

K-9 CATCH-22: THE IMPOSSIBLE DILEMMA OF
USING POLICE DOGS ON APPREHENSION OF
SUSPECTS

Ann L. Schiavone

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2019.630
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

K-9 CATCH-22: THE IMPOSSIBLE DILEMMA OF USING POLICE DOGS ON APPREHENSION OF SUSPECTS

Ann L. Schiavone*

In the past several years, the city of Pittsburgh, Pennsylvania has seen two canine police dogs (K-9s) killed in the line of duty, Rocco in January 2014, and Aren in January of 2016. Both were killed by stab wounds while attempting to apprehend suspects. The man who killed Rocco received significant jail time for stabbing and killing the dog, while the man who killed Aren was fatally shot as a direct result of his actions toward the canine. While Rocco was vocally celebrated in the community, and sympathy primarily focused on the canine, the deaths of Aren and the suspect who killed him, Brian Kelley, Jr., led to a very different response. In the aftermath of the 2016 incident, there was significant vocal outcry from a variety of advocates (for both humans and animals) concerning the injustice of using K-9 officers to apprehend suspects and calling for a ban on such practices. Certainly, Pittsburgh's experiences are not unique, although they present a vivid backdrop for the discussion of whether K-9s should be used for apprehension of suspects and under what circumstances.

This Article explores the legal and ethical questions surrounding the use of police dogs, specifically in the realm of apprehending suspects where a violent interaction between human and canine is inevitable. The Fourth Amendment allows the use of canine force against persons if "reasonable" under the totality of the circumstances, based on the officer's observations. However, that totality of circumstances does not take into account the very real and very reasonable fear response induced in humans by an animal attack, that in some cases compels the suspect to defend themselves and thus places the suspect at risk for further violence,

* Assistant Professor of Law, Duquesne University School of Law. Special thanks to my husband, Anthony Schiavone, Esq. who inspired this paper during our discussions of the stabbing death of K-9 Rocco in 2014, and again with the deaths of Bruce Kelly Jr. and K-9 Aren in 2016. Our discussions of the issue were integral in the development of the thesis and research of this project. My deepest thanks to my research assistants Allen Page (J.D. 2018) and Kelly Capone (J.D. 2020) who devoted many hours to assist me on this project.

and the police dog at risk for injury or death. Further, while any suspect may be compelled to resist or defend itself against a police dog, the historical use of police dogs against African Americans, coupled with the deployment of police dogs more frequently in minority communities, may tend to put African Americans at greater risk in this “K-9 catch-22.” Ultimately, this Article considers the question of whether, in light of human behavioral fear response to animal attacks coupled with examples of implicit racial bias, using police dogs in apprehension is ever truly “reasonable.”

Cry havoc, and let slip the dogs of war.¹

INTRODUCTION: A TALE OF TWO DOGS, AND TWO MEN

On the evening of January 28, 2014, Pittsburgh sheriffs spotted John Rush,² a 21-year-old convicted sex offender, in the Lawrenceville neighborhood of the city.³ Rush, who was wanted on warrants for a home invasion and violations of Megan’s Law registration, scuffled with police before taking refuge in the basement of a nearby home.⁴ The Pittsburgh Police responded with the K-9 unit, warning Rush that if he did not come out, they would release Rocco, the dog.⁵ Rush failed to respond, and the dog was released into the house.⁶

¹ WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

² There is some dispute as to John Rush’s race. Court documents identify him as white, but at trial he testified to being biracial. See Court Summary, *Comm. v. Rush*, No. CP-02-CR-0002230-2014, <https://ujportal.pacourts.us/docketsheets/CourtSummaryReport.ashx?docketNumber=CP-02-CR-0002230-2014&dnh=bOgAJRozjuOl%2bdrbG4jKjg%3d%3d>; but see Lexi Balculfine, *Man accused of killing Pittsburgh police dog waits for jury verdict*, PITTSBURGH POST-GAZETTE (Dec. 12, 2014, 6:18 PM), <https://www.post-gazette.com/local/city/2014/12/12/Jurors-deliberate-trial-man-accused-killing-Pittsburgh-police-dog-Rocco/stories/201412120183>.

³ Paula Reed Ward, *Stabbing Suspect has Extensive Record, Troubled Background*, PITTSBURGH POST-GAZETTE (Jan. 31, 2014, 11:59 PM), <https://www.post-gazette.com/local/city/2014/02/01/Stabbing-suspect-has-extensive-record-troubled-background/stories/201402010073>; Andrew Del Greco, *K-9 Rocco’s Death ‘Great Loss for City of Pittsburgh,’* WTAE ACTION NEWS (Jan. 31, 2014, 4:53 PM), <http://www.wtae.com/article/k-9-rocco-s-death-great-loss-for-city-of-pittsburgh/7464808>.

⁴ *Id.*

⁵ Paula Reed Ward, *Man Who Stabbed Pittsburgh K-9 Officer Receives Lengthy Jail Sentence*, PITTSBURGH POST-GAZETTE (Mar. 10, 2015, 11:26 PM), <http://www.post-gazette.com/local/city/2015/03/10/Killer-of-Rocco-the-Pittsburgh-police-dog-gets-lengthy-prison-sentence/stories/201503100159> [hereinafter *Lengthy Jail Sentence*].

⁶ *Id.*

When Rocco encountered him, Rush stabbed the dog in the back, kidney, and spine, and attacked the dog's handler, Officer Phil Lerza, and two other officers before being apprehended.⁷ In addition to the stab wounds, Rocco also suffered a broken shoulder.⁸ Rocco was rushed to a local, state-of-the-art emergency veterinary facility, but despite two surgeries, he succumbed to his wounds two days later.⁹

Following Rocco's death, the community nearly unanimously expressed outrage at the acts of Rush, as well as sadness and horror for the death of the dog.¹⁰ Rocco was given a funeral service with full law enforcement honors,¹¹ a statue was erected of him on the North Shore of the city,¹² and Rocco's death led directly to passage of Rocco's Law in the Pennsylvania legislature.¹³ The law raised the grade for the intentional killing of a police dog to a second degree felony, with a maximum sentence of ten years in prison.¹⁴

Ultimately, Rush was sentenced to seventeen and a half to forty-four years in prison; three and a half to seven of those years were allocated for the killing of Rocco.¹⁵ The sentencing judge, Jill E. Rangos, ruled Rush must serve his sentences for the assaults on the officers and the killing of the dog consecutively, resulting in a particularly long sentence based on the circumstances.¹⁶ The deployment of Rocco

⁷ Del Greco, *supra* note 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Lengthy Jail Sentence*, *supra* note 5.

¹¹ Lexi Belcuffine, *Trial Begins in Death of Pa. Police Dog Rocco*, MORNING CALL (Dec. 8, 2014, 5:26 PM), <http://www.mcall.com/news/breaking/mc-pittsburgh-k9-rocco-trial-20141208-story.html> ("Rocco was celebrated and mourned as a hero. About 1,200 people attended Rocco's funeral, where he received full police honors, at Soldiers & Sailors Memorial Hall and Museum in Oakland, and a Facebook page, Justice for Rocco, has more than 65,000 likes.")

¹² Paula Reed Ward, *Organizations Collect Donations for Bronze Statue of Pittsburgh K-9 Rocco*, PITTSBURGH POST-GAZETTE (Mar. 4, 2015, 12:00 AM), <http://www.post-gazette.com/local/city/2015/03/04/Organizations-collect-donations-for-bronze-statue-of-K9-Rocco/stories/201503040121>.

¹³ *Lengthy Jail Sentence*, *supra* note 5.

¹⁴ *Id.*; 18 PA. CONS. STAT. § 5548 (2018).

¹⁵ *Lengthy Jail Sentence*, *supra* note 5. Rush was not sentenced under the new law, but was, rather, sentenced under old guidelines which considered the killing of the police dog to be a third-degree felony with a max of seven years. *Id.*

¹⁶ *Id.* Duquesne Law Professor Wes Oliver said the sentence was of a similar length to those handed down for third degree murder. *Id.*

is a textbook example of when a law enforcement officer theoretically “should” use a dog to apprehend a suspect that is a potential danger to the community, and the officer has no option other than using deadly force on the suspect or risking a high likelihood of personal danger.

Fast-forward almost two years to the day. The Port Authority police of Allegheny County (the county in which the city of Pittsburgh sits) were called to deal with two African-American men trespassing and drinking alcohol on Port Authority property.¹⁷ The two men, later identified as 37-year-old Bruce Kelley, Jr., and his father, Bruce Kelley, Sr., did not immediately follow orders from the police to leave the area, and Kelley Jr., who had a knife with him, began acting erratically and belligerently towards officers.¹⁸ Attempts to apprehend the younger man using Tasers failed, likely because his heavy winter coat prevented the device from working properly.¹⁹ Again, a K-9 unit was called to the scene; this time it was the Port Authority police unit, including K-9 Aren, a patrol and explosive detection dog.²⁰ The K-9 handler, following procedure, announced his intention of releasing the dog.²¹ Kelley Jr. replied with his intent to kill the dog if it was released.²² Despite the near certainty of the violent encounter that was to follow, Officer Brian O’Malley released Aren, and Kelley Jr., true to his word, stabbed the dog under his neck and up through his snout.²³ At this point, police officers opened fire and killed Kelley

¹⁷ Tony Raap, *Man Killed After Fatally Stabbing Police Dog in Wilkinsburg*, TRIB LIVE (Jan. 31, 2016, 5:03 PM), <https://triblive.com/news/adminpage/9895073-74/story>; Megan Guza, *Activists Urge Port Authority to Change K-9 Practices in Wake of Deaths*, TRIBLIVE (Feb. 26, 2016, 12:00 PM), <https://triblive.com/news/adminpage/10037291-74/police-authority-port> [hereinafter *Activists*].

¹⁸ Raap, *supra* note 17; Megan Guza, *Port Authority Officers Return to Duty After ‘Tragic’ Busway Shooting*, TRIBLIVE (June 21, 2016, 4:24 PM), <https://triblive.com/news/allegheeny/10669704-74/kelley-authority-port> [hereinafter *Return to Duty*].

¹⁹ Paula Reed Ward, *Medical Examiner’s Report Reveals More Details in K-9 Stabbing, Fatal Shooting of Suspect*, PITTSBURGH POST-GAZETTE (Feb. 1, 2016, 6:33 PM), <http://www.post-gazette.com/local/city/2016/01/31/Port-Authority-K-9-dog-killed-during-incident-in-Wilkinsburg/stories/201601310390> [hereinafter *Medical Examiner’s Report*].

²⁰ Raap, *supra* note 17.

²¹ Torsten Ove, *Family of Man Killed by Port Authority Police in Wilkinsburg Sues over Excessive Force Claim*, PITTSBURGH POST-GAZETTE (Dec. 11, 2017, 3:30 PM), <http://www.post-gazette.com/local/east/2017/12/11/Police-excessive-force-Allegheny-County-Port-Authority-Bruce-Kelley-K-9-lawsuit-federal-court/stories/201712110160>.

²² *Id.*

²³ *Return to Duty*, *supra* note 18.

Jr.²⁴ The dog was rushed to the same emergency clinic where Rocco died, and Aren was pronounced dead on arrival at 4:30 p.m.²⁵

The death of Aren, like the death of Rocco, caused an outpouring of grief over the life of the dog.²⁶ However, unlike the death of Rocco, this incident also involved the death of a person, Bruce Kelley, Jr. In the aftermath, the City of Pittsburgh exhibited significantly more conflict in its response than it did in the death of Rocco.²⁷ While the police also honored Aren with a law enforcement funeral, community groups expressed anger over the callous disregard for the grieving Kelley family.²⁸ Pittsburghers for Public Transit criticized police actions, insisting they used excessive force under the circumstances and placed Kelley Jr. in an untenable position of having to defend himself against an attacking dog.²⁹ These advocates also argued that releasing the dog was a form of animal cruelty, noting Kelley's express threat to kill the dog if released.³⁰ An editorial in the *Pittsburgh Post-Gazette* called

²⁴ *Id.*

²⁵ *Medical Examiner's Report*, *supra* note 19.

²⁶ Lisa Washington, *Hundreds Attend Memorial Service for K-9 Aren*, KDKA-TV (Feb. 4, 2016, 4:35 AM), <https://pittsburgh.cbslocal.com/2016/02/04/k9-aren-to-be-laid-to-rest-today-after-funeral-procession/>.

²⁷ *Return to Duty*, *supra* note 18.

Brandi Fisher with the Alliance for Police Accountability said in a statement that Kelley Jr. suffered from severe mental health issues, which was apparent in video footage of the incident. "Instead of being treated professionally by the Port Authority Police, he was pursued as he tried to avoid confrontation, subjected to an assault by a dog who was trained to attack, and then mowed down in a hail of police bullets. Mr. Kelley's death is representative of the obvious lack of training by the Port Authority Police and the blatant disregard for the mentally ill and Black life."

Id.

²⁸ *Id.*

Port Authority CEO Ellen McLean, in a statement released Tuesday afternoon, apologized for holding Aren's memorial service—attended by more than 300 officers and K-9s from across the region—while Kelley's family was mourning. She said this was insensitive. "While the department was mourning the death of an officer, in hindsight, we shouldn't have had the type of service and procession held for K-9 officer Aren," McLean said.

Id.

²⁹ *Activists*, *supra* note 17.

³⁰ *Id.*

for police to stop using dogs for the apprehension of suspects and cited many of the same arguments used by the Pittsburghers for Public Transit.³¹ While Port Authority police defended the actions of its officers, who arguably followed proper police procedure in escalating the level of force used against Kelley, Jr.,³² to some people, this incident amounted to a police-sponsored death match between Bruce Kelley, Jr. and Aren.³³ The potential issue of racial bias in this incident also cannot be ignored. While Rush, identified in court documents as a white male,³⁴ injured two officers and killed Rocco, he was apprehended alive. Bruce Kelley Jr., an African American male was shot and killed immediately upon attacking Aren.³⁵ These incidents involved different police forces, so it is largely impossible to say whether the officers involved in each incident would have behaved differently under alternative circumstances, but the optics of the incidents do lead to questions of racial bias.³⁶

³¹ Tony Norman, *Training Police Dogs to Attack is Cruel*, PITTSBURGH POST-GAZETTE (Feb. 5, 2016, 2:00 AM), <http://www.post-gazette.com/opinion/tony-norman/2016/02/05/Tony-Norman-Training-police-dogs-to-attack-is-cruel/stories/201602050134>.

³² *Return to Duty*, *supra* note 18 (noting the Allegheny County District Attorney reviewed the incident and determined there was no wrong-doing on the part of the police).

³³ Norman, *supra* note 31.

It is time for police departments to stop training dogs to attack humans, given the history of the practice and the cruelty and unpredictability of the outcomes. No human should be expected to tolerate a dog mauling without trying to stop it in every way possible, even if it meant killing the dog. What happened to Aren was indeed a crime. But the crime began the day he was trained to attack people without any understanding of his actions.

Id.

³⁴ *See* note 2 *supra*.

³⁵ Raap, *supra* note 17.

³⁶ Casey Stelitano, *PPT's Statement the Killing of Bruce Kelley, Jr.*, PITTSBURGHERS PUB. TRANSIT (Feb. 11, 2016), <https://www.pittsburghforpublictransit.org/ppts-statement-on-the-killing-of-bruce-kelley-jr/>.

Using police dogs to attack people, given the history of the practice—particularly against African Americans—and unpredictability of the outcomes, should never be an option for the police. The practice is inhumane for both the dog and the person being attacked. It is illogical to expect a person not to defend oneself when being mauled by a dog. Releasing the dog puts both the dog and the person in harm's way.

The death of Bruce Kelley, Jr. is part of a national pattern where individuals, and disproportionately African Americans, Latinos, and Native Americans, are killed in encounters with the police, where their death was clearly avoidable.

These two incidents occurred in the same city, within two years of one another, and can happen anywhere K-9 units are found. Because of their many similarities as well as their differences, these incidents provide a lens through which we can consider the practice of using K-9s in the apprehension of suspects.

This Article explores the legal and ethical questions surrounding the use of police dogs, specifically in the realm of apprehending suspects where a violent interaction between human and canine is inevitable. The Fourth Amendment has been interpreted to allow the use of canine force against persons if it is “reasonable” under the totality of the circumstances based on the officer’s observations. However, that totality of the circumstances does not consider the very real and very reasonable fear response induced in humans by an animal attack, which in some cases compels the suspect to defend themselves and, thus, places both the suspect and police dog at risk for further violence and injury. Further, while any suspect may be compelled to resist or defend against a police dog, the historical usage of police dogs against African Americans, coupled with the deployment of police dogs more frequently in minority communities may tend to put African Americans at greater risk in this K-9 catch-22. Ultimately, the Article considers the question of whether, in light of the human behavioral fear response to animal attacks and examples of implicit racial bias, using police dogs in apprehension is ever truly “reasonable.”

Part I of this Article begins with a history of the use of dogs in policing, focusing primarily on the use of dogs in opposition to, or as a method of force against, human subjects. Part II explores the current constitutional and legal standards for the use of police dogs as a means of force. Part III considers the problem of human fear response when encountering a dog and how that impacts events surrounding police dog apprehensions. Part IV discusses the historical use of dogs as a means of oppression against minority groups, particularly African Americans, and how this history may heighten the problem of fear discussed in the previous section. Finally, in Part V, the Article draws on authority discussed in previous sections to consider whether canines should ever be used as a method of force against humans, and, if so, how the law could help minimize the harm.

We expect the Port Authority police to undergo training that addresses the impact of implicit bias on police behavior.

Id.

I. HISTORY OF POLICE DOGS

Dogs, unlike any other animal species, are so connected with humans they have become an integral part of human society.³⁷ As many as 38,000 years ago, and perhaps earlier, ancient wolves and ancient man began to co-exist and cooperate, a partnership that many thousands of years later, remains as strong as ever.³⁸ Scientists are beginning to believe humans and dogs, in many ways domesticated each other by exerting evolutionary influence on the development of one another.³⁹ Whether it was the first wolves who would hang around the campfire for a scrap of food or the first humans who followed the wolf pack to a hunt, the human-dog relationship was symbiotic and mutually beneficial.⁴⁰ Early dogs and early humans helped each other in obtaining resources, protecting one another, and providing companionship.⁴¹ As communities and civilizations grew and developed, the dog took on more roles in human society.⁴² While the earliest human-dog relationship likely centered on hunting, it could not have been long before dogs were employed as a means of protection, and then, more formally, in war against other humans.⁴³

Ancient Egyptians, Greeks, and Romans used dogs in war.⁴⁴ Written accounts of the Peloponnesian Wars (431-404 B.C.E.) noted their reliability as watchdogs or

³⁷ Jessica Lynch Alfaro, *An Evolutionary Tale About Dogs and Humans*, UCLA NEWSROOM (Mar. 3, 2011), <http://newsroom.ucla.edu/stories/an-evolutionary-tale-about-dogs-193185> (“Dogs and humans have essentially evolved alongside each other, migrating together across continents. Today, there are no human populations that do not have dogs as an integral part of their culture.”).

³⁸ Gemma Tarlach, *The Origin of Dogs*, DISCOVER MAG. (Nov. 9, 2016), <http://discovermagazine.com/2016/dec/the-origins-of-dogs>. See also James Gorman, *The Big Search to Find Out Where Dogs Come From*, N.Y. TIMES (Jan. 18, 2016), <https://www.nytimes.com/2016/01/19/science/the-big-search-to-find-out-where-dogs-come-from.html> (“By 14,000 years ago, people were burying dogs, sometimes along with humans. But some biologists argue, based on DNA evidence and the shape of ancient skulls, that dog domestication occurred well over 30,000 years ago.”).

³⁹ Brian Hare & Vanessa Woods, *We Didn't Domesticate the Dog. They Domesticated Us.*, NAT'L GEOGRAPHIC NEWS (Mar. 3, 2013), <https://news.nationalgeographic.com/news/2013/03/130302-dog-domestic-evolution-science-wolf-wolves-human/>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ SAMUEL G. CHAPMAN, HISTORY OF POLICE DOGS IN NORTH AMERICA 5 (rev. ed. 1990).

sentries.⁴⁵ Egyptian hieroglyphics depict dogs being unleashed against enemies.⁴⁶ The Romans used war dogs in their campaigns across their vast empire.⁴⁷ The American Revolution and Civil War saw dogs adopted by units as mascots.⁴⁸ Armies on both sides of the world wars used dogs for a variety of functions, from messengers to sentries to medic assistants.⁴⁹ Dogs were used extensively in Vietnam as scouts.⁵⁰ More recently in Iraq and Afghanistan, dogs have been trained in explosive detection.⁵¹ At war, as weaponry advanced, dogs were used less as offensive weapons and more as auxiliary helpers to assist their humans, but not necessarily to attack other humans.⁵²

While war dogs were common in antiquity through today, dogs in policing are a relatively new phenomenon.⁵³ Ghent, Belgium established the first school to train dogs in policing in 1899.⁵⁴ The police dog experiment first made its way to the United States in 1907 in South Orange, New Jersey.⁵⁵ Police canines did not take the country by storm at first. Between 1907 and 1952, there were only thirteen police dog programs in the United States, housed mostly in urban police departments.⁵⁶ Cities such as New York City, New York, Baltimore, Maryland, Detroit, Michigan and Berkley, California all had police dogs in the first half of the twentieth century, along

⁴⁵ *Id.*

⁴⁶ MICHAEL RITLAND & GARY BROZEK, TRIDENT K9 WARRIORS: MY TALE FROM THE TRAINING GROUND TO THE BATTLEFIELD WITH ELITE NAVY SEAL 140–41 (2014).

⁴⁷ *Id.* at 141.

⁴⁸ *Id.* at 142. *See also* Cate Lineberry, *The Dogs (and Bears, and Camels) of War*, N.Y. TIMES OPINIONATOR (July 6, 2011, 9:00 PM), <https://opinionator.blogs.nytimes.com/2011/07/06/the-dogs-and-bears-and-camels-of-war/>.

⁴⁹ CHAPMAN, *supra* note 44, at 6–7.

⁵⁰ *Id.* at 7.

⁵¹ *Types of War Dogs*, U.S. WAR DOG ASS'N, INC., <https://www.uswardogs.org/war-dog-history/types-war-dogs/> (last visited Nov. 4, 2018).

⁵² *See id.* (describing the most common uses of war dogs in modern times including mine and explosive detection, search & rescue, and sentry duty).

⁵³ CHAPMAN, *supra* note 44, at 8.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.*

with two state police departments, the Pennsylvania and Connecticut State Police.⁵⁷ While the number of programs remained small in the first half of the twentieth century, by the late 1950s the number of police dog programs began to increase sharply, with as many as 2,000 operational programs in the United States by 1989.⁵⁸ There are no reasonable estimates regarding the current numbers of police dogs working in the country, but the Secretary of the North American Police Work Dog Association gave a “wild guess” estimate of about 50,000 in 2010.⁵⁹

Police dogs are used for a variety of functions including search and rescue, drug sniffing, bomb detection, crowd control, and general patrol functions, such as suspect apprehension.⁶⁰ Like war dogs, police dog functions are wide-ranging. Apprehension of suspects is only one aspect of a police dog’s job, albeit a controversial one. Just as war dogs have evolved such that they are no longer primarily used as offensive weapons against people, police dogs, too, may be best utilized in auxiliary functions. Dogs evolved as human partners, not antagonists. When dogs are used as instruments of force against other humans, it places both humans and dogs in a no-win situation. The following section will consider the current interpretation of Fourth Amendment law concerning the use of police dogs as instruments of force against other humans, specifically in the apprehension of suspects.

II. POLICE DOGS AND USE OF FORCE UNDER THE LAW

The question of what constitutes the proper use of force by police is a current hot topic in public discourse and legal scholarship.⁶¹ Despite frequent and strong criticism, the law remains firmly planted in the Fourth Amendment jurisprudence of

⁵⁷ *Id.*

⁵⁸ *Id.* at 27.

⁵⁹ Monica Von Dobeneck, *Police Dogs are Sought-After Commodity*, PENNLIVE (Sept. 23, 2010), https://www.pennlive.com/midstate/index.ssf/2010/09/police_dogs_are_sought-after_c.html.

⁶⁰ CHAPMAN, *supra* note 44, at 8–9.

⁶¹ See, e.g., Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629 (2018) (proposing model legislation to requiring reasonable belief and reasonable actions on the part of officers using deadly force); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465 (2018) (considering the impact of *Graham v. Connor* on excessive force claims through empirical analysis of 500 subsequent cases); Douglas Pond Cummings, *Reforming Policing*, 10 DREXEL L. REV. 573 (2018) (recommending police reforms in the use of deadly force, in the face of implicit racial bias).

the United States Supreme Court and gives relatively wide latitude and deference to police making decisions on the use of force.⁶²

In *Tennessee v. Garner*, the Supreme Court established that the question of whether the use of force by police is excessive falls under the Fourth Amendment right of people “to be secure in their persons . . . against unreasonable searches and seizures.”⁶³ ⁶⁴ The Court, here, considered when deadly force could be used against a fleeing suspect.⁶⁵ In *Garner*, the father of an unarmed 15-year-old boy who was killed by officers while fleeing the scene of a burglary, brought suit against the officer and municipality under 42 U.S.C. § 1983 for excessive use of force.⁶⁶ At the time, Tennessee law permitted any use of force to prevent the escape of a felony suspect, regardless of whether the suspect was armed or posed any particular danger.⁶⁷ The facts of the case showed that the suspect was fleeing the scene of a burglary, but the officer had no reason to believe he was armed or posed any danger to officers or citizens.⁶⁸ The officer shot the suspect in the back of the head as he attempted to climb a chain-link fence.⁶⁹

In the majority opinion written by Justice White, the Supreme Court determined that it was unreasonable, under the Fourth Amendment, to use deadly force to seize a suspect, where the suspect posed “no immediate threat” to officers or others.⁷⁰ The court emphasized the Fourth Amendment balancing test, between the nature of the intrusion and the necessity of it, and specifically stated:

⁶² See John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. CIV. LIBERTIES & CIV. RTS. 155, 161 (2016) (“The end result is a highly deferential standard by which to determine whether use of force is justified; the decision to use deadly force is left almost entirely up to the individual officer, and judges and juries are encouraged to give the officer the benefit of the doubt in deciding if use of deadly force was reasonable.”).

⁶³ *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); U.S. CONST. amend. IV.

⁶⁴ Prior to *Tennessee v. Garner* and *Graham v. Connor*, plaintiffs claiming excessive force often invoked Fourteenth Amendment Substantive Due Process analyses, or to a lesser extent Equal Protection analyses. However, with the opinions in *Garner* and later *Graham*, that approach has been almost all but abandoned by plaintiffs and ignored by courts. Obasogie & Newman, *supra* note 61, at 1488–89.

⁶⁵ *Garner*, 471 U.S. at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 11.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.⁷¹

Additionally, the Court, citing both scholarly research and police procedures from other jurisdictions, explicitly rejected the notion that the legitimate threat of deadly force was necessary to ensure the compliance of a suspect.⁷² However, the Court went on to opine that where there is probable cause to believe the suspect poses a threat of serious physical harm, it is not unreasonable to prevent escape by using deadly force.⁷³

Justice O'Connor wrote a dissenting opinion in this case, joined by Chief Justice Burger and Justice Rehnquist, criticizing the majority opinion for allowing the "second-guessing" of "split-second" decisions made by officers.⁷⁴ While agreeing that the facts were unfortunate, Justice O'Connor was unwilling to agree that deadly force was unreasonable, pointing out that the officer's knowledge of the circumstances at the time of the incident was limited:

The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not

⁷¹ *Id.*

⁷² Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 226–27 (2017). In their article, Garrett and Stoughton point out that the Court considered current and proper police tactics in its opinion and used that as evidence to support the argument that deadly force was not required to bring about compliance. *Id.* at 227.

⁷³ *Garner*, 471 U.S. at 11.

⁷⁴ *Id.* at 23, 32 (O'Connor, J., dissenting).

determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.⁷⁵

The decision in *Garner* focused solely on the use of deadly force, and by the time the question of excessive non-deadly force reached the Supreme Court four years later in *Graham v. Connor*, the Court had changed significantly, with Justice Rehnquist taking over as Chief Justice and Justices Scalia and Kennedy joining the court.⁷⁶

Graham v. Connor involved a plaintiff who was a diabetic.⁷⁷ This plaintiff, during an insulin reaction, asked a friend to drive him to a convenience store so he could purchase orange juice.⁷⁸ When the plaintiff arrived at the store, he knew the line was too long to wait in, so he hastily left the store and asked the friend to drive him to another friend's house.⁷⁹ An officer witnessed the hasty departure, found it suspicious, and proceeded to stop the car while he investigated if anything nefarious had occurred at the convenience store.⁸⁰ As the officer called for back-up, the plaintiff got out of the car, acted erratically, and briefly passed out.⁸¹ Despite the insistence of both the plaintiff and his friend that he was in the middle of a diabetic episode and needed "sugar," the officers refused to assist plaintiff and instead used force against him, resulting in a broken foot, bruised forehead, injured shoulder, and cuts to his wrists.⁸²

The opinion, authored by Chief Justice Rehnquist, established that excessive force claims during detainments and arrests must be analyzed under the Fourth Amendment reasonableness standard.⁸³ Building from the language in Justice O'Connor's dissent in *Garner*, the majority opinion in *Graham* held that

⁷⁵ *Id.* at 29–30.

⁷⁶ *Id.* at 3–22; *Graham v. Connor*, 490 U.S. 386, 387 (1989).

⁷⁷ *Garner*, 490 U.S. at 388.

⁷⁸ *Id.*

⁷⁹ *Id.* at 388–89.

⁸⁰ *Id.* at 389.

⁸¹ *Id.*

⁸² *Id.* at 389–90.

⁸³ *Id.* at 395.

“reasonableness” of a particular use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁸⁴ Largely, the Court refrained from setting any particular test of “reasonableness,” preferring to stress that courts should look at “whether the totality of the circumstances” justifies the use of force.⁸⁵ The Court did set forth several factors to be considered in any excessive force case, “including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁸⁶

Under this objective Fourth Amendment approach ushered in by *Graham*, courts specifically consider whether the particular force used was “reasonable” under the circumstances.⁸⁷ The standard is one that is largely deferential to the police, finding that courts must view the totality of the circumstances as the officer knew them at the time and that hindsight should not be considered.⁸⁸ This subjective-objective approach gives wide latitude to the officers in use of force, acknowledging that officers must make “split-second judgments” and to second-guess them with hindsight would be improper.⁸⁹

Although *Garner* was not in any way overruled by *Graham*, the Supreme Court clarified the dichotomy between the two cases in the 2007 decision of *Scott v. Harris*, stating that *Garner* is just one application of the Fourth Amendment “reasonableness” analysis discussed in *Graham*.⁹⁰ Thus, the type of force applied,

⁸⁴ *Id.* at 396; see *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O’Connor, J., dissenting) (“The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances.”).

⁸⁵ *Graham*, 490 U.S. at 396.

⁸⁶ *Id.*

⁸⁷ *Id.* at 397 (“As in other Fourth Amendment contexts, however, the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

⁸⁸ *Id.* at 396.

⁸⁹ *Id.* at 396–97.

⁹⁰ *Scott v. Harris*, 550 U.S. 372, 382–83 (2009) (“*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’ *Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a ‘young, slight, and unarmed’ burglary suspect, by shooting him ‘in the back of the head’ while he was running away on foot and when the officer

whether deadly or non-deadly is one more factor to consider in balancing the rights of the individual with the needs of the government.⁹¹ Therefore, even as just one factor in the *Graham* analysis, to use deadly force, there must be reason to believe the suspect poses an imminent threat to officers or others.⁹²

Because of *Garner*, it is clear that the Supreme Court deems the use of firearms to be deadly force, but it has provided no other examples of “deadly force.” Courts that have considered whether other types of force constitute deadly force generally rely upon the Model Penal Code definition of deadly force, meaning “force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm.”⁹³

Even though police dogs have caused at least a handful of deaths,⁹⁴ and often cause serious bodily harm,⁹⁵ no court has deemed canines to be deadly force as a matter of law. In excessive force claims involving dog bites by canine officers, courts have generally applied the *Graham* factors, analyzing the totality of the circumstances of each case, deeming canines to be non-deadly force.⁹⁶ Only in rare

‘could not reasonably have believed that [the suspect] . . . posed any threat,’ and ‘never attempted to justify his actions on any basis other than the need to prevent an escape.’”) (internal citations omitted).

⁹¹ *Id.*

⁹² *Id.* at 373.

⁹³ MODEL PENAL CODE § 3.11(2) (AM. LAW. INST. 2018); *see also* Chew v. Gates, 27 F.3d 1432, 1454 (9th Cir. 1994) (employing Model Penal Code definition of “deadly force” to determine if use of police dog constituted deadly force); Robinette v. Barnes, 854 F.2d 909, 912 (6th Cir. 1988) (finding Model Penal Code definition of “deadly force” to be useful in analyzing whether police dogs are instruments of deadly force).

⁹⁴ *See* Melissa Brown, *Pettaway Death: Rare in U.S. for Police Dogs to Kill*, MONTGOMERY ADVERTISER (July 31, 2018, 3:41 PM), <https://www.montgomeryadvertiser.com/story/news/crime/2018/07/31/how-many-times-has-k-9-police-dog-killed-suspect-country-montgomery-joseph-pettaway-death-one-few/849017002/> (reporting on one death from a police dog bite and providing information on two similar deaths); Rebecca Parr, *Hayward to Pay \$1.5 Million to Settle Police Dog Attack Suit*, MERCURY NEWS (July 17, 2013, 9:46 AM), <https://www.mercurynews.com/2013/07/17/hayward-to-pay-1-5-million-to-settle-police-dog-attack-suit/> (detailing a U.S. death as a direct result of a police dog bite).

⁹⁵ H. Range Hutson et al., *Law Enforcement K-9 Dog Bites: Injuries, Complications, and Trends*, 29 INJURY PREVENTION 637, 639 (1996) (detailing severe injuries experienced by police dog bite victims); Peter C. Meade, *Police and Domestic Dog Bite Injuries: What are the Differences? What are the Implications About Police Dog Use?*, 37 INJURY EXTRA 395, 399 (2006) (noting seriousness of police dog bite injuries).

⁹⁶ Glenn v. Wash. Cty., 673 F.3d 864, 872 (9th Cir. 2011) (holding *Graham* factors are not exclusive and courts must “examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*”).

circumstances has *Garner* been invoked in any manner.⁹⁷ As with other types of excessive force cases, dog bite cases tend to require fact-intensive analysis on a case-by-case basis, and the factors considered for each case are rarely identical.⁹⁸ Courts in these cases have been largely deferential to police unless officer conduct is egregious.

Canine force during an apprehension is typically exerted through a bite to the suspect. There are two primary methods of canine training used for suspect apprehension: “find and bite” (also sometimes called “bite and hold”) and “bark and hold.”⁹⁹ The “bark and hold” method trains dogs to locate the subject and bark to hold the suspect in place.¹⁰⁰ The dog will only bite if the suspect makes a move to attack or flee.¹⁰¹ This method, while it arguably has drawbacks,¹⁰² tends to incur fewer excessive force claims.¹⁰³ Under the more popular “find and bite” method, “a dog seeks to subdue a suspect by biting his arm or leg” and “is trained to maintain his hold on the suspect until ordered to release the suspect by its handler.”¹⁰⁴ If the suspect attempts to free himself and the dog loses his hold on the suspect, the dog is trained to reestablish it, making the method very aggressive in nature.¹⁰⁵ As a result, “suspects often suffer serious injury from multiple bites received during the course

⁹⁷ See *Robinette*, 854 F.2d at 911–12 (considering whether police dogs should be deemed deadly force under a *Garner* analysis).

⁹⁸ See *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011) (holding that an excessive force inquiry is a “highly fact-intensive task for which there are no per se rules”).

⁹⁹ Charlie Mesloh, *Barks or Bites? The Impact of Training on Police Canine Force Outcomes*, 7 POLICE PRAC. & RES. 323, 324–25 (2006).

¹⁰⁰ *Id.* at 325.

¹⁰¹ *Id.*

¹⁰² *Id.* (“Critics of this system believe that it places the dogs at greater risk by allowing the suspect the opportunity to arm himself, injure or kill the dog, or escape.”).

¹⁰³ See *Hutson et al.*, *supra* note 95, at 641 (“Although the find-and-bark technique yields fewer injuries, complications, medical costs, and litigation its use is still controversial among many law enforcement K-9 officers.”); see also *Meade*, *supra* note 95, at 400 (“Some trainers also state that ‘bite and hold’ training results in fewer injuries. Our observations did not support these statements.”). *But see* *Mesloh*, *supra* note 99, at 333 (finding lower bite ratios (defined as percentage of all apprehensions that involved a bite) for “bite and hold” trained dogs than for “bark and hold” trained dogs in study of Florida police canine handlers).

¹⁰⁴ *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1550 (11th Cir. 1989).

¹⁰⁵ *Id.*

of apprehension.”¹⁰⁶ Under the “find and bite” method, the degree of control the handler maintains over the actions of his dog is a key factor in the severity of injuries incurred by a suspect.¹⁰⁷ Often, however, the dog is released and sent to chase the fleeing suspect and is not within the immediate vicinity of its handler.¹⁰⁸ Additionally, many cases have arisen where the dog is so worked up that the K-9 officer has been unable to secure the release of the dog’s bite on the suspect.¹⁰⁹

While courts are typically deferential to the police, some courts reviewing cases involving dogs trained in the “find and bite” method have ruled in favor of the plaintiff in excessive force claims.¹¹⁰ No court, however, has deemed the “find and bite” method *per se* unconstitutional.¹¹¹ Nor have any courts ruled that a police dog bite is *per se* “deadly force.”¹¹² However, while no court has deemed the use of a canine to be “deadly force,” at least one notable U.S. Court of Appeals judge

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (suggesting that a “handler can recall or restrain the dog before a bite even occurs” or “can quickly remove the dog from the apprehended suspect,” minimizing the apprehended suspect’s injuries).

¹⁰⁸ *Id.* at 1550–51 (noting the importance of the dog being trained to heed oral commands).

¹⁰⁹ *See Jones v. Fransen*, 857 F.3d 843, 847 (11th Cir. 2017) (opining on claim of plaintiff injured by police dog, when the dog would not heed the handler’s command to release the suspect).

¹¹⁰ *See Smith v. City of Hemet*, 394 F.3d 689, 701–02 (9th Cir. 2005) (holding that the use of a police dog constituted excessive force after the officers “sicked” the dog on the suspect multiple times even when he had been restrained); *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994) (concluding that “the force used to arrest [the suspect] was severe” after noting the dog bit the suspect three times, dragged him between four and ten feet, and “nearly severed” his arm). Others have concluded the facts and circumstances that gave rise to the use of force were reasonable in light of the situation. *See, e.g., Miller v. Clark County*, 340 F.3d 959, 961–66 (9th Cir. 2003) (holding that, although the force used was considerable and serious, it was nonetheless reasonable even though the dog “shredded” the suspect’s muscles and reached the bone).

¹¹¹ *See Kuha v. City of Minnetonka*, 365 F.3d 590, 600 (8th Cir. 2003) (holding “the mere use of a police dog trained to bite and hold does not rise to the level of a constitutional violation”); *Jarrett v. Town of Yarmouth*, 309 F.3d 54, 63 (1st Cir. 2003) (noting that “there is no case that has held [bite and hold] policies to be unconstitutional”); *Watkins v. City of Oakland*, 145 F.3d 1087, 1092 (9th Cir. 1998) (agreeing with appellants that “Oakland’s bite and hold policy did not violate clearly established law concerning the use of excessive force”); *Miller*, 340 F.3d at 968 (finding that “use of a police dog to bite and hold [the suspect] until police deputies arrived . . . was a reasonable seizure that did not violate [the suspect’s] Fourth Amendment rights”).

¹¹² *Miller*, 340 F.3d at 961–66 (holding that “the use of force, although considerable and serious, was nonetheless reasonable and did not rise to the level of ‘deadly force,’ even though . . . [the dog] bite lasted between forty-five and sixty seconds, shredded the plaintiff’s muscles, and reached the bone”); *Moore v. Vangelo*, 222 Fed. Appx. 167, 170 (3d Cir. 2007) (stating “[a]lthough it is true that ‘injuries are not unusual, police dogs can—and often do—cause serious harm,’ the use of K-9 force to apprehend suspects where the *Graham* factors weigh in favor of the police is reasonable”).

considered the issue unanswered in the prominent Ninth Circuit case, *Chew v. Gates*.¹¹³ Justice Norris's concurrence questioned whether police dogs trained in the bite and hold method were instruments of deadly force.¹¹⁴ *Chew* involved a suspect who fled police after a routine traffic stop.¹¹⁵ The suspect entered a junkyard, and the dog was sent in after him.¹¹⁶ Facts were disputed as to whether the suspect tried to surrender or tried to attack the dog, but the result was significant injuries to the suspect including a "nearly severed" arm.¹¹⁷ In his concurrence, Justice Norris maintained that such questions could not be resolved on summary judgment, and stressed that if a "dog is trained to deliver deadly force, then the Fourth Amendment requires that its use be limited to those situations where there is probable cause to believe that the suspect poses a significant threat of death or serious bodily harm."¹¹⁸

Despite Judge Norris' concerns, courts have been reluctant to hold that the use of police dogs to bite and hold fleeing suspects constitutes deadly force, even where a suspect has died as a result of injuries sustained from the dog bite.¹¹⁹ The Sixth Circuit considered a case involving the death of a suspect at the hands of a police dog and deemed the actions of the dog and handler reasonable, even though the suspect was unarmed.¹²⁰ In *Robinette*, a police officer and his police dog, Casey, were called to the scene of a suspected burglary at a car dealership.¹²¹ Under the department's K-9 division policy, Casey was trained to track and apprehend suspects by seizing a suspect's arm; however, testimony revealed that if "a suspect's arm is not available, the dog will 'get the first thing that [is] offered to him.'"¹²² As the two arrived at the scene, the officer shouted a warning that the dog would be released if

¹¹³ *Chew*, 27 F.3d at 1461–62.

¹¹⁴ *Id.* at 1452.

¹¹⁵ *Id.* at 1442.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1441.

¹¹⁸ *Id.* at 1456.

¹¹⁹ See *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) (finding that the "use of a properly trained police dog to apprehend a felony suspect does not carry with it a 'substantial risk of causing death or serious bodily harm'").

¹²⁰ *Id.* at 912–13.

¹²¹ *Id.* at 911.

¹²² *Id.* at 910–11.

the suspect did not surrender.¹²³ After repeating this warning without success, the officer released Casey with the command “find him,” and the dog proceeded to search for the suspect.¹²⁴ When the officer caught up with the dog, he found “Casey had the suspect’s neck in his mouth [and] the man was lying face down on the floor with half of his body underneath a car.”¹²⁵ The officer noted the suspect had lost a substantial amount of blood and continued to bleed from his neck.¹²⁶ The officer ordered the dog off and called for an ambulance, but the suspect was pronounced dead at the scene.¹²⁷

The Sixth Circuit upheld the district court’s conclusion that the use of a police dog did not rise to the level of deadly force because “the use of a properly trained police dog to apprehend a felony suspect does not carry with it a ‘substantial risk of causing death or serious bodily harm.’”¹²⁸ In so holding, the court looked to the definition of deadly force from the Model Penal Code.¹²⁹ That definition states that “deadly force” is “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.”¹³⁰ Although the court acknowledged that, in this case, “the use of a police dog did result in a person’s death,” the Sixth Circuit was persuaded that “the evidence in the record . . . indicates that this tragic event was an extreme aberration from the outcome intended or expected.”¹³¹ Essentially, the court concluded that the outcome in this particular case, although egregious, posed little threat of recurrence and the benefits police dogs pose to law enforcement agencies outweigh the potential risks.¹³²

¹²³ *Id.* at 911.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 912.

¹²⁹ *Id.*; MODEL PENAL CODE § 3.11(2) (AM. LAW INST. 2018).

¹³⁰ MODEL PENAL CODE § 3.11(2) (AM. LAW INST. 2018).

¹³¹ *Robinette*, 854 F.2d at 912.

¹³² *Id.* at 914 (“[W]e are not persuaded by the evidence presented that the remote possibility that the use of a police dog to apprehend a felon might, under extraordinary circumstances, cause death, outweighs the dogs’ proven benefits for effective law enforcement.”).

Robinette is not the only instance where death resulted from the use of a police dog. There are three other known and documented deaths.¹³³ In March of 1990, Laurene MacLeod, a homeless woman who had sought shelter in an abandoned West Palm Beach home bled to death following an attack by a police dog sent into the home to locate and subdue the trespasser.¹³⁴ On May 20, 2011, a police dog in Hayward, California severely bit an 89-year-old man, Jesse Porter, in his backyard.¹³⁵ The bite led to gangrene and amputation, and Porter never recovered, dying two months later in a rehabilitation center.¹³⁶ Most recently, on July 8, 2018, 51-year-old Joseph Pettaway was killed by a police dog during an apparent burglary in Montgomery, Alabama.¹³⁷ The police department is currently investigating the incident, but the family disputes that Pettaway was involved in any robbery.¹³⁸ These are the known deaths, but there may be others undocumented because there is no central source of statistics on police dogs.¹³⁹ Additionally, police dogs may be involved in other deaths, but are not reported as such. For example, Philip White of Vineland, New Jersey reportedly died of a heart attack while in police custody, but a video surfaced of a police dog attacking him prior to his death, and some community members believe the dog played a role in the death.¹⁴⁰

¹³³ See *supra* note 94.

¹³⁴ Kate Santich, *The Dog-mauling Case of Laurene MacLeod*, ORLANDO SENTINEL (Oct. 13, 1991), http://articles.orlandosentinel.com/1991-10-13/news/9110111080_1_lillian-macleod-bleed.

¹³⁵ Parr, *supra* note 94.

¹³⁶ *Id.*

¹³⁷ Melissa Brown, *'Nobody Deserves to Die like That': Police K-9 Killed Man, Family Says*, MONTGOMERY ADVERTISER (July 11, 2018, 3:09 PM), <https://www.montgomeryadvertiser.com/story/news/crime/2018/07/11/joseph-pettaway-killed-montgomery-police-k-9-dog-unit-cresta-circle/774941002/>.

¹³⁸ *Id.*

¹³⁹ Martin Kaste, *Videos Reveal a Close, Gory View of Police Dog Bites*, NPR: ALL THINGS CONSIDERED (Nov. 20, 2017, 5:01 AM), <https://www.npr.org/2017/11/20/563973584/videos-reveal-a-close-gory-view-of-police-dog-bites> (quoting Charles Mesloh, former K-9 handler and professor at Northern Michigan University, who opined concerning the difficulty of obtaining good data on police dogs: "When an outsider is trying to collect actual data, they become immediately suspicious").

¹⁴⁰ Justin Glawe, *Cops, K-9 Attacked This Man and They're Covering Up His Death*, THE DAILY BEAST (Apr. 7, 2016, 1:00 AM), <https://www.thedailybeast.com/cops-k9-attacked-this-man-and-theyre-covering-up-his-death>.

Deaths may be rare, but serious bodily harm is not.¹⁴¹ While the statistics regarding police dog bites are scarce, a simple scan of case law can give the reader an understanding of the severity of injuries inflicted by police dogs.¹⁴² There have been relatively few empirical studies of police dog bite data, and those that do exist are focused on data from Los Angeles during the 1990s when the city's police force was under scrutiny for its use of dogs.¹⁴³ The data came from King Drew's Medical Center and revealed that police dog bites were much more serious, and caused more severe injuries than most domestic dog bites.¹⁴⁴ Compared to domestic dog bites, bites from police dogs resulted in higher rates of hospitalization and surgery, and more frequent vascular injuries, bone fractures, and tendon injuries.¹⁴⁵ As many as 20% of people bitten by police dogs experienced severe complications, including permanent disfigurement.¹⁴⁶ While deaths are rare, the injuries are not "band-aid" injuries, as often suggested.¹⁴⁷

Despite this likelihood of serious bodily harm, courts continue to focus on the *Graham* factors when evaluating excessive canine force.¹⁴⁸ Of the circuits that have considered the issue, none have ruled police dogs to be an instrument of deadly force as a matter of law.¹⁴⁹ However, the Third Circuit has affirmed a district court decision

¹⁴¹ See, e.g., *Jones v. Fransen*, 857 F.3d 843, 848 (11th Cir. 2017); *Cooper v. Brown*, 844 F.3d 517, 521 (5th Cir. 2016); *Priester v. City of Riviera Beach*, 208 F.3d 919, 924 (11th Cir. 2000).

¹⁴² *Fransen*, 857 F.3d at 848 (finding police dog bite resulted in permanent disfigurement and limited use of suspect's arm); *Cooper*, 844 F.3d at 521 ("Cooper suffered years of severe pain from lower-leg injuries that required multiple surgeries, including reconstruction and skin grafts."); *Priester*, 208 F.3d at 924 (noting police dog's bites resulted in a total of fourteen puncture wounds on suspect's legs).

¹⁴³ *Hutson et al.*, *supra* note 95, at 638; *Meade*, *supra* note 95, at 395. K. Bradford Snyder & Michael J. Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, 19 ANNALS OF EMERGENCY MED. 983, 983 (1990).

¹⁴⁴ *Meade*, *supra* note 95.

¹⁴⁵ *Id.*

¹⁴⁶ See *Hutson et al.*, *supra* note 95 (finding significant and serious complications from police dog bites including vascular injuries, infections, open fractures, nerve injuries, tendon injuries, open joints, compartment syndrome, partial loss of nose and ear, vocal cord paralysis, amputations, and loss of use of hand due to nerve and tendon injuries).

¹⁴⁷ *Meade*, *supra* note 95, at 400 ("Some police dog trainers and public officials have mischaracterized police dog bites as 'just band-aid injuries' that can be treated with 'first aid and left to heal on their own.' . . . Our observations did not support these statements.") (footnote omitted).

¹⁴⁸ *Chew v. Gates*, 27 F.3d 1432, 1436 (9th Cir. 1994).

¹⁴⁹ See *Marley v. City of Allentown*, 774 F. Supp. 343, 346 (E.D. Pa. 1991) (upholding trial court's decision to allow jury to determine if use of canine was deadly force), *aff'd*, 961 F.2d 1567 (3d Cir. 1992).

that allowed a jury to consider whether the use of a dog was deadly force under the factual circumstances.¹⁵⁰ Despite being mostly deferential to police, the *Graham* analysis has yielded some victories for plaintiffs in canine excessive force cases, particularly where injuries were severe,¹⁵¹ attacks lasted beyond what was necessary to subdue the suspect,¹⁵² where no warnings were provided,¹⁵³ or where the crime was minor.¹⁵⁴

Absent sufficient data on injuries and deaths caused by police dogs, courts will likely continue their very deferential approach to these cases. Scholars, however, are tackling the question of how to reform use-of-force law in spite of current Supreme Court jurisprudence.¹⁵⁵ For example, law professors Garrett Brandon and Seth Staughton, in their article, “*A Tactical Fourth Amendment*,” argue that the Fourth Amendment reasonableness analysis should not immunize “hot-headed, ill-trained, belligerent, or incompetent officers.”¹⁵⁶ Rather, Garrett and Staughton believe courts should consider proper police tactics and procedures when determining reasonableness.¹⁵⁷ Pointing to the analysis in *Garner*, they argue that the Court took into account the fact that the best police practice was not to use deadly force against a fleeing, unarmed and non-dangerous suspect, and, thus, such use of deadly force

¹⁵⁰ *Id.*

¹⁵¹ *Chew v. Gates*, 27 F.3d 1432, 1436 (9th Cir. 1994).

¹⁵² *Cooper v. Brown*, 844 F.3d 517, 523–24 (5th Cir. 2016).

¹⁵³ *Vathekan v. Prince George’s Cty.*, 154 F.3d 173, 175 (4th Cir. 1998) (reversing a summary judgment ruling in favor of a police officer who deployed a police dog without giving a verbal warning); *Kopf v. Wing*, 942 F.2d 265, 268–69 (4th Cir. 1991) (reversing summary judgment in favor of officer defendants where there existed a factual dispute regarding whether a verbal warning was given, and recognizing validity of plaintiff’s argument that “a forewarning that the dog is going to attack, which provides the suspects a fair chance to surrender, is more reasonable than a surprise assault”).

¹⁵⁴ *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (finding officers violated plaintiff’s constitutional right to be free from excessive use of force after the officer ordered his dog to attack plaintiff for stealing \$20 worth of snacks even when the plaintiff submitted immediately to the police and complied with the officer’s orders).

¹⁵⁵ *See, e.g., Lee, supra* note 61, at 664–65 (proposing model state legislation that would require consideration of the reasonableness of an officer’s actions, as well as his or her beliefs, when prosecuting a case involving the use of deadly force); *Cummings, supra* note 61, at 604 (proposing reforms in police procedures and tactics to prevent use of deadly force as a result of implicit racial bias).

¹⁵⁶ *Garrett & Staughton, supra* note 72, at 215–16.

¹⁵⁷ *Id.*

was unreasonable under the circumstances.¹⁵⁸ Garrett and Staughton argue that courts should continue to look at best practices of police tactics to help determine the true reasonableness of an action, and stop using the police need for “split-second” decision-making as a crutch for poor policing.¹⁵⁹

This approach would also be useful concerning canine use of force. When an officer, for example, loses control of his dog and cannot stop an attack on a suspect, he should not be granted immunity from liability where proper canine tactics require maintaining at least verbal control at all times.¹⁶⁰ Similarly, if proper tactics clearly called for another, less violent method of apprehension, an officer should not be given a free pass for choosing to employ the dog.¹⁶¹

What Garrett and Staughton suggest is that the Fourth Amendment “reasonableness” analysis requires more than just the subjective view of a particular officer at a particular moment, it requires the court to truly look at the totality of the circumstances and what is objectively reasonable based on proper police tactics.¹⁶² In the case of canines, part of that totality of any circumstance is to understand that canines can induce a particularly strong fear response, such that suspects may behave counter to what is intended. The next two sections will discuss why use of a canine may not be “objectively” reasonable in all circumstances against all suspects.

III. POLICE DOGS AND THE EFFECT OF FEAR

Research over the past forty years has yielded a revolution in our understanding of human cognition and behavior, particularly related to the impact of fear on behavior and decision-making.¹⁶³ Both psychologists and biologists have explored why people in stressful situations behave as they do, and both fields have arrived at

¹⁵⁸ *Id.* at 226–28.

¹⁵⁹ *Id.* at 303 (“Fourth Amendment reasonableness should reflect objective standards of care, and not ratify split-second decision making.”).

¹⁶⁰ *But cf.* *Jones v. Fransen*, 857 F.3d 843, 848 (11th Cir. 2017) (finding that the officer maintained immunity despite the police dog refusing verbal commands to release suspect, resulting in permanent disfigurement and limited use of suspect’s arm).

¹⁶¹ *But cf.* Kaste, *supra* note 139 (describing video of a police dog set loose on an obviously unarmed, naked, mentally disturbed man).

¹⁶² Garrett & Staughton, *supra* note 72, at 285, 303.

¹⁶³ See generally DANIEL GARDNER, *THE SCIENCE OF FEAR* (2008) (summarizing recent research on the impact of fear on human decision making).

very similar, complimentary conclusions.¹⁶⁴ In particular, researchers have shown that emotions, particularly the powerful emotion of fear, can affect behavior and decision-making profoundly.¹⁶⁵

In his book *“The Emotional Brain,”* neuroscientist Joseph LeDoux reveals that “the basic brain mechanisms of fear are essentially the same through many levels of evolutionary development.”¹⁶⁶ Thus, fear response and fear conditioning work the same way in the various species of vertebrates studied, including reptiles, birds, and mammals, regardless of their capacity for thought and reason, likely because our response to fear is an evolutionary imperative of survival.¹⁶⁷ Detecting and responding to danger is the job of the amygdala, a small almond-shaped section of the brain present in most vertebrates.¹⁶⁸ The amygdala of humans handles the response to danger in the same way that the amygdala of a lizard responds to danger, bypassing the neocortex, where the higher processing systems of the brain reside.¹⁶⁹

¹⁶⁴ *Id.* at 15–16 (discussing the work of psychologists who pioneered the discovery that the brain has two systems of thought, one based in reason, and one based in emotion); see generally JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* (1996) (describing the biology of the brain and how emotions, such as fear, produce particular biological responses).

¹⁶⁵ Notable psychologists Amos Tversky, Daniel Kahneman, Paul Slovic, Sarah Lichtenstein, Baruch Fischhoff and others pioneered the field of decision-making science, considering the role of emotions (including fear) in decision-making. See, e.g., Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Paul Slovic et al., *Behavioral Decision Theory*, 28 *ANN. REV. PSYCHOL.* 1 (1977). Beginning in the 1960s, these scientists and others considered the concept of risk, determining how people make decisions under risk. From this foundation grew a body of research on how perception affects judgment, and how decisions are made intuitively through short cuts called “heuristics.” See, e.g., Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124 (1974) [hereinafter *Judgment under Uncertainty*]. This research altered the general perception that humans were almost always rational when making decisions. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 8 (2011) [hereinafter *THINKING FAST AND SLOW*]. Instead, the results showed that humans made rational errors frequently and often based decision-making on emotion rather than reason. *Judgment under Uncertainty*, *supra* at 1124.

¹⁶⁶ LEDOUX, *supra* note 164, at 171.

¹⁶⁷ *Id.* at 150 (“The amazing fact is that it has not really mattered very much how conditioned fear has been measured, or what species has been studied, as all of the approaches have converged on a common set of brain structures and pathways that are important. . . . Fear conditioning is so important that the brain does the job in the same way no matter how we ask it to do it.”).

¹⁶⁸ *Id.* at 157, 174.

¹⁶⁹ *Id.* at 161, 174.

Thus, in fear-inducing situations humans respond immediately, and unconsciously, through the functions of the amygdala, not based on rational cognition.¹⁷⁰

Behavioral psychologists have observed a similar shortcut process of decision-making that bypasses rational thought. Scholars in this field note that many quick decisions are made with the help of what they call “heuristics.”¹⁷¹ Heuristics are “simple procedures [or shortcuts] that help find adequate, though often imperfect, answers to difficult questions.”¹⁷²

What both neuroscientists and psychologists have found is that a person’s reaction to fear is often based on the impulses of the amygdala, the oldest section of the brain developed to assist with survival.¹⁷³ The frontal cortex, where our human reason and logic reside, developed much later than the amygdala, and sometimes in cases where fear or other emotions are strong, the amygdala will overrule reason.¹⁷⁴ It is believed this occurs through heuristics which allow us to make quick decisions

¹⁷⁰ *See id.* at 174.

Defense against danger is perhaps an organism’s number one priority and it appears that in the major groups of vertebrate animals that have been studied (reptiles, birds, and mammals) the brain performs this function using a common architectural plan. . . . When it comes to detecting and responding to danger, the brain just hasn’t changed much. In some ways we are emotional lizards.

Id.

The picture of emotion . . . is largely one of automaticity. . . . [O]ur brains are programmed by evolution to respond in certain ways to significant situations. Significance can be signaled by information built into the brain by evolution or by memories established through past experiences. In either case, though, the initial responses elicited by significant stimuli are automatic and require neither conscious awareness of the stimuli nor conscious control of the responses.

Id. at 267. This function is important to survival because it allows individuals to act quickly, based on memories of strong emotion, such as fear. *Id. See also* GARDNER, *supra* note 163, at 26–27 (describing the two types of human thinking as “head” (rational) and “gut” (emotional). “Gut is unconscious thought at its defining quality is speed. Gut doesn’t need an encyclopedia to figure out what to do when something moves in the long grass. It makes a snap judgment and sounds the alarm instantly.”).

¹⁷¹ *Id.* at 28 (defining heuristics as “rules of thumb”).

¹⁷² THINKING FAST AND SLOW, *supra* note 165, at 98.

¹⁷³ *Id.* at 103.

¹⁷⁴ JEFF WISE, EXTREME FEAR 16–17 (2009).

and shortcut the more plodding rational decision-making functions.¹⁷⁵ In life-and-death situations, this shortcut system is necessary, but sometimes it can cause issues with our reactions in the modern world.¹⁷⁶

This research is important to the use of police dogs because officers expect compliance from persons faced with or attacked by police dogs, but the rational brain is often hijacked in the face of intense fear by the amygdala, and even the most reasonable people can lose control of their faculties under the wrong circumstances.

A. *The Four Fs of Fear Response*

In his book “Extreme Fear” journalist Jeff Wise discusses the fear response in depth, focusing on the fact that the human mind works differently in the face of fear, and we do not always act in the way we want or expect to act when faced with extreme fear.¹⁷⁷ He also notes that it is largely impossible to tell who will react well in the face of fear and who will “crumble.”¹⁷⁸ In particular, Wise tells the story of Sue Yellowtail, a water quality specialist, who, while taking water samples on the Mancos River in Colorado, found herself being stalked by a mountain lion.¹⁷⁹ The fear response, first described as “fight or flight” by researchers in the early twentieth century,¹⁸⁰ is now understood as a response with not just two, but four components—Freeze, Flight, Fright, and Fight.¹⁸¹ The Four Fs as they are commonly known, developed as a survival mechanism for just the sort of instance that Yellowtail experienced: an animal attack.¹⁸²

¹⁷⁵ GARDNER, *supra* note 163, at 28.

¹⁷⁶ *Id.* at 28–29.

¹⁷⁷ WISE, *supra* note 174, at 12.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 64–65.

¹⁸⁰ See WALTER B. CANNON, BODILY CHANGES IN PAIN, HUNGER, FEAR AND RANGE: AN ACCOUNT OF RECENT RESEARCH INTO THE FUNCTION OF EMOTIONAL EXCITEMENT 211 (1929).

¹⁸¹ WISE, *supra* note 174, at 64. Psychologist and Oxford professor Jeffrey A. Gray first described this expansion of the fear response. JEFFREY A. GRAY, THE PSYCHOLOGY OF FEAR AND STRESS 203 (Cambridge Univ. Press 2d ed. 1987) (1971). See also LEDOUX, *supra* note 164, at 131 (describing the fear responses of avoidance, immobility, aggression, and submission as universal and indicating they are genetically programmed into the human brain).

¹⁸² WISE, *supra* note 174, at 12.

When Yellowtail first noticed the mountain lion, it was about thirty feet away, and she entered the state of “attentive immobility” or “freeze.”¹⁸³ This is the first stage of fear response, and it “tends to occur when the threat is far away or not yet aware of the subject’s presence.¹⁸⁴ The goal is to keep it that way.”¹⁸⁵ For a more readily available example, think of how a prey animal, perhaps a rabbit or deer, will freeze when it sees a human approaching from across the road.¹⁸⁶ That freeze is the first mechanism of defense, an attempt to tell the threat there is nothing to see here and avoid greater danger.¹⁸⁷ It is not a rational response, but rather an automatic fear response centered in the amygdala.¹⁸⁸

When the danger comes closer or becomes more immediate, the next phase of the fear response is “flight.”¹⁸⁹ Yellowtail described for Wise how the approach of the mountain lion broke the “freeze” spell and she felt the need to get away.¹⁹⁰ While she was initially able to move and keep the animal at a distance, this changed when the animal was within striking distance from her.¹⁹¹ The necessity of flight overwhelmed her, and she ran as fast as she could, despite knowing such flight would likely stimulate the cat to action.¹⁹² The proximity of the danger made it impossible for the rational portion of her mind (the frontal cortex) to overrule the amygdala.¹⁹³ She simply had no more say in the matter; her primal brain forced her to run.¹⁹⁴

Yellowtail only made it halfway across the river before the mountain lion attacked and her body fell into the next phase of fear response, “tonic immobility”

¹⁸³ *Id.* at 65.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 66.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* See also LEDOUX, *supra* note 164, at 143 (“Freezing is a built-in response, an innate defense response, that can be activated by either *natural or learned triggers.*”).

¹⁸⁹ WISE, *supra* note 174, at 67–69.

¹⁹⁰ *Id.* at 68.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 69.

¹⁹⁴ *Id.* at 68.

or “fright.”¹⁹⁵ This phase is essentially the body playing dead.¹⁹⁶ Some predators will not eat already-deceased prey or carrion, and, thus, this response can allow a victim to escape if the predator eschews what it believes to be already dead.¹⁹⁷ Fright causes the person’s body to be completely paralyzed, but their mind is hyperaware, such that if the predator releases, the prey is ready to escape.¹⁹⁸ In Yellowtail’s case, the mountain lion did momentarily release its grip enough for her to escape.¹⁹⁹ She does not remember the events of the next few moments,²⁰⁰ but when her memory returns she is fully in the final “f” of fear response, “fight.”²⁰¹

Fight sometimes takes place immediately upon being seized by the predator, rather than after “fright,” but in this case, it was Yellowtail’s last-ditch effort to escape.²⁰² She had a moment of lucidity in her panic and remembered she had a hemostat—a type of surgical tool—attached to her fly-fishing vest.²⁰³ She used it to stab the cat in the eye, over and over, despite the screams of the cat, until finally, she felt the mountain lion had had enough.²⁰⁴ The animal just stood, dazed, and Yellowtail was then able to make her final escape.²⁰⁵ Trackers later found and killed the mountain lion—it was an older female weakened from starvation—likely the reason it chose to go after Yellowtail in the first place.²⁰⁶ The “fight” response, like all the other stages of fear discussed above, can be impossible to resist or to turn off once it has begun.²⁰⁷ Yellowtail’s story, and other similar stories, illustrate how strong the fear response is and the actor’s complete inability to control his or her

¹⁹⁵ *Id.* at 71.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 71–72.

¹⁹⁸ *Id.* at 72.

¹⁹⁹ *Id.* at 74.

²⁰⁰ *Id.* (noting loss of memory is common in these situations. The memory forming section of the brain shuts down, perhaps to protect the person from responses to the worst of the trauma later.).

²⁰¹ *Id.* at 75.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 75–77.

²⁰⁵ *Id.* at 78.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 75.

reactions at certain moments.²⁰⁸ The amygdala took over and pushed the frontal cortex to the side.²⁰⁹

Behavioral psychologists and neuroscientists have spent much time and energy exploring fear and fear responses because their activation in modern settings can often be inappropriate to the setting and lead to negative results.²¹⁰ By now, it has probably become clear how Yellowtail's story relates to the use of police dogs in the apprehension of people. The four Fs discussed above arise from the primal animal brain and can overrule our reason.²¹¹ One of the primary dangers experienced by primitive humans, and all animals, is an attack from another animal, and the four Fs largely developed to address just that type of danger.²¹² Thus, it should be unsurprising that persons faced with a police canine might process through these very same fear responses that gripped Sue Yellowtail. In fact, because the police dog attack is an animal attack, it is likely perfectly reasonable that a person should respond this way. Police expect and demand suspects to act rationally—to peacefully comply and to refrain from fighting back when faced with a police dog. In many cases, it may be literally impossible for the suspect to accomplish this, because his or her amygdala has taken over, and the body is no longer in the control of the rational mind. This is even more likely when the suspect is under the influence of drugs or alcohol or has a mental health condition.²¹³ In such circumstances, the frontal cortex, or rational mind is already impaired and is even less likely to overcome the instinctual fear responses.²¹⁴

In a recent NPR segment, during *All Things Considered*, correspondent Martin Kaste looked into the issue of police dog bites and questioned whether the use of police dogs in apprehending suspects could survive the age of body cameras and

²⁰⁸ *Id.* at 79.

²⁰⁹ *Id.* at 16–17.

²¹⁰ GARDNER, *supra* note 163, at 16–17.

²¹¹ WISE, *supra* note 174, at 137.

²¹² *Id.* at 67. See also LEDOUX, *supra* note 164, at 127 (noting that certain emotional triggers, called “natural triggers,” are evolutionarily programmed into the brain and require no conditioning or learning to be activated). “The sight of a predator is a good example. It is not uncommon for a prey species to recognize predators the first time they see them.” *Id.*

²¹³ See Kaste, *supra* note 139 (including interview of Prof. Seth Stoughton who noted that suspects with mental health issues or other under the influence of drugs or alcohol may not react rationally to a police dog).

²¹⁴ *Id.*

videos by witnesses with smartphones.²¹⁵ In the segment, a person who experienced being bitten by a police dog claimed that once the dog bit, he could not concentrate or follow the commands of the officers.²¹⁶ His mind focused only on the attack at hand and could not process anything else.²¹⁷ This response seems consistent with the fear response described by Wise, LeDoux, and others.²¹⁸ In the segment, Law Professor Seth Stoughton noted that the use of a police dog can make it more difficult for a person to comply with police.²¹⁹ “You just look at the dog as the source of pain and you do everything you can to address that pain. Those shouted commands—you’ll deal with that later, when the pain stops.”²²⁰ Stoughton also notes that substance abuse and mental health issues can further impair a person’s ability to comply: “It’s going to be exponentially more difficult for someone going through a mental health or substance crisis.”²²¹

Proponents of canine police insist that dogs do far more good than harm.²²² They cite that many suspects will give up when faced with the threat of the dog, without the officer releasing the dog.²²³ Also, officers claim that most bites are of a short duration and that many suspects do stop moving or “resisting” when bit.²²⁴ Yellowtail’s experience shows that the “tonic immobility” response could take over in some suspects and appear to the officers like rational compliance, when in truth there is nothing rational about it. Similarly, the fight response would also be entirely predictable but would appear to officers as “resisting” arrest.²²⁵ How an individual

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ WISE, *supra* note 174, at 138. *See also* LEDOUX, *supra* note 164, at 165 (noting that stimuli signaling potential danger is sent directly to the amygdala and to the frontal cortex by different pathways. The amygdala kicks the defense mechanisms into action even before the cortex has a chance to decide if the danger is real). “From the point of view of survival, it is better to respond to potential dangerous events as if they were the real thing than to fail to respond.” *Id.*

²¹⁹ Kaste, *supra* note 139.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

will respond in a particular fear-inducing circumstance is unpredictable, and more importantly, often out of the individual's rational control.²²⁶ This fact should call into question whether the use of police dogs places at least some suspects in an unwinnable catch-22.

B. Heightened Fear and Assessment of Risk Through the Availability and Affect Heuristics

While any human in the throes of fear will face the response outlined above in some form or fashion, there are ways that certain heuristics might make a fear response more likely.²²⁷ As noted above, heuristics are mental shortcuts or associations that help our quick-thinking mind, the amygdala, to solve problems or respond quickly to stimuli.²²⁸ One of the most common heuristics is the availability heuristic.²²⁹ To determine the amount of risk involved in a particular danger, humans will not refer to an actuarial table; they will call to mind examples of the danger to determine how likely or prevalent the risk.²³⁰ What humans can remember most easily will be considered more likely to occur, regardless of the actual risk involved.²³¹ Generally, humans tend to remember recent, vivid events, or those which are the most emotionally engaging to the person.²³² This is the availability heuristic at work. It tells a person to believe that the events he or she can call to mind most easily are also the most probable even when they are rare.²³³

²²⁶ WISE, *supra* note 174, at 138 (“We all have a breaking point, then, beyond which deliberate, conscious control of behavior inevitably gives way to freeze, fight, fright, or flight.”).

²²⁷ GARDNER, *supra* note 163, at 28–29.

²²⁸ *Id.*

²²⁹ *Judgment under Uncertainty*, *supra* note 165, at 1127.

²³⁰ *Id.*

²³¹ *Id.*

²³² CASS SUNSTEIN, *LAWS OF FEAR* 37 (2005).

²³³ GARDNER, *supra* note 163, at 3 (An example of this is the general fear of plane crashes over car crashes despite the fact that death from a car crash is far more likely. After the terrorist attacks on September 11, 2001, Americans abandoned air travel, while substantially increasing their automobile travel. A study by psychologist Gerd Gigerenzer from Berlin's Max Planck Institute found that it took about a year for air travel and car travel to return to normal levels and during that year, an additional 1,595 people died on U.S. roads as a result of the increase in automobile travel.). *See also* THINKING FAST AND SLOW, *supra* note 165, at 138 (noting that study participants had skewed perceptions of risks of death based on media coverage of unusual events that make the unusual more “available” and thus perceived as more likely).

The availability heuristic does not work in the same way for every person in every culture.²³⁴ What might be “available” to one person is not “available” to another, depending on their environment, culture, upbringing, and so forth.²³⁵ This is important when we discuss police dog attacks because, as will be discussed in the following section, there is a strong history of police dogs being used against minorities, particularly African Americans, in a violent way.²³⁶ It is possible that such a history makes those incidences more “available” to African Americans who identify with the victims of the violence, and therefore could increase fear when faced with a police dog.²³⁷ In some cases, that fear might make a suspect comply, but in others it could elicit a stronger fight or flight response.²³⁸

A second important heuristic, the affect heuristic, influences human decisions through our reactions to powerful images and the positive and negative feelings (or affects) intimately connected to those images.²³⁹ The affect heuristic is particularly important to human evaluation of risk and benefit.²⁴⁰ Where an individual has a negative emotional reaction to a particular image, his or her perception of the risk will be great.²⁴¹ If the emotional reaction is a positive one, the person will likely believe the benefits outweigh the risks.²⁴²

This heuristic comes into play in the police dog scenario in two ways. Like the availability heuristic, it can increase a fear response in an individual facing a police dog, but it can also affect perceptions of the dogs in the community and the public eye. First, as mentioned above, persons who have a very negative emotional reaction to police dogs because of past negative associations will immediately see them as high risk to themselves or others. This is precisely why the images of the dogs attacking protesters during the Birmingham civil rights protests were and remain powerful. It is also why the body cam videos and witness videos of police dog attacks

²³⁴ SUNSTEIN, *supra* note 232, at 89.

²³⁵ *Id.*

²³⁶ *See infra* Section IV.

²³⁷ *See infra* Section IV.

²³⁸ *See infra* Section IV.

²³⁹ THINKING FAST AND SLOW, *supra* note 165, at 139.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 103.

²⁴² *Id.*

may induce reform as the NPR segment suggests.²⁴³ These images evoke a strong negative emotional reaction and are exactly the type of vivid imagery that invoke the affect heuristic. When these are the images of police dogs a person calls to mind, they are likely to believe the risks of such dogs far outweigh any benefit. At the same time, other people may have a positive view of a typical police dog. Some community members will think of the police dog that goes to elementary schools and lets the kids pet it. Officers themselves would likely look at the police dog as a partner who has saved lives. An officer's family members or children would also have a positive view of the police dog because they live and interact with it on a daily basis. Persons with these positive images in mind,²⁴⁴ will likely believe that the benefits of police dogs highly outweigh the risks.²⁴⁵

As discussed above, readily available fear-inducing images (availability heuristic), or powerful adverse emotional reactions to images (affect heuristic), may increase the fear and fear response of an individual when faced with a police dog. This may then increase the person's likelihood of having an uncontrolled fear response, thus making the encounter with the police dog more dangerous. Because of the historical association of police dogs being pitted against African Americans, it is possible that these heuristics may more strongly affect African Americans' negative response to police dogs. Additionally, these heuristics can influence not only an individual's response but also community and policymaker responses in either negative or positive ways, depending on whether the association with the dogs is positive or negative. At some point, the body camera videos and witness videos of dog bites may have a profound effect on public perception.

IV. POLICE DOGS AND RACE

While the attack from a police dog will have a strong psychological effect on any person, African Americans may be at an even greater disadvantage when faced with police dogs because of the extensive history of use of dogs against racial

²⁴³ Kaste, *supra* note 139.

²⁴⁴ *Id.* at 138–40 (In this way, the availability and affect heuristics often work together. What invokes the strongest emotion will often be what is most “available.”).

²⁴⁵ SUNSTEIN, *supra* note 232, at 87. It should be noted that we are likely at the mercy of this heuristic at any moment, and that includes the author, the reader, and the scientists who first recognized it. Paul Slovic who first described this heuristic said the following about it: “[the affect] heuristic appears at once both wondrous and frightening: wondrous in its speed, and subtlety, and sophistication, and its ability to ‘lubricate reason’; frightening in its dependency upon context and experience, allowing us to be led astray or manipulated—inadvertently or intentionally—silently and invisibly.” Paul Slovic et al., *The Affect Heuristic*, 177 EUR. J. OP. RES. 1333, 1349 (2007).

minorities.²⁴⁶ The picture of white men in positions of power using dogs against African Americans is a powerful and oft-repeated image in American history and culture that resonates today and impacts the way we must view the use of police dogs, at least in certain contexts.

In early American history, before the advent of police dogs, or even modern policing, slaveholders employed dogs frequently in regular patrols²⁴⁷ and to hunt escaped slaves.²⁴⁸ Abolitionists like Frederick Douglass²⁴⁹ and Harriet Beecher

²⁴⁶ Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 787 (2007) (“From the slave era when dogs were used to hunt down runaway slaves, to the Civil Rights Era where police in the South turned snarling dogs loose to control and disperse crowds gathered in peaceful protest, law enforcement has used dogs to terrorize black communities.”).

²⁴⁷ SOLOMON NORTHUP, TWELVE YEARS A SLAVE 237 (1853). In his memoir, Solomon Northrup describes the slave patrols that kept slaves in order around the plantations:

How it is in other dark places of slavery, I do not know, but on Bayou Boeuf there is an organization of patrollers, as they are styled, whose business it is to seize and whip any slave they may find wandering from the plantation. They ride on horseback, headed by a captain, armed and accompanied by dogs. They have the right, either by law, or by general consent, to inflict discretionary chastisement upon a black man caught beyond the boundaries of his master’s estate without a pass, and even to shoot him, if he attempts to escape. Each company has a certain distance to ride up and down the bayou. They are compensated by the planters, who contribute in proportion to the number of slaves they own. The clatter of their horses’ hoofs dashing can be heard at all hours of the night, and frequently they may be seen driving a slave before them, or leading him by a rope fastened around his neck, to his owner’s plantation.

Id.

²⁴⁸ Frederick Douglass, *The Horrors of Slavery and England’s Duty to Free the Bondsman, An Address Delivered in Taunton, England, on Sept. 1, 1846*, YALE U., <https://glc.yale.edu/horrors-slavery-and-englands-duty-free-bondsman> (last visited Nov. 24, 2018) [hereinafter *Horrors of Slavery*].

Slaves frequently escape from bondage, and live in the woods. Sometimes they are absent eight or nine months without being discovered. They are hunted with dogs, kept for the purpose, and regularly trained. Enmity is instilled into the blood-hounds by these means:—A master causes a slave to tie up the dog and beat it unmercifully. He then sends the slave away and bids him climb a tree; after which he unties the dog, puts him upon the track of the man and encourages him to pursue it until he discovers the slave. Sometimes, in hunting the negroes, if the owners are not present to call off the dogs, the slaves are torn in pieces—this has often occurred.

Id.

²⁴⁹ *Id.*

Stowe²⁵⁰ commonly invoked the image of the savage slave-hunting dogs to convince the public of the evils of slavery.²⁵¹ These images were not merely fiction or propaganda; they were rooted in the experiences of those held in bondage.²⁵² In his memoir “Twelve Years a Slave,” Solomon Northup described the intense fear he experienced being tracked by the slaveholder’s dogs:

I stood upon the fence until the dogs had reached the cotton press. In an instant more, their long, savage yells announced they were on my track. Leaping down from my position, I ran towards the swamp. Fear gave me strength, and I exerted it to the utmost. Every few moments I could hear the yelpings of the dogs. They were gaining upon me. Every howl was nearer and nearer. Each moment I expected they would spring upon my back—expected to feel their long teeth sinking into my flesh. There were so many of them, I knew they would tear me to pieces, that they would worry me, at once, to death.²⁵³

In her novel, “Uncle Tom’s Cabin,” Harriet Beecher Stowe provided a viscerally shocking description of the heroine “Eliza,” baby in tow, scrambling across an icy Ohio River, escaping the slave trader and his ferocious dogs who were known to have “tore a feller half to pieces.”²⁵⁴ Stage performances of “Uncle Tom’s Cabin” that followed always included a scene of “Eliza” escaping the dogs and the image of the dog chasing and attacking the black man or woman became firmly lodged in the American consciousness.²⁵⁵

Had the pitting of dogs against African Americans ended there, the images invoked by abolitionists and former slaves may have fallen into obscurity, but the civil rights era of the 1950s and 60s brought us new images of dogs being used against African Americans, this time by the police.²⁵⁶ At this time, the police K-9 units were entering the “modern era” in the United States, and more and more were

²⁵⁰ HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* 70 (1899).

²⁵¹ See *Horrors of Slavery*, *supra* note 248.

²⁵² NORTHUP, *supra* note 247, at 137.

²⁵³ *Id.*

²⁵⁴ STOWE, *supra* note 250, at 67, 75.

²⁵⁵ J. Frank Davis, *Tom Shows*, *SCRIBNER’S MAGAZINE*, Apr. 1925, at 350, 356.

²⁵⁶ CHAPMAN, *supra* note 44, at 82–83.

formed around the country.²⁵⁷ Unfortunately, the use of police dogs in crowd control during protests led, once again, to images of dogs attacking African Americans.²⁵⁸ In some cases, the incidents could have been attributed to lack of training in the dog or handler, but other instances were born of unabashed racism.²⁵⁹ The most apparent example arose in Birmingham, Alabama in April of 1963, when police officers used dogs to attack peaceful protesters at the behest of the Police Commissioner, who hurled racial slurs and egged on the handlers and dogs.²⁶⁰ A photographer captured the image of police dogs, teeth bared, lunging at the protesters, and once again the country had a new iconic image of white men in positions of power using dogs against racial minorities.²⁶¹ No longer was Eliza's escape from the bloodhounds in the forefront of American minds; now it was the image of police dogs set upon peaceful protesters. While police dogs have been shown to be effective in certain crowd control situations,²⁶² the incident in Birmingham and similar events forced many departments to avoid using dogs in crowd control or only employ them as a last resort.²⁶³

The next watershed moment for police dogs occurred in the 1990s, when the Los Angeles Police Department ("LAPD") found itself on the hot seat for its use of police dogs in a manner that many believed to be racially discriminatory.²⁶⁴ The LAPD faced public scrutiny and lawsuits by organizations because of the allegedly discriminatory use of police dogs against racial minorities.²⁶⁵ In 1991, several civil rights groups, including the American Civil Liberties Union ("ACLU") and the National Association for the Advancement of Colored People ("NAACP"), along

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 81. "Birmingham, Alabama, Police Commissioner Eugene 'Bull' Connor is alleged to have shouted to newsmen, 'I want them to see the dogs work. Look at those niggers run.' He is also reported to have exclaimed, 'Look at that dog go! That's what we train them for—to enforce the law.'" *Id.*

²⁶⁰ *Id.*

²⁶¹ Corky Siemaszko, *Birmingham Erupted into Chaos in 1963 as Battle for Civil Rights Exploded in South*, N.Y. DAILY NEWS (May 3, 2012), <http://www.nydailynews.com/news/national/birmingham-erupted-chaos-1963-battle-civil-rights-exploded-south-article-1.1071793#>.

²⁶² CHAPMAN, *supra* note 44, at 88.

²⁶³ *Id.* at 96.

²⁶⁴ Sheryl Stolberg, *Lawsuit Charges Improper Use of Police Dogs*, L.A. TIMES (June 25, 1991), http://articles.latimes.com/1991-06-25/local/me-1315_1_police-dogs.

²⁶⁵ *Id.*

with a number of public interest lawyers, filed a class action lawsuit against the LAPD for its use of canines, claiming they were used most frequently against racial minorities, were often deployed in non-violent situations, and tended to inflict serious injuries.²⁶⁶ The lawsuit particularly objected to the department's use of the "find and bite" technique, which trains dogs to seek out the suspect and bite when found, only releasing when the officer calls off the dog.²⁶⁷ Additionally, the lawsuit called for dogs to be used only under the "deadly force" policy when the suspect poses a serious threat of death or serious bodily harm to an officer or another person.²⁶⁸

While this lawsuit was eventually settled prior to trial, a group of prominent researchers knowledgeable about the use of force from Temple University and University of California at Los Angeles ("UCLA") did a qualitative empirical study of the LAPD's and Los Angeles Sheriffs' Department's ("LASD") use of canines, from data collected around the time period of the lawsuit.²⁶⁹ The researchers looked at all arrest and search reports of canine handlers during the relevant period.²⁷⁰ For the LAPD, the researchers looked at all 730 reports of canine encounters during a two-year period from June 1990 through July of 1992.²⁷¹ The LASD data included 335 reports for a two-year period spanning January 1989 through December of 1991.²⁷² While over 90% of the canine bites were to African American or Latino individuals,²⁷³ the researchers found no evidence of racial bias in individual encounters—the dog handlers were not, on an individual basis, singling out black

²⁶⁶ *Id.*

²⁶⁷ *Id.* But see Mesloh, *supra* note 99, at 333. In an empirical study of Florida police canines and their handlers published in 2006, the author found that "bark and hold" trained dogs actually had a higher bite ratio than "bite and hold" (or "find and bite") trained dogs. *Id.* Mesloh suggests the counterintuitive result may have occurred either because some "bark and hold" dogs were originally trained as "bite and hold" dogs, or because "bark and hold" dogs are given more freedom to make decisions and used in more situations than "bite and hold" dogs. *Id.* Ultimately, Mesloh concluded that adopting the "bark and hold" method may not solve the use of force problems inherent in the use of police canines. *Id.* at 333–34.

²⁶⁸ Stolberg, *supra* note 264.

²⁶⁹ Alex Campbell, Richard Berk & James J. Fyfe, *Deployment of Violence: The Los Angeles Police Department's Use of Dogs*, 22 EVALUATION REV. 535, 536 (1998).

²⁷⁰ *Id.* at 541.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 544 tbl.1.

suspects for more harsh treatment using dogs.²⁷⁴ However, the data did show that “the LAPD deployed its dogs disproportionately to African American neighborhoods.”²⁷⁵ While the data showed some connection between the deployment of dogs and the rate of crime in the neighborhood, that explanation did not fully account for the disproportionate deployment of canines and suggests that racial bias could be involved at the deployment level.²⁷⁶

In 1992, following the public criticism and filing of the class action lawsuit, the LAPD instituted a number of changes to their canine policy, including requiring verbal warnings before a dog was released, requiring a supervisor on scene when a K-9 unit was called, and retraining the dogs to employ a “bark and hold” technique rather than the formerly used “find and bite” method.²⁷⁷ While these reforms were mostly greeted as positive developments by the community, the debate over the racially-biased use of canines by Los Angeles police continues today.²⁷⁸

At least one other police department’s use of force by canines was researched during a similar time (1993–1998) and showed no evidence of racial bias in deployment of canines.²⁷⁹ The 2003 study of the use of police canines in Prince George’s County, Maryland showed canines were used more frequently in

²⁷⁴ *Id.* at 545–46.

²⁷⁵ *Id.* at 550.

²⁷⁶ Campbell et al., *supra* note 269, at 550.

In short, the association between racial/ethnic composition of neighborhoods and deployment remains after the crime rate is taken into account. When coupled with the absence of any strong racial/ethnic effects at the encounter level, a reasonable inference is that the large number of African Americans who are bitten is linked to deployment patterns unrelated to crime. It is possible that there are other legitimate reasons for this association, but none has been suggested by the LAPD, and we cannot think of any credible ones ourselves.

Id.

²⁷⁷ Douglas U. Rosenthal, *When K-9s Cause Chaos—an Examination of Police Dog Policies and Their Liabilities*, 11 N.Y.L. SCH. J. HUM. RTS. 279, 309 nn.247–48 (1994).

²⁷⁸ Tim Walker, ‘Racist’ LA Police Dogs only Bite Latinos and African Americans, INDEP. (Oct. 11, 2013), <https://www.independent.co.uk/news/world/americas/racist-la-police-dogs-only-bite-latinos-and-african-americans-8874913.html>.

²⁷⁹ Edward R. Hickey & Peter B. Hoffman, *To Bite or Not to Bite: Canine Apprehensions in a Large, Suburban Police Department*, 31 J. CRIM. JUST. 147, 151 (2003).

apprehension of white suspects, and that of all suspects apprehended via use of a canine, whites were more likely to be bitten.²⁸⁰

Although dogs have been used in policing in the United States since the early twentieth century, there is a serious lack of research on the use of canines in general and on questions of racial bias in the use of canines.²⁸¹ Despite a small handful of empirical studies emanating from complaints about the use of canines during the 1990s, we continue to have a lack of any centralized data collection on use of force generally, or, more specifically, on the use of canine force.²⁸² While there is evidence of some reforms since the civil rights era, including better training for dogs and handlers,²⁸³ development of policies for the use of police dogs, and refraining from using dogs in crowd control,²⁸⁴ evidence continues to arise showing that police dogs have a more significant negative impact on African American communities, including more frequent use of canines against African Americans in search and seizure activities.²⁸⁵

²⁸⁰ *Id.*

[D]ata showed that the proportion of non-White suspects apprehended by use of a canine was significantly less than the proportion of White suspects apprehended by use of a canine and that, when apprehended by a canine, non-White suspects were significantly less likely to be bitten by the canine than White suspects.

Id.

²⁸¹ *Id.* at 147. See Campbell, *supra* note 269, at 535 (“We know, however, of no empirical work on the role of police dogs in either the apprehension of suspects or as a method of delivering force.”). See also Mesloh, *supra* note 99, at 323 (“[L]ittle empirical research has been conducted regarding police dog deployment as a use of force.”).

²⁸² James J. Fyfe, *Too Many Missing Cases: Holes in Our Knowledge about Police Use of Force*, 4 JUST. RES. & POL’Y 87 (2002). See also Brown, *supra* note 94.

²⁸³ CHAPMAN, *supra* note 44, at 95.

²⁸⁴ *Id.* at 96.

²⁸⁵ See Jeannine Bell, *Dead Canaries in the Coal Mines: The Symbolic Assailant Revisited*, 34 GA. ST. U. L. REV. 513, 521 (2018) (“The Justice Department found that the Ferguson police treated African-Americans differently at every level. They were arrested more. They got more tickets. They were even bitten by police dogs more. Of the fifteen times Ferguson police dogs bit people, all were African-American victims.”) (emphasis omitted); Lisa M. Olson, *Blue Lives Have Always Mattered: The Usurping of Hate Crime Laws for an Unintended and Unnecessary Purpose*, 20 ST. MARY’S L. REV. ON RACE & SOC. JUST. 13, 39 (2017).

Additionally, where racial information was available, DOJ investigators found every instance of canine use of force (dog bite) between 2011 and 2013 involved an African-American subject. This use of canine force to control

Even if absolutely no racial bias in use of police dogs currently exists, the historical use of dogs in a racially biased manner may still affect African Americans such that the impact of the use of canines is felt more profoundly in African American communities than in white communities.²⁸⁶ An example of this impact can be seen in scientific studies of fears and phobias. Specifically, there is some empirical evidence that the employment of dogs in the civil rights era and prior could have led to a greater instance of phobia and fear of dogs in African Americans.²⁸⁷ Researchers in two studies noted higher rates of fear of dogs in the sample of African Americans surveyed.²⁸⁸ One theory posited by the researchers was that the antagonistic experiences of former generations with dogs in the civil rights era, and possibly even

black bodies is reminiscent of the “packs of negro dogs” deployed as a tool of the slave patrols of yesteryear.

Id. Laurent Sacharoff, *The Binary Search Doctrine*, 42 HOFSTRA L. REV. 1139, 1182 (2014).

Putting together the robust research on implicit racial bias among police officers with the strong showing that dog handlers communicate their beliefs to their dogs, which alert falsely, we find a significant risk that the use of drug-sniffing dogs could lead to racially discriminatory searches. But, this problem does not mean we must abandon the use of dog sniffs. Rather, the results suggest that we take measures to regulate it, including bringing the practice under Fourth Amendment scrutiny. After all, the same studies that identify implicit racial bias also suggest that training can help officers avoid it. If officers can use dog sniffs without any regulation, implicit bias will remain a risk; but, if the Fourth Amendment (or statutes) require safeguards similar to those used in traffic stops—with the addition of the type of training proposed in the implicit bias literature—the risk of racial bias can be reduced.

Id.

²⁸⁶ As discussed above, stories of dogs being used against African-Americans in the past are well known, whether through slave patrols, during civil rights demonstrations or in 1990s Los Angeles. These stories, whether garnered from slave narratives, newspaper reports, or word-of-mouth, evoke strong emotions and thus likely activate both the availability and affect heuristics impacting current impressions and interactions with police dogs. See THINKING FAST AND SLOW, *supra* note 165, at 138–39 (noting the interaction of availability and affect heuristics Daniel Kahneman writes: “Frightening thought and images occur to us with particular ease, and thoughts of danger that are fluent and vivid exacerbate fear.”).

²⁸⁷ L. Kevin Chapman et al., *Fear Factors: Cross Validation of Specific Phobia Domains in a Community-Based Sample of African American Adults*, 25 J. ANXIETY DISORDERS 539, 543 (2011) [hereinafter *Fear Factors*].

²⁸⁸ *Id.* See also L. Kevin Chapman et al., *A Confirmatory Factor Analysis of Specific Phobia Domains in African American and Caucasian American Young Adults*, 22 J. ANXIETY DISORDERS 763, 767 (2008) (“African Americans in the current sample endorsed fears related to stinging insects, strange dogs, as well as rats and mice.”).

as far back as the era of slavery, could be passed down through generations and has led to an “insidious psychological vulnerability to dogs.”²⁸⁹

While this Article argues that use of police dogs to apprehend any suspect, regardless of race, potentially escalates violence and places the human and dog in an inevitable, violent, and unbeneficial confrontation, in circumstances involving African Americans, that escalation may be even more pronounced. The escalation may occur as a result of the history of using dogs against African Americans and the residual fear, regardless of any bias (or lack thereof) of officers. The use of a police dog may always be volatile, but the use of the dog against an African American can create an untenable situation.

V. REASONABLENESS OF USING POLICE DOGS FOR APPREHENSION

It is a commonly repeated truism that police dogs save officers’ lives.²⁹⁰ The story of Rocco, detailed in the introduction is a good example of a situation where sending a police dog into the building first to search for the suspect was likely significantly safer for human officers.²⁹¹ Using dogs is undoubtedly safer for human officers where there is potential for an ambush.²⁹² Canines also show their particular usefulness in apprehension when there is a need to track a suspect over a large area or in rugged terrain.²⁹³

²⁸⁹ See *Fear Factors*, *supra* note 287, at 543 (“It is suggested that these particular animal domain fear factors may occur as a result of conditioning within the environment of the participants, and may in fact include a generational transmission component as a factor in the etiology of the phobia . . . African American adults who experienced overt racism in prior eras may have a generalized fear of symbols (e.g., dogs) related to racial hostility, and transmitted this fear to consequent generations of family members.”).

²⁹⁰ See CHAPMAN, *supra* note 44, at 30 (quoting Director of Public Safety from Dearborn, Michigan on how police dogs save human officer lives).

²⁹¹ Lexi Belcuffine & Liz Navratil, *Pittsburgh Police Dog Rocco Remembered as a Hero*, PITTSBURGH POST-GAZETTE (Jan. 30, 2014), <http://www.post-gazette.com/local/city/2014/01/30/Pittsburgh-police-dog-Rocco-shows-improvement-after-stabbing/stories/201401300243> (quoting mayor as crediting Rocco with saving the lives of human officers).

²⁹² See Charles Mesloh, *An Examination of Police Canine Use of Force in the State of Florida* 41 (Summer 2003) (unpublished Ph.D. dissertation, University of Central Florida) (on file with UCF Libraries, University of Central Florida) (“This ability has proven useful for law enforcement agencies since the police dog is able to clear buildings more accurately and safely than officers alone.” (citations omitted)).

²⁹³ *Id.* at 42–43.

In his book, “Police Dogs in North America,” Samuel Chapman details the vital work that police canines accomplish:

Police executives report that in crowd and search situations a trained officer-dog team can be as effective as up to ten officers without trained dogs. On vice and narcotics raids, it has become standard procedure to station one officer and dog just inside the entrance where gambling is ongoing as the raid is going down. Other teams may be posted at strategic points, too. This is sufficient to keep order and discourage suspects from attempting to destroy evidence or escaping through various doors and windows. The same psychological advantage can be obtained by using officer-dog teams on picket lines where violence is threatened. In crowd situations, like parade duty, police dogs attract admiration and respect as long as the dogs are controlled and do not act provocatively. Should there be purse snatchers, vandals, hecklers, or street crimes, the dogs are ready to go. In highly emotional situations, such as searching rugged terrain for lost children or hunting for fugitives or bodies, the use of dogs has a calming effect on the public and creates confidence in a force’s efforts.²⁹⁴

In canine excessive force cases, just like other excessive force cases, courts often consider the level and extent of danger posed to the officer in determining whether force was justified under the circumstances.²⁹⁵ In analyzing cases, some courts have concluded that certain crimes, like burglary, by their very nature place officers in a position of inherent danger, and, thus, officers are given great leeway in the amount of force justifiable when responding to burglaries.²⁹⁶ Furthermore, courts have recognized the reasonableness of certain practices and procedures of canine teams that protect the safety of the officers on scene.²⁹⁷ In *Lowry*, the court recognized that “the practice of allowing dogs to inspect areas off-lead is in place to protect officers’ safety.”²⁹⁸ The court acknowledged that had the officer been required to keep the dog

²⁹⁴ CHAPMAN, *supra* note 44, at 218–19.

²⁹⁵ See *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994) (stating “the most important single element of the three [*Graham*] factors [is] whether the suspect poses an immediate threat to the safety of the officers or others”).

²⁹⁶ See *Sandoval v. Las Vegas Metro. Police Dep’t*, 756 F.3d 1154, 1163 (9th Cir. 2014) (noting that when officers respond to a burglary in progress, they may reasonably assume that the suspects will flee or offer armed resistance and therefore, “the police are entitled to enter immediately, using all appropriate force”).

²⁹⁷ *Lowry v. City of San Diego*, 858 F.3d 1248, 1259 (9th Cir. 2017).

²⁹⁸ *Id.*

on her leash, the officer “would have been required to expose himself to what the officers reasonably suspected was a burglar, lurking in the dark office, possibly armed.”²⁹⁹ Courts have generally favored the use of dogs by law enforcement officers, especially where the dogs make the officers’ jobs safer, acknowledging that “the use of dogs can make it more likely that officers can apprehend suspects without the risks attendant to the use of firearms in the darkness, thus, frequently enhancing the safety of the officers, bystanders, and the suspect.”³⁰⁰ Discontinuing the use of police dogs for the apprehension of suspects may place officers at greater risk of injury or death and should not be broached lightly.

It is also important to note, however, that the work of police dogs is highly dangerous to the dog itself. In addition to the stories detailed in the introduction, a simple Google search will reveal that police dog work, particularly the apprehension of suspects is life-threatening work for the dog.³⁰¹ It is a staple argument for the continuation of police K-9 units that they save officer lives because the dogs can be sent into life-threatening situations to perform tasks without risking human lives.³⁰² Recently, some individual writers and bloggers have taken issue with the use of police dogs in dangerous situations, noting these dogs do not make a conscious choice to accept the dangers of the job and are often the subject of cruelty from handlers.³⁰³ While one of the nation’s most prominent animal rights organizations,

²⁹⁹ *Id.* at 1259–60. *See also* *Miller v. Clark Cty.*, 340 F.3d 959, 968 (9th Cir. 2003) (holding that the use of an off-leash police dog is a practice that prevents an officer from being ambushed or pulled “into a dangerous situation with no opportunity to react safely”).

³⁰⁰ *Matthews v. Jones*, 35 F.3d 1046, 1052 (6th Cir. 1994) (citing *Robinette v. Barnes*, 854 F.2d 909, 914 (6th Cir. 1988)).

³⁰¹ Charles Keeshan & Susan Sarkauskas, *Heat a Serious Occupational Hazard for Vest-Wearing Cops, Police Dogs*, CHI. DAILY HERALD (July 13, 2018), <https://www.dailyherald.com/news/20180713/heat-a-serious-occupational-hazard-for-vest-wearing-cops-police-dogs>. Gunfire and heat related deaths are the most common causes of death for police dogs while on duty. *Id.* From 2013 through July of 2018, 33 canines have died from gunfire and 42 from heat exhaustion and related issues. *Id.* Note that heat exhaustion included dogs accidentally left in hot cars by officers. *Id.*

³⁰² *See Miller*, 340 F.3d at 968.

³⁰³ Norman, *supra* note 31; *see also* Doris Lin, *Police, Search and Rescue Dogs: The Animal Rights Debate*, <https://www.thoughtco.com/issues-with-police-dogs-and-search-and-rescue-dogs-127902> (June 18, 2017) (The author is the director of legal affairs for the Animal Protection League of New Jersey and describes the basic pros on cons of using police dogs from an animal rights perspective.); Alex Moyle, *Using Dogs as Tool of Racist Oppression*, <https://socialistworker.org/2018/07/17/using-dogs-as-a-tool-of-racist-repression> (July 17, 2018) (“Far from allowing police departments to exploit dogs as mascots that obscure police brutality, socialists, anti-racists and those opposed to animal cruelty should all strongly oppose the formation of K9 units, and demand that existing ones be disbanded as an important component of disarming militarized police forces.”).

People for the Ethical Treatment of Animals (“PETA”), has not taken a stance against use of police dogs,³⁰⁴ many animal welfare and rights organizations do express concern over the frequency of police canine deaths, not just from interaction with suspects but with the actions of the officers themselves.³⁰⁵ In many cases, canine deaths are the direct responsibility of officer via friendly fire, being left in a hot car, or otherwise overworked to the point of exhaustion.³⁰⁶

In an editorial that appeared in the *Pittsburgh Post-Gazette* following the deaths of Bruce Kelley Jr. and Aren, journalist Tony Norman noted the true position of the police dog as having no personal agency, but rather existing at the whim of his partner and the police force.³⁰⁷ He wrote: “Something is often, and I suspect purposefully, forgotten in the emotional coverage of a fallen K-9 officer: The dog *was* ultimately put into the position of being killed by its human partner and the law enforcement agency it served with uncritical loyalty.”³⁰⁸ As Norman and others have pointed out, ultimately, police dogs are property of the department that uses them.³⁰⁹ Despite calling them “officers,” despite laws, like Rocco’s Law,³¹⁰ that increase the punishment for persons who injure or kill a police dog, and despite many officers who truly consider their canine a partner and a family member,³¹¹ the dogs are still

³⁰⁴ See Michelle Kretzer, *Peta to Police: Protect Canine Officers*, <https://www.peta.org/blog/peta-police-protect-k9-officers/> (Oct. 12, 2012).

³⁰⁵ Christopher Ingraham, *The Surprising Reason More Police Dogs are Dying in the Line of Duty*, WASH. POST (Nov. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/20/the-surprising-reason-more-police-dogs-are-dying-in-the-line-of-duty/?noredirect=on&utm_term=.d1b4bf9ad03d.

³⁰⁶ Joshua Rhett Miller, *Police Dog Dies After Being Left in Hot Patrol Truck*, N.Y. POST (July 19, 2017), <https://nypost.com/2017/07/19/police-dog-dies-after-being-left-in-hot-patrol-truck>; Keeshan & Sarkauskas, *supra* note 301 (noting that in the past five and a half years, forty-two dogs have died on the job from heat-related causes, well ahead of the second-leading cause, gunfire (33)).

³⁰⁷ Norman, *supra* note 31.

³⁰⁸ *Id.* (emphasis added).

³⁰⁹ *Id.*

³¹⁰ 18 PA. CONS. STAT. § 5548 (2018).

³¹¹ Human handlers almost universally laud their dogs as partners and members of their family. In no way should this Article be taken as evidence that their regard and emotional attachment to their dogs is not genuine. These officers love their dogs and do not want to see them come to harm. The reactions of Officers Lerza and O’Malley, following the deaths of Rocco and Aren, are evidence of that. See *Lengthy Jail Sentence*, *supra* note 5 (quoting Officer Lerza concerning Rocco: “I lost my partner from this. He was also a family member.”); Megan Guza, *Hundreds of Police Officers Gather in Pittsburgh to Honor Slain K-9*, TRIBLIVE (Feb. 4, 2016), <https://triblive.com/news/adminpage/9906380-74/officers-kelley->

property, and are placed into dangerous positions by their owner, the police department.

Laws like Pennsylvania's Rocco's Law³¹² are hugely popular in the community, but they tend to promote a false sense of the value of these dogs as actual officers. While their human handlers genuinely consider them partners and family, the law still views them as dogs, and, thus, as property.³¹³ The dog's life is only of special value under the statute, in so far as it has been taken by a suspect or criminal.³¹⁴ However, the police department or officer, like any other dog owner, is largely allowed to do with the dog as they see fit.³¹⁵ The community must understand that these statutes do not elevate the police dog's status above property in all contexts.

A. Recommendations

Humans have employed dogs as partners and protectors for millennia. It is nearly undisputed that they are of benefit to policing and at times save officers' lives. When it comes specifically to apprehension of suspects, however, police dogs and the humans they pursue face a no-win situation. Standard human fear response coupled with historical use of dogs in a racially biased manner creates a catch-22. It places both the suspect and the dog in an inevitably violent struggle that is of benefit to neither and often causes serious bodily harm and, at times, even death to the combatants.

police ("O'Malley did not speak during or after the memorial service, during which he sat with head down, looking pained at times, and flanked by family and friends.").

³¹² 18 PA. CONS. STAT. § 5548 (2018).

³¹³ See, e.g., *Brown v. Battle Creek*, 844 F.3d 556, 566 (6th Cir. 2016) ("In line with every other circuit that has addressed this issue, we hold that a dog is property, and the unreasonable seizure of that property is a violation of the Fourth Amendment."); *Andrews v. City of West Branch*, 454 F.3d 914 (8th Cir. 2006) (holding dogs are property subject to Fourth Amendment protection); *Altman v. City of Highpoint*, 330 F.3d 194 (4th Cir. 2003) (ruling that dogs are personal effects for the purpose Fourth Amendment).

³¹⁴ See Kelli Bender, *Police Dog Dies After Being Left in Hot Car for 6 Hours, Officer Who Left Dog Not Charged*, PEOPLE (Aug. 24, 2018), <https://people.com/pets/police-dog-dies-in-hot-car/>.

³¹⁵ See Mary Bowerman, *Retired Cop Allowed to Purchase K-9 Partner for \$1*, USA TODAY NETWORK (Feb. 5, 2016), <https://www.usatoday.com/story/news/nation-now/2016/02/05/ohio-police-officer-purchase-dog-auction/79881280/> (describing story of an Ohio police officer who's K-9 partner was scheduled to be auctioned off after the officer's retirement, because of the dog's status as property); Kenneth Garger, *Retired Police Dog Saved by Animal Rights Group*, N.Y. POST (Dec. 13, 2015), <https://nypost.com/2015/12/13/retired-police-dog-saved-by-animal-rights-group/> (describing an animal rescue group's efforts to save a retired K-9 dumped at a Brooklyn animal shelter and scheduled for euthanasia).

Because of the significant numbers of injuries and lawsuits related to police dog bites, at least one law enforcement organization, and even the Justice Department, has acknowledged a need for reform.³¹⁶ The default “fix” in these instances is to move from a “find and bite” procedure to a “bark and hold” procedure to reduce the frequency of bites.³¹⁷ But “bark and hold” may not be the panacea desired by its proponents. At least one study has shown bite ratios increase rather than decrease when the force changed its procedure to “bark and hold.”³¹⁸ Additionally, “bark and hold” is criticized because it gives suspects time to arm themselves, prepare to defend themselves, or escape.³¹⁹

Ultimately, we do not know if “bark and hold” is better than “find and bite” or vice versa, because we have almost no statistical information on use of force with police dogs. Research for this paper revealed an incredible dearth of data. There is not even a good estimate of how many police dogs are working in the country, let alone statistics on the number of apprehensions, or injuries and deaths associated with apprehensions. As discussed above, the data which does exist suggests that police dogs cause significant damage to persons when used in apprehensions, and the dogs themselves are in significant danger. Without comprehensive data, there is very little chance for meaningful reform in this area.

While there is little data on police dog usage itself, the analysis of principles of cognitive science discussed above suggests that siccing a dog on a suspect has the likelihood of accelerating the violence and causing the suspect to defend himself, thus putting the suspect in the position of inviting further acts of force, even deadly force against him. It is a catch-22 for the suspect and dog. As it stands, the law grants great leeway to officers in the use of the dog as a tool of force against suspects, and the reasonableness of their use is viewed only from the position of the officer at the time of apprehension. Viewing reasonableness only through the eyes of handler at

³¹⁶ See Mesloh, *supra* note 99, at 324.

Over the past year, the International Association of Chiefs of Police (IACP) has expressed interest and concern with the use of force by canine handlers and their partners. As a result IACP’s model policy regarding canine unit utilization proposed that “Bark and Hold” be adopted by all law enforcement agencies. Shortly afterward, the Department of Justice (DOJ) in their publication, “Principles for Promoting Police Integrity” stated that agencies should train their dogs “to find and bark rather than find and bite.”

Id.

³¹⁷ *Id.*

³¹⁸ *Id.* at 333.

³¹⁹ *Id.* at 325.

the time of the encounter is short-sighted in light of what cognitive science tells us of human fear response.

This Article makes three primary recommendations to assist in reducing the harm associated with using police dogs in apprehension. First, governments need data on police dogs and their usage to make meaningful and evidence-based reforms. Second, the standard for reasonableness in the use of force involving police dogs should take into account what cognitive science tells us about a suspect's potential reaction to an attacking dog. Third, understanding that the use of the dog in apprehensions can increase rather than decrease the violence, police forces should voluntarily curb the circumstances where police dogs are used in apprehension of suspects and restrict use to those circumstances where officers are most at risk of ambush, such as searching buildings or rough terrain.

First and foremost, governments need data to determine the extent of the problem. States and the Department of Justice should collect statistics on police dogs and their use in apprehensions, among other things. Comprehensive and unbiased data collection on the use of police dogs would help communities understand how dogs are currently being used and how to improve their use. Such data is necessary for the benefit of community members, police, and the dogs themselves. Like all excessive force situations, more data is needed for communities and courts to make informed decisions. Information on death and injury caused by police dogs, including how many injuries and the nature of those injuries, would also help lawmakers understand the issues and consider alternatives. Deaths and injuries to canines themselves must also be tracked via centralized and unbiased data collection. It is likely that all the reforms suggested here hinge on obtaining data.

Second, from a legal perspective, the Fourth Amendment "reasonableness" analysis must include consideration of the fear response of the suspect under the totality of the circumstances. Because cognitive science shows the release of the dog (unlike any other uses of force) is likely to elicit a particular fear response, and possibly escalate the violence of the encounter, the officer should be expected to appreciate this risk, and calculate if the threat is serious enough that such escalation is preferable to other options. Further, reasonableness requires consideration of the possibility that African Americans may be at greater risk for certain fear responses because of the historical use of dogs against them. The totality of the circumstances approach should also require a reasonable officer to consider whether the suspect is at a greater disadvantage in his response to the dog because he or she is under the influence of a substance or is experiencing a mental health crisis, thus potentially heightening the fear response.

Third, the data that does exist, coupled with circumstantial evidence, such as body camera videos and eyewitness accounts, suggest that police dogs are currently being used too frequently and in situations where they should not be used to

apprehend suspects. While sometimes use of police dogs may be necessary to protect the community, the life of an officer, or even to prevent use of more deadly force on the suspect, police dogs should not be used in all or even a majority of circumstances. Because of the likelihood of increasing the violence of the encounters, causing serious bodily harm to suspects, and endangering the dogs themselves, police officers should use dogs sparingly in apprehension situations.

The story of the Pittsburgh Port Authority K-9, Aren, is an example of when a broader reasonable analysis, and greater discretion on the part of the officers would be helpful. The suspect was clearly under the influence of alcohol and likely dealing with mental health issues as well.³²⁰ He specifically told the police he would kill the dog if it was released upon him.³²¹ Releasing the dog at that time was like setting a match to gasoline. It placed the suspect in the position of acting to defend himself and gave the police the excuse to use deadly force upon him when it likely would have been unreasonable to do so before. Releasing the dog set up a violent encounter where the dog and the suspect would come out on the wrong end. Despite the District Attorney's determination of no wrongdoing,³²² was such a scenario necessary? If the officers were required to account for the likelihood of the fear response, would they have chosen another tactic?

Alternatively, the story of Rocco, while tragic, may be the type of situation where the use of the dog is truly reasonable—an armed and dangerous suspect holed up in a location where ambush is likely. The situation still sets up a probable violent encounter and places the dog and suspect at odds, but perhaps there was no other safe means of extracting the suspect from his position. These types of situations may warrant the proper use of the police dog for apprehension. Dogs should be reserved for only the most dangerous situations involving possible ambushes or rough terrain. Police dogs can still be highly useful in other areas of policing including search and rescue, drug sniffing, and bomb detection.

³²⁰ *Medical Examiner's Report*, *supra* note 19; *see also* Bob Mayo, *Some charges held, others dismissed against Bruce Kelley Sr., father of man killed after killing K-9 Aren*, WTAE ACTION NEWS (Mar. 3, 2016, 8:18 PM), <https://www.wtae.com/article/some-charges-held-others-dismissed-against-bruce-kelley-sr-father-of-man-killed-after-killing-k-9-aren/7478228> (noting Bruce Kelley, Jr.'s history of mental illness).

³²¹ *Ove*, *supra* note 21.

³²² *Return to Duty*, *supra* note 18.