuit seeking damages, in which the officer is named, or in the form of a complaint to the police department asking for an investigation into the shooting of an individual's dog.

⁷⁸ Precise statistics regarding settlements in the context of officer-involved canine companion shootings are unavailable (which is not surprising given that settlements may stipulate conditions of non-disclosure) but my survey of a number of these lawsuits

departmental internal review procedures and exacerbates the difficulty of successfully suing a municipality under § 1983 rather than just the individual officer⁷⁹ since final judgments regarding whether an officer was unreasonable are scarce. Despite estimates that over 1,000 dogs are shot by police every year,⁸⁰ there are practically no instances where officers have been discharged or otherwise meaningfully

suggests that most cases in which the plaintiffs are willing to settle are settled. *See, e.g.*, Jack Howser, *Smokey the Dog Shooting Case Settled*, DISCLOSURE (May 20, 2013), <http://www.disclosurenewsonline.com/2013/05/20/smokey-the-dog-shooting-case-settled/> [https://perma.cc/AC9A-5PQ5] (accessed Dec. 24, 2016) (reporting that an owner of a dog killed by a police officer settled with the city); Mária Zulick Nucci, *That's My Dog, Don't Shoot!": Seized Effects and Fido*, ANIMAL L. & RTS., Oct. 2013, at 22, 23 (describing a case that settled for more than \$100,000). This makes sense considering that monetary damages for the shooting of a companion canine are unlikely to be sufficiently large to encourage people to bring non-meritorious or frivolous suits. The absence of further proceedings in a number of cases after a police department's motion for summary judgment has been denied strongly suggests that the plaintiff there settled. For example, in *Brown v. Muhlenberg Township*, 269 F.3d 205, the Third Circuit reversed the lower court's grant of a motion for summary judgment and remanded the case to proceed to trial. Although a memorandum from the court below suggested the case would proceed to trial in November of 2002, there is no record of any disposition. *Brown v. Eberly*, No. CIV.A. 99-1076, 2002 WL 31528675, at *1 (E.D. Pa. Nov. 14, 2002). Departments may attempt to settle with a plaintiff despite an internal review board's determination that a shooting was justified. *See* Caroline Connolly, *Owner of Dog Killed by Cop Sues Salt Lake City PD for \$1.5 Million*, FOX13 SALT LAKE CITY (Dec. 18, 2014, 10:42 PM), <http://fox13now.com/2014/12/18/owner-of-dog-killed-by-cop-sues-salt-lake-city-pd-for-1-5-million/> [https://perma.cc/4DKS-KXQD] (accessed Dec. 24, 2016) (reporting on a case involving an owner of a dog shot by a police officer who declined a previous settlement offer in order to bring more publicity to the issue).

⁷⁹ Although the failure to train framework would appear to be particularly applicable to these types of claims, because a plaintiff bears the burden of demonstrating that the municipality was deliberately indifferent to the pattern of constitutional violations, as in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), and the shooting of a canine companion under these circumstances is only a constitutional violation if it is deemed unreasonable by a court, a plaintiff faces a practically insurmountable burden in pleading that there were prior instances where police officers unreasonably shot companion canines such that the municipality could be fairly understood as having been reckless in failing to train its officers in canine behavior or alternative force techniques. For example, in *Esterson v. Broward County Sheriff's Department*, 2010 WL 4614725, the court dismissed § 1983 claims against the municipality arising out of an officer-involved shooting of a companion canine that was based on a theory of failure to train its officer's in canine behavior or alternative force techniques, despite the plaintiff's inclusion of numerous prior incidents where that department's officers had shot dogs and even a court order summarizing a canine shooting by an officer of that department. The court there concluded that prior shootings did not by themselves amount to a pattern of misconduct, because the shootings were not necessarily police abuses or violative of the constitution.

⁸⁰ This is likely a low estimate, given that individual police departments may be responsible for shooting close to 100 dogs per year. *See* Dawn Turner Trice & Jeremy Gorner, *Are Police Too Quick on the Draw Against Dogs?*, CHI. TRIB. (Aug. 6, 2013), http://articles.chicagotribune.com/2013-08-06/news/ct-met-cops-shooting-dogs-20130806_1_police-shootings-police-officer-rottweiler [https://perma.cc/MN2S-QHUT] (accessed Dec. 24, 2016) (finding that Chicago Police Officers shot approximately ninety dogs a year between 1998 and 2013 (488 animals, almost all dogs, in total between 2008 and 2013)).

disciplined due to their shooting of a companion canine.⁸¹ This is true even in the rare situations where an internal investigation deemed the shooting to be unjustified, but the city settles a civil suit against the officer.⁸² Even in situations where an individual prevails in her § 1983 or other civil suit against an officer because of the shooting of her companion canine, the underlying internal review conducted by the department prior to the lawsuit has concluded that the shooting was justified.⁸³ Thus there appears to either be a significant disconnect be-

⁸¹ See, e.g., *Schor v. N. Braddock Borough*, 801 F. Supp. 2d 369 (W.D. Pa. 2011) (denying a motion to dismiss a suit against a police officer and his supervisor where the officer who shot and killed a dog had shot and killed a dog under unreasonable circumstances just six months before and had not been reprimanded by the department nor had he received training); Domingo Ramirez Jr., *supra* note 14 (discussing an officer who was cleared by an internal investigation and not subject to any disciplinary measures after shooting and killing an eighty-five-year-old man's Jack Russell terrier, finding that the dog had been "aggressive"); Chris Halsne & Web Staff, *Settlement Reached in Police Killing of Dog, Called Largest in U.S. History*, FOX31 DENVER (Jan. 25, 2016, 12:46 PM), <http://kdvr.com/2016/01/25/settlement-reached-in-police-killing-of-dog/> [<https://perma.cc/CF39-CTQE>] (updated Jan. 26, 2016, 6:25 AM) (accessed Dec. 24, 2016) (noting that the officer who shot and killed "Chloe" was deemed to have been acting reasonably by an internal investigation when he shot her five times after taser-ing her while she was restrained by a catchpole and the officer was not fired). The city later settled the *Schor* suit. Rich Lord, *Suit Over North Braddock Police Shooting of Dog Settled*, PITTSBURGH POST-GAZETTE (Oct. 3, 2011, 12:15 PM), <http://www.post-gazette.com/local/east/2011/10/03/Suit-over-North-Braddock-police-shooting-of-dog-settled/stories/201110030239> [<https://perma.cc/87HU-HEN8>] (accessed Dec. 24, 2016). See also Radley Balko, *Dogs in Deadly Crossfire*, DAILY BEAST (July 19, 2009, 3:49 AM), <http://www.thedailybeast.com/articles/2009/07/19/dogs-in-a-deadly-crossfire.html> [<https://perma.cc/LM7R-FFY6>] (accessed Dec. 24, 2016) (discussing the prevalence of officer-involved companion canine shootings and stating "I've noticed an increase in media accounts of police officers shooting the family pet—with a notable lack of remorse or disciplinary consequences [from and for the police officers]."). However, rare examples exist of officers being fired after unreasonably shooting dogs while on duty. See *Chief Fires Cop For Shooting Family's Dog*, NBC CHI. (Jul. 28, 2014, 4:08 PM), <http://www.nbcchicago.com/news/local/Chief-Fires-Cop-For-Shooting-Familys-Dog-268941651.html> [<https://perma.cc/8YJ5-S7UG>] (accessed Dec. 24, 2016) ("despite the fact that 'the officer may have been justified under the Illinois Use of Force statute governing deadly force,' the decision was made to terminate him"); *Danville Fires Cop Who Killed Growning Miniature Dachshund*, RICHMOND TIMES-DISPATCH (July 10, 2009, 8:20 PM), http://www.richmond.com/news/article_2263bfdb-1352-5084-82a0-bab7f95ddf01.html [<https://perma.cc/PT26-JJA2>] (accessed Dec. 24, 2016) (discussing an officer getting fired after shooting a dachshund for violating investigation protocol).

⁸² See Melanie, *Family of Slain Dog Arfee Awarded \$80,000*, LIFE WITH DOGS (Mar. 18, 2015), <http://www.lifewithdogs.tv/2015/03/family-of-slain-dog-arfee-awarded-80000/> [<https://perma.cc/4H6C-UJC5>] (accessed Dec. 24, 2016) (describing a situation where an officer who shot and killed a black lab that was inside a parked van was not fired, where internal investigation deemed shooting unreasonable, and city settled with dog's owner for \$80,000).

⁸³ The Des Moines Police Department paid \$51,000 in a settlement to the owners of a dog shot by a police officer, despite the department's conclusion in its internal review (prior to the filing of a civil suit) that the officer's actions were justified. Jennifer Sullivan, *Des Moines to Pay \$51,000 over Fatal Shooting of Dog*, SEATTLE TIMES (Feb. 20, 2013, 5:54 AM), <http://www.seattletimes.com/seattle-news/des-moines-to-pay-51000-over-fatal-shooting-of-dog/> [<https://perma.cc/CL48-U3TP>] (accessed Dec. 24, 2016).

tween the circumstances under which a court will consider a seizure to be appropriate and those in which a department will, or a lack of meaningful investigation on the part of the department. Convictions for animal cruelty resulting from an officer's shooting of a companion canine are even more rare.⁸⁴ Even in particularly egregious situations, for instance where a police officer slit the throat of a Shar-Pei named Nala, criminal charges of animal abuse are unlikely to be sustained,⁸⁵ if filed at all.

B. Section 1983 Suits Are an Ineffective Mechanism for Change or to Hold Officers and Departments Accountable

In most circumstances, an individual bringing a 42 U.S.C. § 1983 suit against a municipality for the wrongful killing of her companion animal will not be able to seek equitable relief in the form of an injunction.⁸⁶ It seems unlikely that a plaintiff could convince the court that there was "sufficient likelihood"⁸⁷ that she would have another dog unreasonably killed by a municipal police officer in the future, such that the award of an injunction would be a proper form of relief. Damage awards from civil actions are inefficient as a method to inspire change, both at the individual-officer-conduct level and at the departmental policy level.⁸⁸ Settlements and jury verdicts do not affect police

⁸⁴ The shooting death of "Chloe" in Colorado, which was recorded by a neighbor on his cellphone, occurred when officers responded to a barking dog call because Chloe had gotten loose in her neighborhood, restrained Chloe with a looped catch pole, and proceeded to taser her and shoot her five times. The incident, which resulted in a vigil and protest planned via social networking, prompted the Colorado Legislature to pass legislation mandating Colorado police departments to provide canine behavior training to their officers, but failed to result in a conviction for animal cruelty, and the officer who shot Chloe was not fired. Kieran Nicholson and Joey Brunch, *Commerce City to Investigate Officer Shooting Restrained Dog Saturday*, DENVER POST (Nov. 26, 2012, 6:55 AM), <http://www.denverpost.com/2012/11/26/commerce-city-to-investigate-officer-shooting-restrained-dog-saturday/> [https://perma.cc/J4QS-T45D] (accessed Dec. 24, 2016). This author not found a single instance where an on-duty officer has been convicted of animal cruelty because of his shooting and killing of a companion canine, but have found convictions of off-duty officers for such acts. See, e.g., Litsa Pappas, *Harrisonburg Police Officer is Guilty of Animal Cruelty*, WHSV (Aug. 23, 2012, 5:02 PM), <http://www.wHSV.com/home/headlines/Harrisonburg-Police-Officer-is-Guilty-of-Animal-Cruelty-167236225.html> [https://perma.cc/EU76-FRZR] (accessed Dec. 24, 2016) (reporting that an off-duty officer who was out riding his bicycle shot a dog for barking at him and was convicted of animal cruelty).

⁸⁵ Justin Fentin, *Charges Dropped Against 1 Officer in Dog Killing*, BALTIMORE SUN (Jan. 14, 2015, 7:59 PM), <http://www.baltimoresun.com/news/Maryland/crime/blog/bs-md-ci-police-dog-killing-charges-dropped-20150114-story.html> [https://perma.cc/4VMT-RTYG?type=image] (accessed Dec. 24, 2016).

⁸⁶ See *supra* note 4 (discussing *Lyons* and limits on equitable remedies).

⁸⁷ *Lyons*, 461 U.S. at 111 (1983).

⁸⁸ See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1027–30, 1046–47, 1077–78 (2010) (discussing the practice of indemnification for officers, settlement practices of municipalities, limited review processes, and other problems with the practical impact of civil remedies).

departmental official policy, because the policymakers do not gather or analyze information on these lawsuits.⁸⁹ In addition to failing to change departmental policy, the potential for civil liability is unlikely to influence police officers' actual conduct in the field,⁹⁰ because the odds are good that they will not be personally on the hook for any damages award or settlement.⁹¹ Although § 1983 and similar civil remedies are often brought against the municipality as well as the individual officer, the claims against the municipality are often dismissed⁹² because of the difficulties in demonstrating both that a municipality was unreasonable in its action or inaction (for instance failing to provide canine behavioral training) and that the particular harm to the plaintiff was attributable to that action or inaction.⁹³ Thus, even if the plaintiff is successful, only the individual officer is held liable as a named party to the suit. Furthermore, where a case is settled, the officer and municipality are not required to acknowledge that an officer was unreasonable or otherwise wrong in shooting a companion canine. As one victim who settled with the city after his dog was killed by an officer put it, "My attorney and I settled with the city. Although they deny any fault in the matter, their insurance paid their deductible. It is not what I wanted but it is at least some acknowledgment."⁹⁴

⁸⁹ *Id.* at 1027–28, 1077–78.

⁹⁰ See VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 7 (4th ed. 2001) ("[I]t would seem that the prospect of civil liability has a deterrent effect in the abstract survey environment, but that it does not have a major impact on field practices."); Kenneth J. Novak et al., *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 *POLICING INT'L J. POLICE STRAT. & MGMT.* 352, 363 (2003) ("Officer initiated aggressive behaviors . . . do not seem to be deterred to any substantial extent by concerns about liability.")

⁹¹ See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 *GEO. WASH. L. REV.* 453, 473 (2004) ("Individual officials, however, almost never reap the financial consequences of § 1983 suits that are brought against them because the government handles their legal defense and indemnifies them for any damages assessed against them."); Richard Emery & Ilann Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 *FORDHAM URB. L. J.* 587, 590 (2000) ("[P]olice officers almost never pay anything out of their own pockets to settle civil lawsuits. Nor do they pay for judgments rendered after jury verdicts for plaintiffs."); Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. REV.* 885, 890 (2014) (reviewing litigation payments and indemnification policies of eighty-one different law enforcement agencies and finding that the state or municipality covered 99.98% of all civil rights litigation costs, including compensatory and punitive damage awards, brought against officers).

⁹² See discussion of Bandes and Rudovsky, *infra* note 164 (discussing the unlikelihood to succeed on a failure-to-train claim under § 1983).

⁹³ A plaintiff seeking to hold a municipality liable under § 1983 must show not only fault (clearly unreasonable conduct) but also adequate causation. See *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 398–99 (1997) (finding that a municipality could not be held liable for an officer's constitutional violations, despite the fact that the municipality had failed to perform appropriate background checks on the officer, because the particular constitutional deprivation was not the "plainly obvious consequence" of the hiring decision).

⁹⁴ Howser, *supra* note 78.

Despite the practical reality that the costs associated with defending such a suit, and ultimately any damages awarded, will almost always be borne by the municipality (essentially the taxpayers),⁹⁵ the fact that the municipality or police department is not itself held liable has symbolic significance. The inadequacy of the civil damages remedy, when coupled with the scant departmental procedures for investigating and punishing officers who shoot companion canines,⁹⁶ creates a situation where citizens are, for all intents and purposes, limited to a mere hope that a police officer will not shoot their dog due to the potential inconvenience of a civil suit—in other words, for no other reason than because the officer does not want to kill an animal or be inconvenienced by a civil suit. Certainly, one would hope that for the vast majority of police officers, the decision to kill an individual's dog would not be an easy one and would only be made out of utter necessity, but departmental policy and the law should not rely on this good faith belief as the sole enforcement mechanism for keeping dogs safe.

III. PREVENTION: MUNICIPAL TAXPAYER STANDING AS AN ALTERNATIVE APPROACH

Most pet owners do not view their canine companions as fungible goods.⁹⁷ To the contrary, studies have shown that the vast majority of pet owners see their dogs as family members, and many consider themselves to be 'pet parents' to their canine children.⁹⁸ Thus, the fact

⁹⁵ Schwartz, *supra* note 91, at 890 (“[T]axpayers almost always satisfy both compensatory and punitive damages awards entered against their sworn servants.”).

⁹⁶ See *supra* Section II (discussing the legal remedies available after a companion canine has been harmed).

⁹⁷ This is apparent from the massive amounts of money and time that individuals are willing to expend when their dogs go missing. See, e.g., *Lost Pet Professionals*, FACEBOOK, <https://www.facebook.com/LostPetProfessionals> [<https://perma.cc/A9RZ-R8WF>] (accessed Dec. 24, 2016) (showing a number of different lost pets, each with substantial rewards for information leading to their return). In 2014, a D.C. woman spent \$35,000 attempting to locate her adopted lab/Rottweiler mixed-breed dog. See Dana Hedgpeth, *D.C. Woman Spends \$35,000 in Search for Missing Dog*, WASH. POST (Nov. 10, 2014), <http://www.washingtonpost.com/blogs/local/wp/2014/11/10/nw-woman-spends-35000-in-search-for-missing-dog/> [<https://perma.cc/NV8X-BD6Z>] (accessed Dec. 24, 2016) (describing the efforts one woman made to find her lost dog). There are even companies that are exclusively in the business of tracking down lost pets for a hefty fee. See, e.g., *Lost Pet Professionals*, <http://www.lostpetprofessionals.com> [<https://perma.cc/GW2U-M7Z4>] (accessed Dec. 24, 2016) (providing for-profit, lost-pet-searching services).

⁹⁸ A 2011 survey found that 81% of those surveyed saw their pet dogs as true family members, and 54% understood themselves as “pet parents.” Stanley Coren, *Do We Treat Dogs the Same Way As Children in Our Modern Families?*, PSYCHOL. TODAY (May 2, 2011), <https://www.psychologytoday.com/blog/canine-corner/201105/do-we-treat-dogs-the-same-way-children-in-our-modern-families> [<https://perma.cc/KWS3-YA79>] (accessed Dec. 24, 2016). Other studies have found different numbers, but nonetheless concluded that over 50% of dog owners viewed their dog as a family member. See, e.g., *Survey: Dogs #1 in Our Hearts*, AM. VETERINARY MED. ASS'N (Feb. 12, 2013), <https://www.avma.org/news/pressroom/pages/Valentines-Pet-Demo-Release.aspx> [<https://perma.cc/4DBC-8BEP>] (accessed Dec. 24, 2016) (pointing out that 66.7% of dog owners considered their dog to be a family member).

that 93% of pet owners would be willing to risk their own lives for their pet is not surprising.⁹⁹ Even in situations where an individual is able to prevail in an action for damages resulting from the loss of their beloved dog, for many pet owners, no amount of money can actually replace what that individual has lost. Accordingly, pet owners would much rather prevent these types of deprivations from occurring, as opposed to simply being able to collect monetary damages as a result of their loss.¹⁰⁰ Indeed, those individuals who pursue civil claims against an officer and municipality because of the shooting death of their companion canine typically explicitly state that the purpose of their suit is to bring about change in policies,¹⁰¹ and they may decline monetary settlements absent stipulations requiring such a change in departmental policy.¹⁰² However, pet owners are not the only ones who should be actively seeking to prevent the unnecessary harming of companion canines, and this should also be an important goal for police departments and local municipalities.¹⁰³

A. *Common Goal of Preventing the Shootings, Not Just Compensating Victims After the Fact*

In addition to the potential for litigation, police departments face a substantial risk of losing community trust and respect following these incidents, and in certain situations, “shooting a dog brings more heat down on an agency than an officer-involved shooting of a human.”¹⁰⁴ This is particularly true given the extensive media cover-

⁹⁹ L. Case, *Perspectives on Domestication: The History of Our Relationship with Man's Best Friend*, 86 J. ANIMAL SCI. 3245, 3245 (2008) (citing 2004 Pet Owner Survey, AM. ANIMAL HOSP. ASS'N (2004), <https://faunalytics.org/wp-content/uploads/2015/05/Citation1058.pdf> [<https://perma.cc/N9E4-CH3E>]).

¹⁰⁰ See Melanie, *supra* note 82 (quoting the owner of black Labrador killed by police who received an \$80,000 settlement as saying “I'd rather have my dog.”).

¹⁰¹ See, e.g., Jayne Miller, *City Claims Officers Not City Employees in Response to Suit*, WBALTV (Jan. 27, 2015, 6:19 PM), <http://www.wbalv.com/news/city-claims-officers-not-city-employees-in-response-to-suit/30948020> [<https://perma.cc/UDY2-RQRE>] (accessed Dec. 24, 2016) (quoting the attorney for a woman who filed a § 1983 claim after her dog was killed by Baltimore Police in 2014 saying that “[t]he point of the claim is to effectuate changes in policy in the Baltimore City Police Department when dealing with these potential type of situations”).

¹⁰² See, e.g., Harry Stevens, *Owner of Dog Shot by Utah Police Turns Down \$10,000 Offer*, SALT LAKE TRIB. (July 29, 2014, 8:59 PM), <http://www.sltrib.com/sltrib/news/58236771-78/kendall-department-police-offer.html.csp> [<https://perma.cc/HMG6-KB6E>] (accessed Dec. 24, 2016) (reporting on a dog's owner who declined a settlement because he wanted the police to change their policy with respect to handling canine companions).

¹⁰³ See Gary P. Maddox, *Officer Safety Corner: Dogs and the Police Response: A Guide for Safe, Successful, and Humane Encounters*, POLICE CHIEF MAG. (Aug. 2013), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=3000&issue_id=82013 (accessed Dec. 24, 2016) (“Given the growing amount of media attention, the increasingly obvious public interest in animal welfare issues, and because it is the right thing to do, this subject calls for significant attention and training.”).

¹⁰⁴ David Griffith, *Can Police Stop Killing Dogs?*, POLICE: L. ENFORCEMENT MAG. (Oct. 29, 2014), <http://www.policemag.com/channel/patrol/articles/2014/10/can-police->

age that officer-involved canine shootings receive and because of the prevalence of cell phones equipped with cameras, which allow bystanders or victims to take video or photographs of the incident either as it is occurring or immediately after a dog has been shot.¹⁰⁵ Although there is not a single documented instance of an on-duty police officer having been killed as a result of a dog-bite related injury,¹⁰⁶ police officers have harmed and even killed people in their attempts to shoot dogs.¹⁰⁷ When officers shoot at dogs, there is a real risk that they will inadvertently hit a bystander or another police officer. This risk is not merely speculative, as a number of such incidents have indeed occurred, some

stop-killing-dogs.aspx [https://perma.cc/3QUX-UT2W] (accessed Dec. 24, 2016). See, e.g., *Group 'Anonymous' Targets Hawthorne Police Department for Fatally Shooting Dog*, CBS L.A. (July 5, 2013, 8:41 PM), <http://losangeles.cbslocal.com/2013/07/05/group-anonymous-targets-hawthorne-police-department-for-fatally-shooting-dog/> [https://perma.cc/4BJT-U488] (accessed Dec. 24, 2016) (describing how the internet hacker group, Anonymous, shut down the Hawthorne Police Department's website following a Hawthorne police officer's killing of a Rottweiler, and posted "Police of Hawthorne, you should know you are our primary target. This matter will not remain unresolved" within days of the shooting); *Salt Lake Police Shooting Sparks Large Protest for Victim: A Dog Named 'Geist'*, Fox News (June 29, 2014), <http://www.foxnews.com/us/2014/06/29/salt-lake-police-shooting-sparks-large-protest-for-victim-dog-named-geist/> [https://perma.cc/ZB7H-5BQG] (accessed Dec. 24, 2016) (discussing the massive public protests that occurred in Salt Lake City, Utah, after a Salt Lake City Police Officer shot and killed a pet Weimeraner that was in a fenced-in yard on private property).

¹⁰⁵ See, e.g., Nicholson & Brunch, *supra* note 84 (discussing the video recording of the shooting death of "Chloe"); rbalko19, *Puppycide in Oklahoma* at 0:57, YOUTUBE (Oct. 23, 2008), https://www.youtube.com/watch?v=5FF1Wgeb_aw (accessed Dec. 24, 2016) (showing a dog owner's surveillance video of an Oklahoma sheriff's deputy shooting her dog).

¹⁰⁶ BATHURST ET AL., *supra* note 2.

¹⁰⁷ See, e.g., Radley Balko, *Iowa Cop Reportedly Tries to Shoot Dog, Kills Woman Instead*, WASH. POST (Jan. 9, 2015), <http://www.washingtonpost.com/news/the-watch/wp/2015/01/09/iowa-cop-reportedly-tries-to-shoot-dog-kills-woman-instead/> [https://perma.cc/6UPU-Y4UP] (accessed Dec. 24, 2016) (describing how an officer shot and killed a woman while trying to shoot her dog that was playing with her four-year-old child at the time); Christian McKinney, *Sheriff: 10-Year-Old Shot by Deputy During Capture of Suspect*, WALB NEWS (July 16, 2014, 7:42 AM) <http://www.walb.com/story/25991974/sheriff-son-shot-during-manhunt-douglas-police-shooting-suspect-captured> [https://perma.cc/Y4VQ-MDF8] (accessed Dec. 24, 2016) (describing how an officer attempted to shoot a dog but instead shot a 10-year-old child); Reg Chapman, *Police: Cop Accidentally Shoots Fellow Officer, Suspect Arrested*, CBS MINN. (Mar. 30, 2012, 11:15 PM), <http://minnesota.cbslocal.com/2012/03/30/police-officer-shot-wounded-in-north-minneapolis/> [https://perma.cc/K22Q-MNKP] (accessed Dec. 24, 2016) (describing how a police officer accidentally shot another officer while trying to shoot a dog); Lisa Colagrossi, *Police Officer, Aiming for Dog, Accidentally Shoots His Sergeant in Brownsville*, ABC 7 (Feb. 18, 2015), <http://abc7ny.com/news/nypd-officer-aiming-for-dog-accidentally-shoots-sergeant-in-brooklyn/523066/> [https://perma.cc/J68X-AN3T] (accessed Dec. 24, 2016) (describing how an officer shot another officer while trying to shoot at dog); Tony Shin, *Sheriff's Deputy Accidentally Shoots Himself*, NBC L.A. (Apr. 16, 2014, 3:24 AM), <http://www.nbclosangeles.com/video/#!/on-air/as-seen-on/Sheriffs-Deputy-Accidentally-Shoots-Himself/255584201> [https://perma.cc/PU3Z-5DQA] (accessed Dec. 24, 2016) (describing how an officer shot himself when attempting to shoot dog).

tragically resulting in death.¹⁰⁸ The insufficient training, policies, and lack of consequences concerning police officers' shootings of companion canines may lead police officers to believe it is acceptable to discharge their gun in circumstances that endanger human lives, merely because of the presence of a dog.¹⁰⁹

When an officer discharges a firearm, whether at a dog or an individual, the situation necessarily escalates. Beyond the risk that a police officer, in attempting to shoot a dog, will accidentally shoot another person, the 'shoot first' approach to handling companion canines creates situations where civilians may reasonably believe that they are justified in using force against a police officer. These situations typically arise where a police officer enters a private home or property without a valid search warrant, unannounced, and shoots an individual's companion canine.¹¹⁰ Presently, a number of states allow individuals to use some degree of physical force to protect their property, and when they are in their home, they may be allowed to use

¹⁰⁸ See Balko, *supra* note 107 (reporting on a woman who was killed by an officer shooting at a dog).

¹⁰⁹ See, e.g., Kelly Baylis, *Puppy Killed by Camden Police: Witnesses Say That More Than 30 Shots Were Fired by Multiple Cops*, NBC PHILA. (Apr. 18, 2011), <http://www.nbcphiladelphia.com/news/local/Puppy-Killed-by-Camden-Police-120070079.html> [<https://perma.cc/MH2X-Y6GX>] (accessed Dec. 24, 2016) (recounting how when responding to a call to break up some teenage fighting, police discharged in excess of thirty shots to kill "Capone" when he wrangled loose from his leash); BATHURST ET AL., *supra* note 2, at 6–8.

¹¹⁰ Situations where police officers execute a no-knock (meaning they are not required to announce their presence) warrant or otherwise enter the *wrong* house present particularly compelling instances where an individual could reasonably conclude that the use of some force against an officer was justifiable. See, e.g., *Austin Police Officer Fatally Shoots Dog After Going to Wrong Address*, CBS HOUS. (Apr. 18, 2012, 8:16 AM), <http://houston.cbslocal.com/2012/04/18/austin-police-officer-fatally-shoots-dog-after-going-to-wrong-address/> [<https://perma.cc/B6NP-HKM3>] (accessed Dec. 24, 2016) (describing how officers responding to the wrong house shot and killed dog while owner was playing Frisbee with the dog); Leticia Juarez, *Deputies Shoot, Kill Dog When Responding to Wrong Home in Hesperia*, ABC7 (June 7, 2016), <http://abc7.com/news/deputies-shoot-kill-dog-when-responding-to-wrong-home-in-hesperia/1375989> [<https://perma.cc/QP26-J9M4>] (accessed Dec. 24, 2016) (describing how deputies shot a dog after approaching the wrong house); Doyle Murphy, *San Diego Cop Kills Service Dog After Knocking on Wrong Door*, N.Y. DAILY NEWS (Mar. 18, 2015, 5:11 PM), <http://www.nydailynews.com/news/national/san-diego-kills-pet-dog-knocking-wrong-door-owner-article-1.2154428> [<https://perma.cc/HC3Q-SNRM>] (accessed Dec. 24, 2016) (describing how officer shot a service dog after going to the wrong house, despite his own partner petting the friendly dog); Esther Robards-Forbes, *Leander Police Officer Shoots Dog at Wrong House*, STATESMAN (June 18, 2013, 5:05 PM), <http://www.statesman.com/news/news/leander-police-officer-shoots-dog-at-wrong-house/NYPDY/> [<https://perma.cc/6Q9P-WHET>] (accessed Dec. 24, 2016) (describing how officers serving a warrant at the wrong house shot a family's therapy dog); Ellen Thompson, *Sheriff's Office: Address Mixup Preceded Deputy Shooting*, RECORDNET.COM (May 5, 2007, 12:01 AM), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070505/A_NEWS/705050317 [<https://perma.cc/WEM9-7RVM>] (accessed Dec. 24, 2016) (describing how officers went to the wrong house to execute search warrant and shot a family dog, as well as a mother and her child).

deadly force solely to protect their property.¹¹¹ Indiana has even gone so far as to explicitly permit the use of force against a police officer to “prevent or terminate . . . unlawful trespass on or criminal interference with property lawfully in the person’s possession,” as well as under other circumstances.¹¹²

An incident involving a DeKalb County Police Officer is demonstrative of the tragic consequences that flow from the shoot-first approach to handling companion canines. On December 29, 2014, DeKalb County police officers responded to a domestic disturbance call that had been placed by Kevin Davis.¹¹³ April Edwards, Davis’s girlfriend, had been stabbed in an altercation with her friend, Terrence Hilyard,

¹¹¹ See, e.g., ALA. CODE § 13A-3-25 (2016) (outlining defense of property); ALASKA STAT. § 11.81.350 (2016) (justifying the use of force in defense of property and premises); ARK. CODE ANN. § 5-2-608 (2016) (justifying the use of physical force in defense of premises); COLO. REV. STAT. § 18-1-705 (2016) (justifying use of physical force in defense of premises); CONN. GEN. STAT. § 53a-20 (2016) (justifying the use of physical force in defense of premises); FLA. STAT. § 782.02 (2016) (justifying the use of deadly force in any dwelling house); GA. CODE ANN. § 16-3-23 (2016) (as to habitation); GA. CODE ANN. § 16-3-24 (2016) (regulating property other than habitation); 720 ILL. COMP. STAT. ANN. 5/7-2 (2012) (justifying the use of force in defense of dwelling); KY. REV. STAT. ANN. § 503.080 (2016) (justifying protection of property); ME. REV. STAT. ANN. tit. 17-A, § 104 (2016) (outlining affirmative defenses in the use of force in defense of premises); MINN. STAT. § 609.065 (2016) (justifying the taking of life in defending a place of abode); MONT. CODE ANN. § 45-3-103 (2015) (justifying the use of force in defense of an occupied structure); N.H. REV. STAT. ANN. § 627:7 (2016) (justifying the use of force in defense of premises); N.Y. PENAL LAW § 35.20 (2016) (justifying the use of physical force in defense of premises and in defense of a person in the course of burglary); N.D. CENT. CODE § 12.1-05-07 (2015) (permitting deadly force provided lesser force would expose anyone to substantial danger of serious bodily injury); OR. REV. STAT. § 161.225 (2016) (justifying the use of physical force in defense of premises); 18 PA. CONS. STAT. § 507 (2016) (justifying the use of force for protection of property); S.D. CODIFIED LAWS § 22-16-34 (2016) (justifying homicide and self-defense in a dwelling house); TEX. PENAL CODE ANN. § 9.42 (West 2015) (allowing deadly force to prevent arson under certain circumstances); UTAH CODE ANN. § 76-2-405 (LexisNexis 2015) (justifying force in defense of habitation); WASH. REV. CODE § 9A.16.050 (2016) (permitting deadly force for prevention of any felony under certain circumstances).

¹¹² IND. CODE § 35-41-3-2 (2016) provides “(i) A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:

- (1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
- (2) prevent or terminate the public servant’s unlawful entry of or attack on the person’s dwelling, curtilage, or occupied motor vehicle; or
- (3) prevent or terminate the public servant’s unlawful trespass on or criminal interference with property lawfully in the person’s possession, lawfully in possession of a member of the person’s immediate family, or belonging to a person whose property the person has authority to protect.”

However, under Indiana Code section 35-41-3-2, a person may not use force when they reasonably believe the police officer to be (A) acting lawfully; or (B) engaged in the lawful execution of the public servant’s official duties.

¹¹³ Keith Whitney, *Family Says DeKalb Man Is Hero Killed by Police*, DECATUR 11ALIVE (Jan. 30, 2015, 2:03 PM), <http://decaturn11alive.com/news/news/1835122-family-says-dekalb-man-hero-killed-police> [https://perma.cc/9Sj4-7788] (accessed Dec. 24, 2016).

which prompted Davis to call 911.¹¹⁴ When the officer arrived at the home, he did not identify himself as police or otherwise announce his presence, and proceeded to open the door.¹¹⁵ At this point, the officer claims that Davis's three-legged dog, Tooter, charged at him, so he shot and killed her.¹¹⁶ According to Edwards, she and Davis heard the gunshot and believed that Hilyard had returned with a gun in order to shoot them, which led Davis to arm himself for protection.¹¹⁷ Accounts differ as to exactly what happened next, but ultimately the officer shot Kevin Davis twice, killing him.¹¹⁸

B. *The Lack of Officer Training and Its Consequences*

The unfortunate reality is that most police departments do not have mandatory training programs for their officers on how to interact with canines that they encounter in the field. Those departments that do have such training programs typically implement them in response to a series of incidents involving their officers shooting a dog, which result in widespread public outrage and a civil suit.¹¹⁹ However, some departments opt not to implement training or otherwise change their departmental policies even after one of their officers unreasonably kills a person's dog.¹²⁰ For instance, in 2013, the city of Minneapolis

¹¹⁴ Gloria Tatum, *Kevin Davis's Girlfriend, April Edwards, Talks about Shooting*, ATLANTA PROGRESSIVE NEWS (Feb. 28, 2015), <http://atlantaprogressivenews.com/2015/02/28/kevin-daviss-girlfriend-april-edwards-talks-about-shooting/> [https://perma.cc/KMC7-FVRJ] (accessed Dec. 24, 2016).

¹¹⁵ Cassandra Fairbanks, *Man Calls 9-1-1 After Finding Girlfriend Stabbed, Cops Show Up, Kill Him and His 3-Legged Dog*, FREE THOUGHT PROJECT (Feb. 2, 2015), <http://thefreethoughtproject.com/police-kill-man-called-report-girlfriend-stabbed-witnesses-told-drop-weapon-shot/> [https://perma.cc/6ULF-PFAP] (accessed Dec. 24, 2016).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See, e.g., Donna Littlejohn, *More Training Offered to Hawthorne Police in Wake of Dog Shooting*, DAILY BREEZE (July 10, 2013, 12:01 AM), <http://www.dailybreeze.com/general-news/20130710/more-training-offered-to-hawthorne-police-in-wake-of-dog-shooting> [https://perma.cc/BCB3-KCN3] (accessed Dec. 24, 2016) (reporting that police in Hawthorne, California required training on reading dog body language after high-profile killing of "Max" the Rottweiler, which resulted in a civil suit against the city); Tara West, *Texas Police Department to Get Training to Lower the Number of Dog Deaths by Shooting*, INQUISITR (Sept. 10, 2014), <http://www.inquisitr.com/1466169/texas-police-department-to-get-training-to-lower-the-number-of-dog-deaths-by-shooting/> [https://perma.cc/QX86-ZTS2] (accessed Dec. 24, 2016) (finding that police in Austin, Texas will have mandatory four-hour training on dog behavior after several highly publicized incidents where Austin police officers shot and killed dogs, and discussing that the Leander, Texas Police Department implemented a similar policy in response to a high profile officer-involved canine shooting).

¹²⁰ See, e.g., J.D. Tucille, *Police Shoot Dog and Actually Compensate Family*, REASON.COM: HIT & RUN (Apr. 11, 2013, 5:39 PM), <http://reason.com/blog/2013/04/11/police-shoot-dog-and-actually-compensate> [https://perma.cc/2PUJ-9KYP] (accessed Dec. 24, 2016) (reporting that in Minneapolis, Minnesota police shot and killed two pet dogs after barging in unannounced to execute a search warrant, the city settled with the owners for \$225,000 in 2013). Problems persist as Minneapolis Police continue to shoot dogs in unreasonable situations. See Jack Highberger, *Minneapolis Man Say Cops Shot*

opted to settle a civil suit for \$225,000 that arose out of the 2011 execution of a search warrant of James and Aisha Keten's home wherein two officers shot and killed two of the family's pet pit bulls.¹²¹ However, the Minneapolis Police Department still appears not to require that its officers participate in any canine behavior training at all.¹²²

Given the interest in preventing the needless shooting of companion animals and the inability for post-deprivation legal strategies to effectively change police department policy, municipal taxpayer standing may offer an alternative way of challenging the training and policies that most police departments currently have, or do not have, regarding officer interactions with canine companions. Although taxpayer standing has been extremely limited where plaintiffs rely solely on taxpayer status to challenge federal¹²³ or state law,¹²⁴ municipal taxpayers have traditionally had standing to challenge the disburse-

and Killed His Pit Bull, Fox9 (Apr. 21, 2015, 9:31 PM), <http://www.myfoxtwincities.com/story/28864033/minneapolis-man-says-police-shot-and-killed-his-pit-bull> [https://perma.cc/MKG3-8KTR] (accessed Dec. 24, 2016) (reporting on a five-year-old pit bull that was merely barking when a Minneapolis police officer opened fire and shot the dog multiple times).

¹²¹ *Keten v. Minneapolis*, No. 11-1520 DWF/JSM, 2013 U.S. Dist. LEXIS 32275 (D. Minn. Mar. 8, 2013). See also Nick Halter, *Minneapolis Pit-bull Shooting Results in \$225k Settlement*, JOURNALMPLS.COM (Apr. 1, 2013), <http://www.journalmpls.com/news/2013/04/minneapolis-pit-bull-shooting-results-in-225k-in-settlement/> (accessed Dec. 24, 2016) (reporting that a Minneapolis pit bull shooting resulted in a \$225,000 settlement).

¹²² This is based on a review of Minneapolis police department materials and news reports related to Minneapolis officers shooting dogs. There is nothing to suggest they have implemented such a training program. One would expect that, given the negative publicity associated with officer-involved canine companion shootings, the department would be eager to publicize such a program. See *MPD Policy & Procedure Manual*, CITY MINNEAPOLIS (July 2000), http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_pre face [https://perma.cc/W56L-7JXW] (accessed Dec. 24, 2016) (failing to mention canines); MINNEAPOLIS POLICE, MINNEAPOLIS POLICE FIELD TRAINING OFFICER HANDBOOK, (2009), http://www.minneapolismn.gov/www/groups/public/@mpd/documents/webcontent/convert_258855.pdf [https://perma.cc/3AKS-KX6Z] (accessed Dec. 24, 2016) (lacking any canine training procedures); ST. PAUL POLICE DEP'T, ST. PAUL POLICE DEPARTMENT MANUAL (2014), <https://www.stpaul.gov/DocumentCenter/View/70740.pdf> [https://perma.cc/V39R-57WJ] (accessed Dec. 24, 2016) (evidencing lack of training and attention dedicated to properly responding to potential canine encounters).

¹²³ See *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (finding that plaintiff challenging Maternity Act based on interests as federal taxpayer did not have standing because interest was too minute, remote, and fluctuating). However, federal taxpayers have had standing to challenge congressional action under its Article I § 8 taxing and spending powers, where plaintiffs allege Establishment Clause violations; *Bowen v. Kendrick*, 487 U.S. 589, 619–20 (1988) (finding that federal taxpayers had standing to bring Establishment Clause claim challenging Adolescent Family Life Act as congressional action under tax and spending power even where the Executive Branch had role in disbursing funds); *Flast v. Cohen*, 392 U.S. 83, 88–90 (1967) (finding that federal taxpayer had standing to challenge disbursement of federal funds under the Elementary and Secondary Education Act as violative of establishment clause).

¹²⁴ See *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (holding that state taxpayer interest in preventing diminution of state funds is too "minute and indeterminable" to provide standing).

ment of municipal funds by virtue of their status as taxpayers.¹²⁵ The Supreme Court has explained that the different treatment of municipal taxpayers for standing purposes is “based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation” and that “[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate.”¹²⁶

IV. PRACTICAL PREVENTION: CALIFORNIA TEST CASE

Because California has a statutory provision explicitly authorizing citizen taxpayer suits to enjoin the illegal spending of state and municipal funds, California may be one of the more desirable states in which to bring a case challenging police department policy regarding officer-canine interactions.¹²⁷ In addition to allowing taxpayers to seek injunctive relief, California courts have granted taxpayers relief in the form of declaratory judgment, damages and mandamus.¹²⁸ Courts in California have consistently read § 526a as broadly authorizing municipal taxpayers to bring suit.¹²⁹ Indeed, “[t]he primary purpose of

¹²⁵ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (reaffirming *Frothingham*’s acceptance of municipal taxpayer suits); *Crampton v. Zabriskie*, 101 U.S. 601, 609 (1879) (“Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county . . . there is at this day no serious question. The right has been recognized by the State courts in numerous cases.”); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 *EMORY L.J.* 771, 803 (2003) (“A presumption in favor of municipal taxpayer standing exists.”).

¹²⁶ *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923); see also *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 211 (6th Cir. 2011), *cert. denied*, 565 U.S. 820 (2011) (“The idea that the unconstitutional spending of taxpayer money is itself an injury, actionable at the municipal level even if not at the federal level, is rooted in the stockholder analogy drawn by the Supreme Court in *Frothingham*. A person who owns stock in a corporation values profitability, but she also has an interest in seeing her money well spent by the corporate officers. ‘Like a shareholder of a private corporation, a municipal taxpayer has an immediate interest in how the municipality spends resources that reflect his contributions.’”).

¹²⁷ “An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.” CAL. CIV. CODE § 526a (West 1982).

¹²⁸ *Van Atta v. Scott*, 27 Cal. 3d 424, 449–50 (1980).

¹²⁹ See *L.A. Police Protective League v. City of Los Angeles*, 181 Cal.Rptr. 3d 712, 716 (Cal. Dist. Ct. App. 2014) (“Section 526a should be liberally construed to achieve its remedial purpose.”); *Daily Journal Corp. v. County of Los Angeles*, 172 Cal. App. 4th 1550, 1557 (Cal. Dist. Ct. App. 2009) (“Section 526a gives citizens standing to challenge governmental action and is liberally construed to achieve that purpose.”); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 29 (Cal. Dist. Ct. App. 2001) (stating that suits under § 526a “provide a general citizen remedy for controlling illegal governmental activity”).

[§ 526a] . . . is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.”¹³⁰

In *Wirin v. Horall*, taxpayer plaintiffs successfully brought suit to enjoin the Police Department of Los Angeles from continuing to carry out a departmental policy of blocking off streets in Los Angeles and stopping and searching individuals without obtaining warrants and without probable cause.¹³¹ The Second District Court of Appeals explained that where police officers’ actions were unlawful and beyond the scope of their authority, the officers were “illegally expending and wasting the public funds of the city of Los Angeles in (a) using the equipment of the police department of the city in illegal and unauthorized acts and (b) expending the time of the paid police officers of the city of Los Angeles in performing *illegal and unauthorized acts*.”¹³² However, a California taxpayer’s ability to seek an injunction under § 526a is not without limits. A taxpayer will not have standing if she is challenging expenditures merely as wasteful because she disagrees with an official’s decision, believes that the funds could be spent more efficiently or is actually attempting to mount a collateral attack on a judicial ruling.¹³³ Although a taxpayer may not challenge governmental conduct that is legal, she will have standing “to challenge an illegal expenditure when it is alleged that paid employees of a public entity are spending their time engaging in illegal conduct.”¹³⁴ Insofar as a taxpayer plaintiff pleads facts sufficient to demonstrate that she is

¹³⁰ *Blair v. Pitchess*, 5 Cal. 3d 258, 267–68 (1971) (en banc). This leniency has consistently been true in cases filed in state court in California, but federal cases have not always afforded municipal taxpayer plaintiffs the same degree of leniency in fulfilling standing requirements. See *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001) (“California’s lenient taxpayer standing requirements do not relieve [federal plaintiffs] of the obligation to establish a direct injury under the more stringent federal requirements for state and municipal taxpayer standing.”); *Greenberger v. S.F. Police Dep’t*, No. C-01-2163 PJH, 2001 WL 969048, at *1 (N.D. Cal. Aug. 13, 2001) (“[T]he fact that a plaintiff might have standing as a taxpayer under Code of Civil Procedure 526a to bring a suit in California state court does not mean that the same plaintiff has standing to bring the same claim in federal court. Standing to sue is governed by federal law; a state statute cannot confer standing where none exists under federal law.”).

¹³¹ *Wirin v. Horall*, 85 Cal. App. 2d 497 (Cal. Dist. App. Ct. 1948).

¹³² *Id.* at 504–05 (emphasis added).

¹³³ See *Sundance v. Municipal Court*, 729 P.2d 80, 103 (Cal. 1986) (finding that there is no taxpayer standing where all that is alleged is that “expenditures are unwise, that the results are not worth the expenditure, or that the underlying theory of the Legislature involves bad judgment”); *Los Angeles Police Protective League v. City of Los Angeles*, 181 Cal. Rptr. 3d 712, 717 (finding that taxpayer does not have standing to seek injunction “where the real issue is a disagreement with the manner in which government has chosen to address a problem because a successful claim requires more than ‘an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion.’”); *Gould v. People*, 56 Cal. App. 3d 909, 922 (Cal. Dist. Ct. App. 1976) (finding that it would be a misuse of taxpayer suits to be used as vehicles for mounting collateral attacks on the correctness of judicial rulings in particular cases).

¹³⁴ *Culp v. City of Los Angeles*, No. B208520, 2009 WL 3021762, at *5–6 (Cal. Dist. Ct. App. Sept. 23, 2009).

seeking to enjoin the *illegal* expenditure of funds, she will have standing.

An individual who has paid property taxes in a particular municipality for over a year would have standing to challenge that municipality police department's policies. There are several routes that individuals could take. First, they could claim that the department's policy regarding officer-involved shootings of companion canines violated state law, most likely the state's animal anti-cruelty laws. Additionally, or in the alternative, they could allege that the departmental policy violated either federal or constitutional law. Even where a department's stated policies appear on their face to comply with state, federal, and constitutional requirements, a taxpayer may still bring a challenge alleging that the actual practices, customs, or actions of the department are unlawful.¹³⁵ Indeed, as Justice Frankfurter, writing for the U.S. Supreme Court in *Nashville, Chattanooga & St. Louis Railway v. Browning* explained, "[i]t would be a narrow conception of jurisprudence to confine the notion of laws to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law."¹³⁶ This appears to be particularly true where a police department evinces that it will continue with a certain practice.¹³⁷ Given the statements by numerous police department representatives following an officer-involved canine companion shooting that the officer was justified, evincing that the department will continue to allow its officers to use deadly force against canine companions in similar circumstances, the unnecessary and unreasonable shooting of companion canines is a practice that, absent intervention, is likely to continue.¹³⁸ It is unclear

¹³⁵ See *White v. Davis*, 13 Cal. 3d 757 (1975) (holding that taxpayer plaintiffs had standing to challenge police department practice of going undercover as students in public California University); *Lundberg v. County of Alameda*, 298 P.2d 1, 3-4 (Cal. 1956) (holding that taxpayer had standing to challenge tax exemptions given to schools operated by religious institutions); *Thompson v. Petaluma Police Dep't*, 231 Cal. App. 4th 101, 105-06 (Cal. Dist. Ct. App. 2014) (holding that taxpayer plaintiff would have standing if alleged police department's practice of impounding cars violated state law); *Kortum v. Alkire*, 69 Cal. App. 3d 325, 327 n.2 (Cal. Dist. Ct. App. 1977) (upholding lower court finding that taxpayer plaintiffs could challenge police department's use of deadly force against non-violent felons, even where stated departmental policy did not expressly permit for this use of deadly force).

¹³⁶ *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940).

¹³⁷ See *Wirin*, 85 Cal. App. 2d at 499-500 ("Defendant publicly announced that they intended to continue to conduct 'police blockades' as herein above set forth at times and places unannounced unless enjoined by the court.").

¹³⁸ See, e.g., *Nipps*, *supra* note 9. Sherriff's Department representative stated that the shooting of "Smoke" was justified because "pepper spray and tasers are not effective against animals that are low to the ground and constantly moving," which suggests that the department does not consider whether the response is proportionate to the threat posed by the dog and that they will consider discharging a firearm to be an appropriate first response. *Id.* This statement regarding the efficacy of alternative force methods against dogs is erroneous. For a depiction of an officer effectively utilizing a Taser to subdue a dog he believed to be dangerous, see *Police Use Taser on Dog Instead of Shoot It*, LIVELEAK (Oct. 18, 2007), http://www.liveleak.com/view?i=a1d_1192690532 [https://

whether an allegation that is essentially one rooted in a failure to train could support a taxpayer plaintiff attempting to enjoin a police department's policy concerning the shooting of companion canines.

A. *Claims That a Police Policy Violates State Law*

One approach that a taxpayer could take would be to claim that a given departmental policy, either as written or in practice, violates the California Constitution. In particular, a novel argument could be made that police department policies that allow an officer to shoot and kill a companion canine based on his own determination that the canine is dangerous is an improper delegation of authority to the executive branch. California has clearly defined what constitutes a vicious¹³⁹ or dangerous¹⁴⁰ companion canine, and established a procedure by which such determinations are to be made for individual canines.¹⁴¹ Police department policies that permit officers to destroy companion canines based on an officer's determination of dangerousness, divorced from those procedures, allow executive officers to make determinations that are supposed to be made by a neutral magistrate or through appropriate administrative agency procedures.¹⁴²

perma.cc/2LQB-53UW] (accessed Dec. 24, 2016) (showing a police demonstration of tasering a dog).

¹³⁹ Under California law, a vicious dog is defined as: (a) Any dog seized under Section 599aa of the Penal Code and upon the sustaining of a conviction of the owner or keeper under subdivision (a) of Section 597.5 of the Penal Code. (b) Any dog which, when unprovoked, in an aggressive manner, inflicts severe injury on or kills a human being. (c) Any dog previously determined to be and currently listed as a potentially dangerous dog which, after its owner or keeper has been notified of this determination, continues the behavior described in Section 31602 or is maintained in violation of Section 31641, 31642, or 31643. CAL. FOOD & AGRIC. CODE § 31603 (West 2001).

¹⁴⁰ Under California law, a potentially dangerous dog is defined as: (a) Any dog which, when unprovoked, on two separate occasions within the prior 36-month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner or keeper of the dog. (b) Any dog which, when unprovoked, bites a person causing a less severe injury than as defined in Section 31604. (c) Any dog which, when unprovoked, on two separate occasions within the prior 36-month period, has killed, seriously bitten, inflicted injury, or otherwise caused injury attacking a domestic animal off the property of the owner or keeper of the dog. CAL. FOOD & AGRIC. CODE § 31602 (West 2001).

¹⁴¹ CAL. FOOD & AGRIC. CODE § 31622 (West 2001). *See also* Kaylan E. Kaatz, *Those Doggone Police: Insufficient Training, Canine Companion Seizures, and Colorado's Solution*, 51 SAN DIEGO L. REV. 823, 864 (2014) ("Before declaring a dog vicious, an established process must be followed and an owner must be given an opportunity to be heard and to appeal, ensuring that a judge's final determination of a canine companion's vicious propensities is just.")

¹⁴² *See* CAL. FOOD & AGRIC. CODE §§ 31621, 31645 (West 2001) (showing that there are already mechanisms in the State Legislature for police officers to refer dog cases to a neutral magistrate; thus, policies allowing police officers to make snap judgments essentially allow them to be judge, jury, and executioner). For instance, animal care and control officers are expressly delegated authority regarding determinations as to the disposition and temperament of domestic animals. CAL. FOOD & AGRIC. CODE § 31645 (West 2001).

In *Humane Society of the United States v. State Board of Equalization*, the plaintiff taxpayers sought to prevent California from continuing to award tax exemptions to farmers who kept chickens in cages alleged to be cruel and inhumane.¹⁴³ Essentially, plaintiffs alleged that the practice of keeping chickens in such conditions violated state anti-cruelty laws, and that the government should be prevented from awarding tax benefits to individuals violating state anti-cruelty laws.¹⁴⁴ The court of appeal there denied relief under § 526a because the government itself had not acted illegally by granting the contested tax exemptions.¹⁴⁵ A taxpayer suit brought against a municipality challenging a police department's policies concerning shooting companion canines would not share this fatal flaw, because the taxpayer would be challenging actions of paid police officers as unlawful, not the actions of a non-governmental third party.¹⁴⁶ Therefore, a taxpayer may bring suit alleging that a police department's procedures for handling companion canines violate California anti-cruelty laws.

California's anti-cruelty law provides in relevant part that "[e]very person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal" or who "cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal . . . to be cruelly beaten, mutilated or cruelly killed" commits the crime of animal cruelty.¹⁴⁷ Although § 597(a) of the statute contains a mens rea requirement of malice, no such mental state is required to establish animal cruelty under § 597(b).¹⁴⁸ Additionally, § 597(b) applies to individuals irrespective of whether they own or have custody of the animal.¹⁴⁹

¹⁴³ *Humane Soc'y of the U.S. v. State Bd. of Equalization*, 152 Cal. App. 4th 349, 354–56 (Cal. Dist. Ct. App. 2007).

¹⁴⁴ *Id.* at 352.

¹⁴⁵ *Id.* at 351.

¹⁴⁶ See *Wirin*, 85 Cal. App. 2d at 505 (plaintiffs brought suit under section 478—Remedies of Taxpayers—Injunction Against Illegal Expenditure). See *Pitchess*, 5 Cal. 3d at 268 (explaining that the mere "expending [of] the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts constitute[s] an unlawful use of funds which could be enjoined under section 526a.>").

¹⁴⁷ CAL. PENAL CODE § 597(a)-(b) (West 2010) (emphasis added).

¹⁴⁸ See *People v. Riazati*, 129 Cal. Rptr. 152, 160 (Cal. Ct. App. 2011) (finding that an individual commits animal cruelty under § 597(b) when an individual acts in merely a reckless way).

¹⁴⁹ "Except as otherwise provided in subdivision (a) or (c), every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for each offense, guilty of a crime punishable pursuant to subdivision (d)." CAL. PENAL CODE § 597(b) (emphasis added). One could mistakenly construe the

The statute exempts the harming of “any animal *known* as dangerous to life, limb, or property” from the definition of animal cruelty.¹⁵⁰ Therefore, where the clear language of a department’s policy provides for the destruction of a companion canine under circumstances where an animal is not *known* to be dangerous, a taxpayer may be able to enjoin the department from continuing to carry out its policy of shooting dogs. This clearly stated policy approach is the most likely to succeed, but is dependent on finding a California police department’s policy with particular language. In counties or cities where the police department offers no training to its officers so that they are able to make an informed decision about what constitutes a ‘dangerous’ animal, a municipal taxpayer could allege that this failure to provide training renders their departmental policy violative of California’s animal anti-cruelty laws.

The written policies of police departments are difficult to come by, as many departments do not make them publicly available, although the manuals would need to be made available in response to a Freedom of Information Act request. However, the Los Angeles Police Department and the San Jose Police Department do make their manuals available. The Los Angeles Police Department manual provides that officers are authorized to “use a firearm to destroy a vicious,¹⁵¹ potentially dangerous,¹⁵² or rabid animal when a delay would expose persons to danger.”¹⁵³ The stated policy appears to fall short of requiring that an officer “know” that a companion canine is dangerous prior to shooting it, and thus may conflict with § 597. The San Jose Police De-

text as requiring that a person must have had the charge or custody of an animal to violate 597(b), but that is not the case. *See* *People v. Youngblood*, 91 Cal. App. 4th 66, 71 (Cal. Dist. Ct. App. 2001) (explaining that “every person” as used in the beginning of 597(b) is a distinct subject of the statute, and that “whoever” as used after the “and” in the statute is a distinct subject of the statute).

¹⁵⁰ CAL. PENAL CODE § 599c (West 2010) (emphasis added).

¹⁵¹ Under California law, a vicious dog is defined as: (a) Any dog seized under Section 599aa of the Penal Code and upon the sustaining of a conviction of the owner or keeper under subdivision (a) of Section 597.5 of the Penal Code. (b) Any dog which, when unprovoked, in an aggressive manner, inflicts severe injury on or kills a human being. (c) Any dog previously determined to be and currently listed as a potentially dangerous dog which, after its owner or keeper has been notified of this determination, continues the behavior described in Section 31602 or is maintained in violation of Section 31641, 31642, or 31643. CAL. FOOD & AGRIC. CODE § 31603 (West 2016).

¹⁵² Under California law, a potentially dangerous dog is defined as: (a) Any dog which, when unprovoked, on two separate occasions within the prior 36-month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner or keeper of the dog. (b) Any dog which, when unprovoked, bites a person causing a less severe injury than as defined in Section 31604. (c) Any dog which, when unprovoked, on two separate occasions within the prior 36-month period, has killed, seriously bitten, inflicted injury, or otherwise caused injury attacking a domestic animal off the property of the owner or keeper of the dog. CAL. FOOD & AGRIC. CODE § 31602 (West 2016).

¹⁵³ *Los Angeles Police Department Manual Volume 4: Line Procedures*, L.A. POLICE DEP’T, at 204.80, http://www.lapdonline.org/lapd_manual/volume_4.htm [https://perma.cc/J3H7-ZWPT] (accessed Dec. 24, 2016).

partment (SJPD) manual permits officers to discharge their firearm “to dispatch any animal that poses an immediate threat to any person or other animal” where “other dispositions are impractical.”¹⁵⁴ On its face, the SJPD manual allows an officer to shoot a dog where the dog poses a threat to another animal. California’s anti-cruelty law exempts an individual from the crime of animal cruelty for intentionally and cruelly killing an animal, if that animal poses a danger to ‘property.’¹⁵⁵ By broadly authorizing an officer to kill a companion canine whenever the dog poses a threat to any other animal irrespective of whether that animal is owned, and is thus someone’s property,¹⁵⁶ the department permits its officers to shoot dogs in circumstances that would violate § 597 and § 599. Generally, the policies deliberately defer to the discretion of the officers in making these types of determinations. Accordingly, it is necessary to look beyond the actual text of the policies to determine if there is an established practice of unreasonable canine companion shootings, such that the need for officer training in canine behavior or alternative force protocols is so apparent that the department’s failure to provide such options amounts to an adoption of an unconstitutional policy.

Separate and apart from the written policies of specific police departments, an established pattern of police officers shooting and killing dogs in situations where the dog was plainly not dangerous may be sufficient to demonstrate that the actual policy of a particular municipal department is violative of the state’s anti-cruelty laws. As is discussed further below, this would be dependent upon a court’s willingness to import the failure-to-train analytical framework into the standing analysis of whether a taxpayer’s challenge to a municipality’s expenditure of funds to pay the salary of police officers habitually committing illegal acts can be sustained.

B. Claims That a Municipality Is Expending Funds Paying the Salaries of Officers Carrying Out Policies in Violation of the Constitution

An alternative, albeit untested approach, would be to utilize the failure-to-train framework in order to establish that a municipality’s ‘actual’ policy was to permit officers to unreasonably shoot companion canines, and thus was a policy capable of being contested by a municipal taxpayer based on an illegal use of taxpayer funds. Indeed, the Ninth Circuit has indicated a willingness to consider such a claim,

¹⁵⁴ *San Jose Police Department Duty Manual 2012: Line Operations/Procedures L 2000–L 2900*, SAN JOSE POLICE DEP’T (2012), at L 2638, <http://www.sjpd.org/Records/DutyManual.asp> [<https://perma.cc/23Y3-R5U3>] (accessed Dec. 24, 2016).

¹⁵⁵ See CAL. PENAL CODE § 599(c) (West 2010) (explaining that if an animal is known as dangerous to life, limb or property, harming it is exempted from California’s anti-cruelty law).

¹⁵⁶ Wild animals must be captured to be owned; property in wild animals is only acquired by actual capture. See *Pierson v. Post*, 3 Cai. R. 175, 177 (N.Y. Sup. Ct. 1805) (“[P]ursuit alone vests no property or right in the huntsman . . .”).

though not specifically related to a municipal taxpayer suit. For instance, in *Long v. County of Los Angeles*, they stated that “[t]his court consistently has found that a county’s lack of affirmative policies or procedures to guide employees can amount to deliberate indifference, even when the county has other general policies in place.”¹⁵⁷ Although, in the context of § 1983 suits where an individual is suing for damages post-deprivation, an officer’s shooting of a canine companion has been analyzed as a seizure under the Fourth Amendment.¹⁵⁸ A taxpayer bringing a pre-deprivation suit could frame the departmental policies as violative of the Constitution’s due process requirements. Where municipal police departments fail to provide training in canine behavior and the efficacy of lesser force tools against companion canines,¹⁵⁹ yet have policies which explicitly permit officers to shoot a dog that they deem ‘dangerous’ prior to obtaining a warrant to do so, there is a presumption that the presence of a dog always presents an exigent circumstance. Under this reasoning, the seizure of that dog can always be justified, even without a warrant or an actual, verifiable threat to anyone’s safety or property.¹⁶⁰

Even outside the context of a § 1983 suit where an individual is alleging harm from a particular police officer’s conduct, a police department’s policies, practices and procedures may be challenged on the basis that they violate the Constitution.¹⁶¹ Typically, allegations of failure to train arise in the context of § 1983 litigation as a means of holding a municipality liable for the conduct of its officers.¹⁶² However, given the recognition that failure to train liability only attaches where a plaintiff can demonstrate that the failure to provide training demonstrates deliberate indifference such that it can properly be considered

¹⁵⁷ *Long*, 442 F.3d at 1189.

¹⁵⁸ *See supra* note 27.

¹⁵⁹ *See generally* BATHURST ET AL., *supra* note 2 (noting that a DOJ guide was authored to explore the lack of proper training regarding canine encounters).

¹⁶⁰ The Supreme Court has consistently been resistant to *per se* rules providing that a search or seizure can occur without a warrant. In *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the Supreme Court declined to allow a bright-line rule permitting for the extraction of blood for a blood test without an individual’s consent in the context of a DUI arrest without first obtaining a warrant to compel the blood test. Although the court acknowledged the “natural dissipation of alcohol in the bloodstream” and its potential to frustrate law enforcement’s objectives in prosecuting drunk drivers, the Court found that a rule that expressly allowed this type of seizure to occur without first obtaining a warrant, thus representing a *per se* exigent circumstance in every case, was circumscribed by the Constitution. *Id.* at 1558.

¹⁶¹ *See* *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (acknowledging a claim could be made “challeng[ing] . . . policies, practices and procedures of the police department that are said to violate constitutional rights,” but finding the U.S. Attorney General lacked standing to bring suit because of federalism considerations).

¹⁶² *See Bd. of Cty. Comm’rs*, 520 U.S. 397 (finding that a municipality could not be held liable for an officer’s constitutional violations despite the fact that the municipality had failed to perform appropriate background checks on the officer, because the particular constitutional deprivation was not the “plainly obvious consequence” of the hiring decision).

a “city policy,”¹⁶³ it would seem as though a municipal taxpayer in California should be able to bring a case under § 526(a) challenging that policy insofar as it involves the expenditure of municipal funds. In general, failure-to-train claims have been notoriously difficult for plaintiffs to prevail on in the § 1983 context.¹⁶⁴ However, the Supreme Court, in its discussion of the “narrow range of circumstances”¹⁶⁵ that give rise to municipal liability on the basis of a failure to train, explicitly mentioned the *constitutional necessity* for training where the use of deadly force is involved:

The city has armed its officers with firearms Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are “deliberately indifferent” to the need.¹⁶⁶

A municipal taxpayer could allege that insofar as a police department’s manual provides that deadly force (i.e., the discharging of a firearm) is appropriate against a ‘dangerous’ animal, but then provides no guidance to its officers as to how to determine when an animal is dangerous, the policy is itself constitutionally deficient.

V. CONCLUSION

As a dog lover, the staggering number of companion canines who have been killed by police officers is upsetting, but the prevalence of such shootings should be troubling irrespective of how one feels about pet dogs. Officer-involved companion canine shootings implicate

¹⁶³ *Harris*, 489 U.S. at 379 (“Only where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by the municipality can the failure be properly thought of as an actionable city ‘policy.’”); *see also* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970) (“Although not authorized by written law, [state official’s practices] could well be so permanent and well settled as to constitute ‘a custom or usage’ *with the force of law.*”) (emphasis added).

¹⁶⁴ This is attributable to both a trend in Supreme Court precedent since *Harris*, which has seemingly restricted the ways in which plaintiffs could demonstrate a failure to train, as well as some of the serious procedural obstacles that plaintiffs in such cases face. These include difficulty with discovery and finding evidence of prior police conduct sufficient to demonstrate a custom. 489 U.S. at 379. *See, e.g., Bd. of Cty. Comm’rs*, 520 U.S. 397 (finding that for municipal liability to attach, the failure must result in an unconstitutional consequence that is plainly obvious and the failure must have been likely to bring about the specific constitutional violation at issue); *see* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1330–32 (1999) (discussing the difficulty and unlikelihood of successfully bringing a failure to train claim); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 *HARV. C.R.-C.L. L. REV.* 465, 486–88 (1992) (discussing how the Supreme Court has limited the availability of failure to train as a basis for municipal liability in § 1983 actions).

¹⁶⁵ *Bd. of Cty. Comm’rs*, 520 U.S. at 398.

¹⁶⁶ *Harris*, 489 U.S. at 390, n.10.

human safety, unchecked and coercive abuses of police authority to invade our possessory interests, the potential for an individual to mistakenly use force against an officer in a good faith attempt to protect their property, and, perhaps more fundamentally, the legitimacy of the law to which we are expected to conform and respect for those who are charged with ensuring that we do. Civil litigation should not be the sole check on police authority and discretion where such profound interests are concerned. As Justice Brennan declared in his dissenting opinion in *Horton v. California*, “A decision to invade a possessory interest in property is too important to be left to the discretion of zealous officers engaged in the often competitive enterprise of ferreting out crime.”¹⁶⁷

The fundamental problem is that in a plethora of ways, dogs are beholden to and entirely dependent on humans. As a practical matter dogs depend on their people to feed and care for them. But on a deeper level, whether a dog finds itself in a situation where a police officer has the opportunity to think that it poses a threat is entirely outside of its control.¹⁶⁸ In that light, dogs seem simply blameless in all this.¹⁶⁹ Moreover, dogs are not capable of meaningfully conforming their behavior in response to demands from police officers. This is precisely why guidelines regarding the circumstances under which an officer is entitled to shoot a companion canine, and the enforcement of those guidelines, are vital.¹⁷⁰ The lack of guidance to both civilians and officers, woefully deficient or non-existent canine behavior training programs, and absence of meaningful oversight other than through civil litigation renders humans and dogs alike incapable of modifying their behavior so as to prevent these tragedies.

¹⁶⁷ *Horton v. California*, 496 U.S. 128, 144 (1990).

¹⁶⁸ This is true both where an officer is rightly executing a search warrant on a home or where an officer goes onto private property in a good faith effort to pursue a suspect or locate a missing person.

¹⁶⁹ A compelling argument can be made that even where a dog has attacked and actually harmed a person this is still the case. See Martha Neil, *Fighting Fido: After Fatal Attack, Tougher Dog Laws Let Prosecutors Put Collar on Canine Owners*, 89 A.B.A. J. 26 (2003) (discussing holding humans accountable for the actions of their dogs).

¹⁷⁰ For instance, the display of ‘Beware of Dog’ signs or other indicators that a dog lives on an individual’s property would intuitively seem a good preventative measure that would put officers on notice. However, such prophylactic measures have previously been insufficient to prevent tragedy. See Elisa Black-Taylor, *Chicago PD Shoot Elderly Dog After Opening Gate and Ignoring Beware of Dog Sign*, ELISA’S EXAMINER (Aug. 18, 2014), <https://elisasexaminer.wordpress.com/2016/07/05/chicago-pd-shoot-elderly-dog-after-opening-gate-and-ignoring-beware-of-dog-sign/> [https://perma.cc/3LED-MAW9] (accessed Dec. 24, 2016) (describing an incident where police officers shot a 120-pound dog they said was being aggressive despite a ‘Beware of Dog’ sign).