

# Those Doggone Police: Insufficient Training, Canine Companion Seizures, and Colorado's Solution

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## I. INTRODUCTION

“They took a member of my family[!]” sobbed Leon Rosby following the death of his beloved rottweiler, Max, after police shot the canine companion four times in Hawthorne, California.<sup>1</sup> The incident occurred when Rosby blasted music from his car while filming an ongoing police standoff, allegedly making the situation more dangerous.<sup>2</sup> As police arrested Rosby, Max jumped out of the car window and approached the officers.<sup>3</sup> One of the officers, with his gun drawn and aimed at Max, attempted to control Max by grabbing his leash but fired on the dog after it displayed “aggressive movements.”<sup>4</sup> The incident triggered public outrage as YouTube videos of the altercation went viral.<sup>5</sup> Hawthorne Police Chief Robert Fager wrote two letters to the community stressing that the department would conduct an administrative investigation, create a taskforce to evaluate current dog encounter procedures for police officers, and institute safer measures for animals and police officers alike.<sup>6</sup>

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1. John Hartung, *Hawthorne Police Shoot, Kill Dog—Caught on Camera*, ABC LOCAL (July 1, 2013, 12:00 AM), <http://abc7.com/archive/9159064/>; accord Matt Hamilton, *Video of Hawthorne Police Killing Dog Sparks Web Protests*, LOS ANGELES TIMES (July 2, 2013), <http://www.latimes.com/news/local/la-me-0703-dog-killed-20130703,0,4135515.story>.

2. See Hamilton, *supra* note 1.

3. See *id.*; see also Kathleen Miles, *Second Video of Dog Shooting Exonerates Police, Department Says, Lawyers Disagree (VIDEO)*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/07/08/second-video-dog-shooting\\_n\\_3536658.html](http://www.huffingtonpost.com/2013/07/08/second-video-dog-shooting_n_3536658.html) (last updated Apr. 3, 2014, 11:59 PM) (describing how another cell phone video shows the shooting officer reaching his hand toward the dog and hesitating before shooting it four times).

4. See Press Release, Hawthorne Police Dep’t, Obstruction Arrest/Officer Involved Shooting (July 1, 2013), available at <http://hawthornepolice.com/press-releases-documents/2013/7/1/10sychomeim1cfrhwm88kvel13oj71>.

5. See Christine Mai-Duc, *Hawthorne Besieged by Protests over Video of Police Shooting Dog*, LOS ANGELES TIMES (July 10, 2013), <http://articles.latimes.com/2013/jul/10/local/la-me-ln-hawthorne-besieged-by-protests-over-video-of-police-shooting-dog-20130710>. For actual YouTube videos of the shooting, see Gabriel Martinez, *Hawthorne, CA Police Kill Dog(1)*, YOUTUBE (June 30, 2013), <https://www.youtube.com/watch?v=WDBZr4ie2AE>; ZT5 Entertainment, *Hawthorne Police Shoot Dog—Second (2nd) Angle—Slow Motion WARNING: GRAPHIC*, YOUTUBE (July 4, 2013), [http://www.youtube.com/watch?v=eRxCn\\_RuJ1E](http://www.youtube.com/watch?v=eRxCn_RuJ1E) [hereinafter *Videos*].

6. See Press Release, Hawthorne Police Dep’t, Message to the Community from the Hawthorne Chief of Police (July 12, 2013), <http://hawthornepolice.com/press-releases-documents/2013/7/13/w12gw6cc295tf43bscujr2do1ymz25> [hereinafter July 12, 2013 Press Release]. Stemming from growing concern regarding threats made to the police department, Chief Fager wrote the first letter to reassure the community that he would hold the police department accountable. See Press Release, Hawthorne Police Dep’t, Message to the Community from the Hawthorne Chief of Police (July 3, 2013), <https://local.nixle.com/alert/5027693/>. In his second letter to the community, Chief Fager explained the multiple steps the department took in an effort to prevent future unnecessary dog shootings. See July 12, 2013 Press Release, *supra*. Prior to the incident, the

Max's horrific death at the hands of a police officer is not a unique case but "the tip of the iceberg" of a greater institutional problem.<sup>7</sup> Over half of intentional police shootings in the nation involve animals—typically dogs<sup>8</sup>—a likely byproduct of police departments failing to provide officers with adequate training for dog interactions.<sup>9</sup> In fact, less than ten police departments nationwide have mandatory canine behavior training for their police officers.<sup>10</sup> Although officers with dog partners—referred to

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Hawthorne Police Department enjoyed friendly relations with the community and animal associations because it was one of only two departments in the state that staffed a canine service dog around the clock. *See Hawthorne Police Use Therapy Dog To Help Residents in Need*, CBS LOCAL (June 19, 2013, 11:53 PM), <http://losangeles.cbslocal.com/2013/06/19/hawthorne-police-use-therapy-dog-to-help-residents-in-need/>. Scottie, a golden retriever, facilitates a relationship of trust between the community and police, frequently visiting hospitals, retirement homes, and crime scenes. *Id.* Scottie also serves his department by boosting morale and easing stressful situations. "*Scottie*" Service Dog, HAWTHORNE POLICE, <http://www.hawthornepolice.com/service-dog/> (last visited Sept. 16, 2014).

7. Erin Fuchs, *Horrifying Video Is Just the Tip of the Iceberg of Cops Killing Dogs*, BUS. INSIDER (July 2, 2013, 11:38AM), <http://www.businessinsider.com/police-are-shooting-dogs-2013-7>. Fuchs goes on to provide three highly publicized examples of dogs shot by police in the months leading up to Max's demise. *See id.*

8. *See* CYNTHIA BATHURST ET AL., U.S. DEP'T OF JUSTICE, THE PROBLEM OF DOG-RELATED INCIDENTS AND ENCOUNTERS 10 (2011), *available at* <http://ric-zai-inc.com/Publications/cops-p206-pub.pdf>; PETS ADVISER, GUNNED DOWN: WHY ARE SO MANY DOGS BEING SHOT BY POLICE? 12 (2013), *available at* <http://www.petsadviser.com/gunned-down-report-new.pdf>. Actual statistics regarding the frequency and total number of police firearm discharges are scarce, as few departments release this information. *See* PETS ADVISER, *supra*, at 2. *But see* N.Y. CITY POLICE DEP'T, 2011 ANNUAL FIREARMS DISCHARGE REPORT 37–43 (2012), *available at* [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/nypd\\_annual\\_firearms\\_discharge\\_report\\_2011.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf) (providing a detailed annual analysis of intentional firearm discharges on animals).

9. *See* Mike Carter, *Half of Intentional Shooting by Police Involve Dogs*, *Study Says*, SEATTLE TIMES, [http://seattletimes.com/html/localnews/2019809359\\_rosie02m.html](http://seattletimes.com/html/localnews/2019809359_rosie02m.html) (last modified Dec. 3, 2012, 6:00 AM); Charlotte Raschke, *Don't Shoot My Dog*, LAW ENFORCEMENT TODAY (June 1, 2012), <http://lawenforcementtoday.com/2012/06/01/don-t-shoot-my-dog/>. "Usually, police simply aren't properly trained or don't have the resources to deal with canine encounters . . ." Carter, *supra*. In regard to Hawthorne Police training, their police manual is unavailable to the public. *See* <http://hawthornepolice.com> (providing no publicly available copy of the department's police manual). Its sister agency, the Los Angeles Police Department, specifically details when firearm discharge upon dogs is appropriate but does not mention nonlethal control methods. *See* L.A. POLICE DEP'T, 2014 1ST QUARTER MANUAL § 204.80 (2014), *available at* [http://www.lapdonline.org/lapd\\_manual/volume\\_4.htm#204](http://www.lapdonline.org/lapd_manual/volume_4.htm#204).

10. *See* Anthony Armentano, *Law Unleashes New Breed of Trigger Happy Police*, GLOBAL ANIMAL (July 9, 2013), <http://www.globalanimal.org/2013/07/09/law-unleashes-new-breed-of-trigger-happy-police/102488/>. Milwaukee, Nashville, New York, and Omaha,

as K9s—receive special training on canine behavior, very few police departments provide extensive mandatory training on dog interactions for officers without K9s.<sup>11</sup>

Due to the lack of canine interaction training, most officers are unable to distinguish a barking dog from a dangerous dog because they are incapable of ascertaining the meaning of the dog's body language.<sup>12</sup> As a result, officers frequently shoot canines due to misconceptions of perceived threats, even though there has not been a single documented incident of an officer dying from an altercation with a dog in the line of duty.<sup>13</sup> Despite the lack of threat to officers, police supposedly shoot a dog every ninety-eight minutes.<sup>14</sup>

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as well as Arlington, Austin, and Fort Worth, Texas, are the current departments known to mandate dog interaction training for officers. *Id.*

11. See Raschke, *supra* note 9. Because of the high “costs and time pressures,” few departments provide training on dog communications. *Communicating with Dogs*, COPS, <http://cops.igpa.uillinois.edu/resources/police-dog-encounters> (last visited Sept. 16, 2014). This stands in stark contrast to the U.S. Postal Service, which provides over two hours of initial training, sponsors National Dog Bite Prevention Week focusing on ways to avoid dog bites, and offers additional training with professional dog trainers. See Armentano, *supra* note 10; *Dog Bite Awareness*, U.S. POSTAL SERVICE, <http://about.usps.com/corporate-social-responsibility/dog-bite-awareness.htm> (last visited Sept. 16, 2014); *Fresno Letter Carriers Get Dog Bite Prevention Training*, U.S. POSTAL SERVICE (May 17, 2013), [http://about.usps.com/news/state-releases/ca/2013/ca\\_2013\\_ma0517.htm](http://about.usps.com/news/state-releases/ca/2013/ca_2013_ma0517.htm). For a discussion on the special status of K9s, see *infra* Part II.D.

12. See *Viilo v. City of Milwaukee*, 552 F. Supp. 2d 826, 835 (2008); Radley Balko & J.L. Greene, *Cop Shoots Dog: Untrained Officers Commit ‘Puppicide,’* HUFFINGTON POST, [http://www.huffingtonpost.com/2012/04/27/cop-shoots-dog-puppicide\\_n\\_1446841.html](http://www.huffingtonpost.com/2012/04/27/cop-shoots-dog-puppicide_n_1446841.html) (last updated Apr. 30, 2012, 3:28 PM). For a discussion on the various meanings behind a dog's behavior, see text accompanying notes 202–10.

13. See BATHURST ET AL., *supra* note 8, at 10; PETS ADVISER, *supra* note 8, at 4. For comparison purposes, while no officer has died from a dog encounter in the past fifty years, two officers died from bee stings, one died due to an incident with a cow, and over four thousand officers died by gunfire. PETS ADVISER, *supra* note 8, at 5. Eighty-eight civilians died from dog bites between 2006 and 2008, an average of less than thirty deaths per year. *Report: U.S. Dog Bite Fatalities January 2006 to December 2008*, DOGSBITE.ORG (Apr. 20, 2009), <http://www.dogsbite.org/reports/dogsbite-report-us-dog-bite-fatalities-2006-2008.pdf>. Additionally, people are “573 times more likely to get killed by a car and 3 times as likely to get struck by lightning [than to] be killed by a dog.” BRIAN HARE & VANESSA WOODS, *THE GENIUS OF DOGS: HOW DOGS ARE SMARTER THAN YOU THINK* 213 (2013).

14. Mike Riggs, *Is a Pet Dog Really Killed by a Police Officer Every 98 Minutes?*, CITYLAB (Oct. 24, 2013), <http://www.citylab.com/politics/2013/10/dog-really-killed-police-officer-every-98-minutes/7356/> (citing Ozymandias Media, *Puppicide: A Documentary*, KICKSTARTER, <https://www.kickstarter.com/projects/1850434439/puppicide-a-documentary> (last visited Sept. 16, 2014)). This is a mere estimate garnered from tallying dog-shooting news stories, which activists hope to confirm following receipt of Freedom of Information Act requests. See Ozymandias Media, *supra*.

The animal-loving community commonly refers to the shooting of a canine companion<sup>15</sup> by a law enforcement officer as “puppicide.”<sup>16</sup> Instances of puppicide garner significant media attention,<sup>17</sup> because the public often views dogs as innocent, defenseless creatures.<sup>18</sup> This belief is furthered by the fact that the number of reported dog bite incidents actually decreased as dog populations increased, with only two percent of dog bite victims requiring hospitalization.<sup>19</sup> Despite this fact, one law enforcement officer explained that much of his force seems to employ a dogged “shoot first, think later” mentality<sup>20</sup> in nearly every dog encounter, whether there is reason to fear the animal or whether the dog greets the officer very eagerly.<sup>21</sup> It is estimated that police shoot 5366 dogs each year.<sup>21</sup>

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15. This Comment uses *canine companion* to refer to dogs only within the field of companion animals. For a discussion of companion animals, see *infra* text accompanying notes 31–35.

16. Armentano, *supra* note 10.

17. Charles C.W. Cooke, *Puppicide*, NAT’L REV. ONLINE (Nov. 4, 2013, 4:00 AM), <http://www.nationalreview.com/article/362980/puppicide-charles-c-w-cooke>. Ozymandias Media is currently filming a short documentary titled *Puppicide* to bring more awareness to this epidemic while raising funds for a longer, full-length version to be pitched to television networks. See Ozymandias Media, *supra* note 14. A trailer for the video is available at <http://www.kickstarter.com/projects/1850434439/puppicide-a-documentary>.

18. See Mark Thompson, *Why Focus on Puppicide?*, ORDINARY TIMES (Aug. 5, 2010), <http://ordinary-gentlemen.com/blog/2010/08/05/why-focus-on-puppicide>. However, some breeds commonly associated with frequent attacks, such as pit bulls, do not enjoy this characterization. See Paul Ciampantelli, *How Pit Bulls Got Singled Out as Dangerous Dogs*, PAWNATION (Feb. 8, 2013), <http://www.pawnation.com/2013/02/08/how-pit-bulls-got-singled-out-as-dangerous-dogs/>. Interestingly, one study found that “the most aggressive dog toward strangers and other dogs [is] the dachshund.” HARE & WOODS, *supra* note 13, at 213.

19. See BATHURST ET AL., *supra* note 8, at 7–8. The lack of reported dog bite incidents to public health agencies indicates a decline in dog bites. See *Dogs Becoming Part of the Family: Dog Bite Injuries Decreasing*, NAT’L CANINE RES. COUNCIL (May 19, 2013), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Dogs%20Becoming%20Part%20of%20the%20Family%20-%202013%20Release%20-%20Website.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Dogs%20Becoming%20Part%20of%20the%20Family%20-%202013%20Release%20-%20Website.pdf). This statistic is supported by the steady number of people seeking medical attention for a dog bite, despite substantial increases in both the human and canine populations. *Id.* However, websites advising when to seek medical attention for dog bites and explaining when a bite is severe enough to warrant a doctor’s visit may also play a role in this decline. See *Animal or Human Bite*, CHILD. HOSP. COLO., <http://www.childrenscolorado.org/wellness-safety/is-your-child-sick/animalorhumanbite/animal-or-human-bite-when-to-call> (last visited Sept. 16, 2014).

20. *Law Enforcement Today Article Advises Police Not To Kill Family Dogs*, LIFE WITH DOGS (July 10, 2013), <http://www.lifewithdogs.tv/2013/07/law-enforcement-today-article-advises-police-not-to-kill-family-dogs/>. Officer James P. Gaffney explained that no

Realizing the shortcomings of many police departments, the Community Oriented Policing Services (COPS), an office within the U.S. Department of Justice, released *The Problem of Dog-Related Incidents and Encounters*,<sup>22</sup> a publication setting forth current statistics, training recommendations for police, and steps that dog owners can take to reduce the number of canine companion deaths.<sup>23</sup> The goal of the project was to increase effective training for dog interactions by advocating that lethal force is rarely necessary in situations involving dogs.<sup>24</sup> Suggestions for law enforcement agencies and police departments include attending dog behavior training, increasing access to animal control or similar services, and implementing alternatives to lethal force, such as pepper spray.<sup>25</sup> The Hawthorne Police Department plans to incorporate many of these suggestions in their animal incident policy update currently under review; it is a policy choice they made following Max's shooting.<sup>26</sup>

This Comment advocates that California adopt Colorado's Dog Protection Act or a similar measure mandating police training for dog interactions and implementing specific procedures by law enforcement agencies to reduce dog shootings by police.<sup>27</sup> With the increasing occurrence and coverage of police dog shootings, the need for more adequate law enforcement training on animal encounters is ever present.<sup>28</sup> Additional training, as recently mandated by the Colorado legislature, would minimize police dog shootings.<sup>29</sup> It would also help clarify the applicability of 42 U.S.C. section 1983, the federal statute permitting recovery for the loss of a dog due to a police shooting.<sup>30</sup>

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matter the situation, whether the owner posted a "Beware of Dog" sign or whether a pup happily bounded towards an officer, many grab their guns instead of employing other methods to diffuse the situation. *See id.*

21. Puppicide, [https://scontent-a-sjc.xx.fbcdn.net/hphotos-pm2/1458678\\_575903702464167\\_1323027537\\_n.jpg](https://scontent-a-sjc.xx.fbcdn.net/hphotos-pm2/1458678_575903702464167_1323027537_n.jpg) (last visited Sept. 16, 2014).

22. BATHURST ET AL., *supra* note 8. COPS advances various policies for more uniform police practices and provides resources and funding to state and local agencies. *About COPS*, CMTY. ORIENTED POLICING SERVS., <http://www.cops.usdoj.gov/Default.asp?Item=35> (last visited Sept. 16, 2014).

23. *See* BATHURST ET AL., *supra* note 8, at 1; *infra* Part IV.A.

24. *See* BATHURST ET AL., *supra* note 8, at 29.

25. *See id.* at 31; *infra* note 220 and accompanying text.

26. E-mail from Hawthorne Police Dep't, [hpweb@cityofhawthorne.org](mailto:hpweb@cityofhawthorne.org), to author (Oct. 4, 2013, 02:53PM EST) (on file with author).

27. *See generally* COLO. REV. STAT. § 29-5-112 (2013). For a detailed discussion of the law and its implications, see *infra* Part IV.B.

28. *See* PETS ADVISER, *supra* note 8, at 2.

29. *See* Ivan Moreno, *Colorado Dog Protection Act Aims To Stop Fatal Animal Shootings by Police*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/05/13/colorado-dog-protection-act-animal-shootings\\_n\\_3269117.html](http://www.huffingtonpost.com/2013/05/13/colorado-dog-protection-act-animal-shootings_n_3269117.html) (last updated May 13, 2013, 6:35 PM).

30. Section 1983 reads,

Part II focuses on recent developments in animal law illustrating society's highly empathetic view of dogs. It also outlines the legal classification of dogs as personal property and the constitutional amendment implications when police shoot a dog, highlighting the disparity between the treatment of canine companions and police K9s. Part III discusses 42 U.S.C. section 1983 as an avenue for recovery after a law enforcement officer seizes a canine companion, providing a thorough breakdown of the elements and defenses applicable to an owner's claim and analyzing Rosby's potential for success in such a claim. Part IV provides a detailed overview of current developments, summarizes the U.S. Department of Justice's publication regarding animal encounters, explains Colorado's Dog Protection Act while evaluating its overall purpose and goals as well as its implications for section 1983 liability, and reviews existing California animal welfare laws. Part V advocates for California to adopt a measure increasing police training and protecting canine companions.

## II. THE SOCIAL AND LEGAL STATUS OF COMPANION ANIMALS

### A. *Man's Best Friend for Good Reason*

*A house without either a cat or a dog is the house of a scoundrel.*<sup>31</sup>

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

42 U.S.C. § 1983 (2012).

31. Portuguese Proverb. This Comment will not address any feline companion shootings. Many people believe dogs are better than cats. *See, e.g.,* Draganescu, *10 Reasons Why Dogs Are Better Than Cats*, ANIMALS ZONE (Oct. 28, 2010), <http://www.animals-zone.com/10-reasons-why-dogs-are-better-than-cats>. This notion is also supported by scientific evidence—dogs were domesticated first, bond better with humans due to pack mentality, exhibit greater cognitive capacity and problem solving, and perform more utility tasks. *See* Kate Douglas, *The Great Pet Showdown*, NEW SCIENTIST, Dec. 12–18, 2009, at 32, 32–37. However, some people prefer cats. *See* John Bradshaw, *More than a Feline*, NEW SCIENTIST, Sept. 14, 2013, at 44, 45 (explaining that cats are “easily the world’s most popular pet, outnumbering dogs by as many as three to one”); *see also* United States v. Boyce, 742 F.3d 792, 801 (7th Cir. 2014) (Posner, J., concurring) (“Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, ‘Isn’t he beautiful?’ I answer yes, though I’m a cat person and consider his dog hideous.”).

Modern day society increasingly supports the existence and role of companion animals.<sup>32</sup> Companion animals “live and share their lives with human beings, . . . are responsive to and interact emotionally with their guardians, and . . . are valued as ends in themselves.”<sup>33</sup> In general, companion animals are household pets that rely on humans to fulfill their needs.<sup>34</sup> Although dogs and cats are typical examples of companion animals, the term encompasses any domesticated species kept for companionship.<sup>35</sup>

Since 1988, pet ownership among American households has increased by twelve percent.<sup>36</sup> Over 82.5 million American households share their homes with companion animals,<sup>37</sup> demonstrating that pet adoption is becoming commonplace, as more Americans become pet owners rather than parents.<sup>38</sup> This year, over two-thirds of dog owners classified their pet as a member of the family.<sup>39</sup> One Texas judge explained that this notion is partially due to the fact that dogs exhibit the best human traits

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32. For a discussion of how American law has evolved to support the role of companion animals in our society, see *infra* Part II.B. In North America, humans have cared for and affectionately buried dogs for thousands of years. See HARE & WOODS, *supra* note 13, at 254. However, not all modern day cultures appreciate dogs. See *id.* at 255–57 (listing China, Dominica, the Galapagos Islands, and Pemba Island as places that do not view dogs favorably).

33. Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1059 n.2 (1995).

34. See 510 ILL. COMP. STAT. 70/2.01a (2014); OR. REV. STAT. § 401.977 (2013); *Definition of Companion Animal*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.asPCA.org/about-us/aspca-policy-and-position-statements/definition-of-companion-animal> (last visited Sept. 16, 2014).

35. *Species Suitable To Be Companion Animals*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.asPCA.org/about-us/aspca-policy-and-position-statements/species-suitable-to-be-companion-animals> (last visited Sept. 16, 2014). “Dogs, cats, horses, rabbits, ferrets, birds, guinea pigs and select other small mammals, small reptiles and fish” can be companion animals. *Id.*

36. See *Pet Industry Market Size and Ownership Statistics*, AM. PET PRODUCTS ASS’N, [http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) (last visited Sept. 16, 2014).

37. *Id.* Over half of these households, 56.7%, are home to dogs, the most of any animal listed in the survey. *Id.*

38. Jonathan P. Wilkerson, Comment, A “Purr”fect Amendment: Why Congress Should Amend the Internal Revenue Code To Apply the Charitable Remainder Exception to Pet Trusts, 41 TEX. TECH L. REV. 587, 590 (2009) (citing Wendy G. Turner, *Our New Children: The Surrogate Role of Companion Animals in Women’s Lives*, QUALITATIVE REP. (Mar. 2001), <http://www.nova.edu/ssss/QR/QR6-1/turner.html>); see also HARE & WOODS, *supra* note 13, at 4 (noting that people in the industrialized world are having fewer children but providing increasingly lavish lifestyles for a growing population of pet dogs).

39. *Dogs Becoming Part of the Family: Dog Bite Injuries Decreasing*, *supra* note 19. The overall attachment to pet dogs has also increased, as owners spend more money on them each year. *Id.*

and lack the worst ones.<sup>40</sup> Recent psychological polls also show pets occupy a special place in the eyes of owners, with forty percent of respondents electing to save their pet over a stranger and seventy-three percent of respondents choosing their dog if they could have only one friend.<sup>41</sup> Children also share these preferential views of companion animals, listing pets among the most important people in their lives and declaring their pet as their main confidant.<sup>42</sup>

There are good reasons for this psychological attachment to animal companions.<sup>43</sup> Pet owners experience mental benefits from owning pets, including increased companionship and reduced depression, stress, and anxiety.<sup>44</sup> Dogs naturally calm their owners, easing fears and feelings of

40. Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. App. 1994) (Andell, J., concurring). Judge Andell discussed how dogs are so much more than mere property because they are loyal, trustworthy, courageous, playful, and loving, and not apathetic, petty, or hateful. *Id.* A study conducted by Emory University revealed that dogs have functional homology similar to humans, displaying evidence of love and attachment. See Marie-Louise Olson, *Dogs Have FEELINGS Too! Neuroscientist Reveals Research That Our Canine Friends Have Emotions Just Like Us*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-2447991/Dogs-FEELINGS-Neuroscientist-reveals-research-canine-friends-emotions-just-like-us.html> (last updated Oct. 6, 2013, 8:21 PM). Dogs are capable of feelings at the same level as a child, and neurological tests indicate brain activity similar to humans for positive experiences. See *id.* Studies also show that all dogs are capable of using human gestures, with their level of skill varying based upon the context in which humans give the gesture. See HARE & WOODS, *supra* note 13, at 240–41. To read the study by Emory University researchers, see Gregory S. Berns, et al., *Functional MRI in Awake Unrestrained Dogs*, PLoS ONE (May 11, 2012), <http://www.ccnl.emory.edu/greg/journal.pone.0038027.pdf>.

41. See Stanley Coren, *Is a Dog's Life Worth More than a Person's?*, PSYCHOL. TODAY (Aug. 27, 2013), <http://www.psychologytoday.com/blog/canine-corner/201308/is-dogs-life-worth-more-persons>; Laura Goldman, *Surveys Say Dogs Are Official Family Members*, I LOVE DOGS (June 13, 2011), <http://www.ilovedogs.com/2011/06/surveys-say-dogs-are-official-family-members/#.UiJoWTbktqU>.

42. See *Companion Animals*, ANIMAL WELFARE INST., <https://awionline.org/content/companion-animals-0> (last visited Sept. 16, 2014).

43. See HARE & WOODS, *supra* note 13, at 279. A study revealed that spending as little as thirty minutes with your dog releases increased levels of oxytocin, beta-endorphins, prolactin, phenylethylamine, and dopamine, chemicals that reduce stress, trigger happy feelings, increase pleasure, and promote bonding. See *id.* at 279–80.

44. See JOAN SCHAFFNER & JULIE FERSHTMAN, LITIGATING ANIMAL LAW DISPUTES: A COMPLETE GUIDE FOR LAWYERS 443 (2009); Deborah L. Wells, *Domestic Dogs and Human Health: An Overview*, 12 BRIT. J. HEALTH PSYCHOL. 145, 149 (2007); see also *People v. Tohom*, 969 N.Y.S.2d 123, 132 (App. Div. 2013) (permitting a comfort dog to accompany a witness during testimony eased the witness's psychological and emotional stress); Patrick Mahaney, *The Link Between Pets and Human Health*, PETMD (June 18, 2014), <http://www.petmd.com/blogs/thedailyvet/patrick-mahaney/2014/june/link-between->

distrust,<sup>45</sup> providing “what we all need and want . . . complete acceptance, unconditional love, [and] deep and everlasting friendship and trust.”<sup>46</sup> Canines also decrease symptoms of bipolar and post-traumatic stress disorders by requiring owners to adopt healthy lifestyle changes.<sup>47</sup> These changes include solidifying a routine, actively exercising, and socializing with others.<sup>48</sup> Both for children and adults, dogs provide opportunities to learn about friendship, selflessness, and loyalty.<sup>49</sup>

Owners also experience significant physical health benefits from owning a dog, such as reduced risks of cardiovascular disease, high blood pressure, and high cholesterol levels.<sup>50</sup> Merely petting a canine companion reduces stress, lowers blood pressure, slows heart rate, and relaxes muscles.<sup>51</sup> The *American Journal of Cardiology* published a study showing that after a heart attack, pet owners had a higher rate of survival than nonpet owners.<sup>52</sup> Canine companions also bolster their owners’ immune systems

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pets-and-human-health-31823 (referring to these beneficial psychological effects as “zooeia,” derived from the Greek words for animals and health).

45. Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 179 (2009) (citing Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLE PI (Sept. 2, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php>).

46. Barbara Myers, *Loss, Grief, and Mourning*, ANIMAL LEGAL DEF. FUND, <http://Aldf.org/resources/when-your-companion-animal-has-been-harmed/loss-grief-and-mourning/> (last visited Sept. 16, 2014). A recent study revealed that dogs’ brains comprehend emotions conveyed in human speech, which may explain why canine companions seem to know exactly what their human owners need from them. See Michaelene Doucleff, *How Dogs Read Our Moods: Emotion Detector Found in Fido’s Brain*, NPR (Feb. 21, 2014, 12:40 PM), <http://www.npr.org/blogs/health/2014/02/21/280640267/how-dogs-read-our-moods-emotion-detector-found-in-fidos-brain>.

47. See *The Therapeutic and Health Benefits of Pets*, HELPGUIDE, <http://www.helpguide.org/life/pets.htm> (last visited Sept. 16, 2014). Interacting with and training a future service dog helps veterans overcome post-traumatic stress disorder, assisting in regaining the ability to communicate, form emotional connections, and feel safe and secure. See Chris Colin, *How Dogs Can Help Veterans Overcome PTSD*, SMITHSONIAN (July 2012), <http://www.smithsonianmag.com/science-nature/How-Dogs-Can-Help-Veterans-Overcome-PTSD-160281185.html>.

48. See HELPGUIDE, *supra* note 47.

49. See JOHN GROGAN, *MARLEY AND ME: LIFE AND LOVE WITH THE WORLD’S WORST DOG* (2005) (chronicling the story of the disobedient but lovable dog Marley whose unconditional love changed the lives of his owners). “Such short little lives our pets have to spend with us, and they spend most of it waiting for us to come home each day. It is amazing how much love and laughter they bring into our lives and even how much closer we become with each other because of them.” *Id.* at 282.

50. 147 CONG. REC. S7310 (daily ed. July 9, 2001) (statement of Sen. Robert C. Byrd); see STANLEY COREN, *THE MODERN DOG: A JOYFUL EXPLORATION OF HOW WE LIVE WITH DOGS TODAY* 228 (2008).

51. See COREN, *supra* note 50, at 222; Wells, *supra* note 44, at 147.

52. See COREN, *supra* note 50, at 224; accord Wells, *supra* note 44, at 146 (“Dog owners were roughly 8.6 times more likely to still be alive 1 year after a heart attack than

and lower risks of developing allergies and asthma.<sup>53</sup> Although stories of dogs correctly detecting cancer in their owners were once a phenomenon of sorts, a recent study revealed pet dogs are actually better at discovering cancer than conventional screening methods employed by hospitals.<sup>54</sup> Overall, pets lower the mortality rates of their owners.<sup>55</sup>

Owners experience profound feelings of grief and emotional distress when a beloved pet passes away, and this is especially true for dog owners.<sup>56</sup> As one California appellate court noted, there is “no other domestic animal[ ] to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt” than a dog.<sup>57</sup> Dog owners experience the typical stages of grief following the death of their beloved pets, ranging from pain and sadness to anger

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those who did not own a dog.”). Cat owners, on the other hand, are more likely to die in the first year following a heart attack. Wells, *supra* note 44, at 146–47. The difference between dog and cat owner recovery may be due to the aloofness acting as a stressor instead of a comforting companion. See Karen Allen et al., *Cardiovascular Reactivity and the Presence of Pets, Friends, and Spouses: The Truth About Cats and Dogs*, 64 PSYCHOSOMATIC MED. 727, 728 (2002).

53. See Jeanie Lerche Davis, *5 Ways Pets Can Improve Your Health*, WEBMD, <http://www.webmd.com/hypertension-high-blood-pressure/features/health-benefits-of-pets> (last visited Sept. 16, 2014). A study revealed that infants were approximately half as likely to exhibit allergy symptoms if a dog lived in their home. *Id.*

54. See COREN, *supra* note 50, at 242–44. Cancerous tumors produce an odor that can emanate through sweat or breath, detectable by dogs due to their acute sense of smell. Wells, *supra* note 44, at 147. A dog can discern this scent and provide an alert that something is wrong, resulting in the owner going to the doctor and receiving an official diagnosis. See COREN, *supra* note 50, at 242–44. Dogs can also detect seizures and hypoglycemia. Wells, *supra* note 44, at 148.

55. See *Young v. Savinon*, 492 A.2d 385, 388 (N.J. Super. Ct. App. Div. 1985). *Young* discussed the psychological implications of a “no pets” provision in lease contracts. *Id.* at 387–88. Defendant tenants appealed a verdict against them for violation of a no pets provision enacted after signing the initial lease, but prior to signing the lease renewal. *Id.* at 387. Following review of expert testimony, the court held the provision unreasonable because the pets were not nuisances to other tenants and the defendant tenants would suffer physically and emotionally from a forced abandonment of the pet as opposed to a pet’s natural death. *Id.* at 387–88.

56. See Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and Their Owners*, 2002 WIS. L. REV. 735, 742.

57. *Phillips v. San Luis Obispo Cnty. Dep’t of Animal Regulation*, 228 Cal. Rptr. 101, 103–04 (Ct. App. 1986). The appellate court acknowledged that some human owners develop similar feelings towards their cats. See *id.*

and loneliness.<sup>58</sup> These feelings further illustrate the strong attachment between owners and their dogs.<sup>59</sup>

### *B. Legal Progress Recognizing the Unique Status of Pets*

Since Biblical times and the days of yore, the law has identified animals as items of property.<sup>60</sup> This view carried over into American common law and still prevails in various contexts today.<sup>61</sup> However, American law continues to evolve, encompassing a more compassionate view of companion animals.<sup>62</sup> Nearly every state has animal cruelty laws, protecting dogs and cats from inhumane and vicious treatment.<sup>63</sup> The

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58. See Meyers, *supra* note 46. Dogs seem to experience similar levels of grief, as illustrated by the true story of Hachi, a dog who accompanied his master every day on his walk to the train station and returned in the afternoon to await his arrival. *HACHI: A DOG'S TALE* (Stage 6 Films 2009). After his master died, Hachi faithfully continued to return to the train station every day for nine years to wait for his master. *Id.*

59. See HARE & WOODS, *supra* note 13, at 280, 282 (noting that the bond and feelings between a human and his dog are mutual and dogs prefer to be with humans rather than with other dogs); see also 147 CONG. REC. S7310 (daily ed. July 9, 2001) (statement of Sen. Robert C. Byrd) ("A long, frustrating day at work melts into insignificance—gone—with the healing salve of warm, excited greetings from one's ever faithful, eternally loyal dog."); DAVID FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 15 (2d ed. 2011) ("[A] dog which has lost its master, which has sought him on every road with sorrowful cries, which enters the house agitated, uneasy, which goes down the stairs, up the stairs, from room to room, which at last finds in his study the master it loves, and which shows him its joy by its cries of delight, by its leaps, by its caresses." (quoting Voltaire's response to Rene Descartes)).

60. See Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 534 (1998). At a burial site in Israel dated ten to twelve thousand years old, archeologists discovered a human skeleton buried with its hand around a puppy, the first recorded instance of dog domestication. See HARE & WOODS, *supra* note 13, at 30. But see Jun-Feng Pang et al., *mtDNA Data Indicate a Single Origin for Dogs South of Yangtze River, Less Than 16,300 Years Ago, from Numerous Wolves*, 26 MOLECULAR BIOLOGY & EVOLUTION 2849, 2862–63 (2009) (finding that dogs actually descended from domesticated Chinese wolves between 8500 and 14,000 years ago).

61. Kelch, *supra* note 60, at 534.

62. See Squires-Lee, *supra* note 33, at 1059 n.2, 1098 n.252; see also *Bueckner v. Hamel*, 886 S.W.2d 368, 378 (Tex. App. 1994) (Andell, J., concurring) ("The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.").

63. See, e.g., CAL. PENAL CODE §§ 286.5; 596–600.5 (West 2010); MD. CODE ANN., CRIM. LAW. § 10-604 (LexisNexis Supp. 2010). The definition of animal cruelty differs by state. See, e.g., IOWA CODE ANN. § 717B.8 (West 2003) (making it a misdemeanor to abandon a cat or dog); MINN. STAT. ANN. § 343.40 (West Supp. 2008) (requiring owners to provide dog houses for canines that live outdoors); WASH. REV. CODE ANN. § 16.52.205 (West 2006 & Supp. 2014) (defining animal cruelty beyond merely intentional injury or death to encompass any negligent starvation, dehydration, or suffocation of an animal, and any activity remotely related to sexual activity with an animal). However, it typically describes actions "beyond the boundary of socially/

federal government also has two animal cruelty laws: one governing the slaughter of animals for food and the other limiting scientific procedures performed on animals.<sup>64</sup> Recognizing the special relationship between pets and their owners, Congress banned the dog and cat fur trade and permitted military dog handlers to adopt their retired canine partners.<sup>65</sup> Several states also acknowledge the unique connection shared by owners and companion animals by permitting recovery of noneconomic damages for the loss of a pet.<sup>66</sup> The damages can include recovery for loss of companionship and for mental or emotional distress, but the amount of recovery is limited.<sup>67</sup> Since 1990, almost every state adopted statutory

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culturally acceptable conduct.” FAVRE, *supra* note 59, at 201. Cruel behavior must be condemned or else “[it will] only lead to more deviant behavior.” 147 CONG. REC. S7311 (daily ed. July 9, 2001) (statement of Sen. Robert C. Byrd).

64. See 7 U.S.C. §§ 1901–07 (2012); 7 U.S.C. §§ 2131–59 (2012). For a discussion of the various amendments to these laws throughout the past fifty years, see *Animal Welfare Act*, ANIMAL WELFARE INST., <https://awionline.org/content/animal-welfare-act> (last visited Sept. 16, 2014). In 2008, Representative Conyers proposed a bill requiring the collection and publication of all crimes of animal cruelty, but the bill did not pass. See *Animal Cruelty Statistics Act of 2008*, H.R. 6597, 110th Cong. (2008). In 2009, Senator Byrd delivered a heartfelt speech advocating for the strengthening of the Humane Slaughter Act by requiring additional reporting and documentation of inhumane animal treatment. 147 CONG. REC. S7311 (daily ed. July 9, 2001) (statement of Sen. Byrd). Senator Byrd stated, “Barbaric treatment of helpless, defenseless creatures must not be tolerated even if these animals are being raised for food—and even more so, more so. Such insensitivity is insidious and can spread and is dangerous. Life must be respected and dealt with humanely in a civilized society.” *Id.*

65. See Pintar, *supra* note 56, at 742–43. Previously, military personnel encountered significant red tape when attempting to adopt their former partners. See Kari Huus, *Marine and Dog Bonded by War, Divided by Red Tape*, NBC NEWS Mar. 9, 2012, 4:03 PM, <http://usnews.nbcnews.com/news/2012/03/09/10626495-marine-and-dog-bonded-war-divided-by-red-tape>.

66. See Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 256–58 (2012) (describing existing legislation in Tennessee, Illinois, and Connecticut, which expressly allow non-economic damages for the loss of a pet). In certain cases of veterinary malpractice, extended damages—beyond market value or costs—may be awarded. See William C. Root, “Man’s Best Friend”: Property or Family Member? *An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 441–42 (2002). However, increased damages may have the reverse effect of increasing veterinary costs. See James O. Cook & Adrian Hochstadt, *Non-Economic Damages in Pet Lawsuits*, GP SOLO, July/Aug. 2009, available at [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/petlawsuits.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/petlawsuits.html).

67. See Christopher D. Seps, *Animal Law Evolution: Treating Pets As Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339, 1344. For example, Maryland

provisions permitting the establishment of pet trusts as a means for owners to finance their pet's future care in the event of their death.<sup>68</sup> These laws highlight the legislature and judiciary's willingness to acknowledge and preserve the bond between owners and pets.

Complications arise in determining pet custody when owners divorce.<sup>69</sup> Some courts utilize the same system used to determine child custody, which considers which owner-parent would be best.<sup>70</sup> Other courts consider who purchased the pet and whether the purchaser intended the pet to be a gift.<sup>71</sup> Recently, a New Jersey superior court settled a pet custody dispute by analyzing and comparing the subjective value of the pet to each owner.<sup>72</sup> On rare occasions, a trial court will award "petimony"—

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limits the amount of recovery to \$7500 and Illinois limits recovery to \$25,000. MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (LexisNexis 2006); 510 ILL. COMP. STAT. ANN. 70/16.3 (West 2004 & Supp. 2011).

68. See Shidon Aflatooni, *The Statutory Pet Trust: Recommendations for a New Uniform Law Based on the Past Twenty-One Years*, 18 ANIMAL L. 1, 4 (2011). Although states vary in regards to what type of trust they allow, owners in every state can find a way to finance their pet's future care in the event of their death. See Wilkerson, *supra* note 38, at 591–92. A statutory pet trust allows individuals to create a trust designating the pet as the beneficiary. *Id.* at 591 n.38. In a traditional trust, a human beneficiary cares for the pet. *Id.* An honorary trust exists in states that neither explicitly permit nor void trusts that list pets as beneficiaries. *Id.*

69. See *Akers v. Sellers*, 54 N.E.2d 779, 779 (Ind. App. 1944) (in banc). In *Akers*, a husband and wife owned a Boston terrier, likely in place of having children, and later divorced. *Id.* The presiding judge failed to rule on custody of the dog, so the wife retained possession of it. *Id.* The Indiana appellate court expressed concern as to whether the decision should rest on the best interests of the dog or purely legal title. *Id.* at 779–80.

70. Seps, *supra* note 67, at 1346 (citing Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 221–22 (2003)). *Contra In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984).

71. Seps, *supra* note 67, at 1346 (citing *Akers*, 54 N.E.2d at 779; Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIMONIAL LAW. 1, 4–5 (2006)). A gift requires donative intent, delivery, and acceptance. See, e.g., *Linton v. United States*, 630 F.3d 1211, 1216 (9th Cir. 2011); *Welch v. Dececco*, 101 So.3d 421, 422 (Fla. Dist. Ct. App. 2012); *Ferer v. Aaron Ferer & Sons Co.*, 732 N.W.2d 667, 673 (Neb. 2007).

72. See *Houseman v. Dare*, 966 A.2d 24, 29 (N.J. Super. Ct. App. Div. 2009); see also Eric Kotloff, Note, *All Dogs Go to Heaven . . . Or Divorce Court: New Jersey Un"leashes" a Subjective Value Consideration To Resolve Pet Custody Litigation in Houseman v. Dare*, 55 VILL. L. REV. 447, 465 (2010) (discussing the case). Although the New Jersey Superior Court acknowledged that a pet's value is more inherent than its replacement cost, it declined to apply the "best interests" standard to pets. *Houseman*, 966 A.2d at 28. The best interests standard typically applies in child custody cases and requires a judge to determine which custodial parent would best serve "the child's welfare and interests." Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 283 (1991).

monetary payments to support and provide for the pet—in a divorce proceeding.<sup>73</sup> Thus, despite their classification as mere property, some courts extend a more humanistic view to pets.<sup>74</sup>

Despite this legal progress, federal and state laws continue to consider companion animals as property.<sup>75</sup> Many courts express contempt regarding the classification of companion animals as property, acknowledging that pets are more than just personal property.<sup>76</sup> Some local governments redefined animal owners as pet guardians to highlight the special status and rights extended to cats and dogs.<sup>77</sup> Regarding canine companions, the Wisconsin Supreme Court explained, “Labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property.”<sup>78</sup> Recently, the Texas Supreme Court begrudgingly declined to award emotional distress damages for the loss of a dog, noting that companion animals are “beloved friends and . . . family members. . . . [They] add to our everyday lives.”<sup>79</sup> The court noted that

73. See Huss, *supra* note 70, at 223.

74. See Heidi Stroh, *Puppy Love: Providing for the Legal Protection of Animals when Their Owners Get Divorced*, 2 J. ANIMAL L. & ETHICS 231, 232 (2007) (noting that although many courts across the country base their decisions in pet custody disputes on notions of property law, there are some courts who consider the best interests of the animal when making these determinations).

75. See, e.g., 18 U.S.C. § 43(a)(2)(A) (2012) (stating that personal property includes animals and forbidding the use of postal interstate carriers to purposely damage or interfere with animal enterprises, such as pet stores, zoos, or companies selling animals and animal products); CAL. PENAL CODE § 491 (West 2010) (declaring dogs personal property); Drake v. Dean, 19 Cal. Rptr. 2d 325, 329 (Ct. App. 1993) (explaining that the law recognizes a property value in dogs).

76. See, e.g., Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979). The Corso court explained that dogs are “somewhere in between a person and a piece of personal property. . . . To say it is a piece of personal property and no more is a repudiation of our humaneness” because it returns love and affection, responds to human stimulation, and is capable of displaying emotion which causes a human response. *Id.*

77. See R. Scott Nolen, *Now, It's the Lawyer's Turn*, AM. VETERINARY MED. ASS'N (Mar. 1, 2005), <https://www.avma.org/News/JAVMANews/Pages/050301d.aspx>.

78. Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001). Although the Rabideau court declined to extend damages for intentional infliction of emotional distress after an owner's companion dog was shot by police officers, the court liberally read the pleadings to encompass a claim for property loss. *Id.* at 804.

79. Strickland v. Medlen, 397 S.W.3d 184, 185 (Tex. 2013). In Strickland, animal control captured Avery, a mixed-breed dog, after she escaped from her backyard. *Id.* at 186. When the father went to the shelter to retrieve her, he did not have enough

the value of a pet to its owners is beyond mere market value, but the law unfortunately does not compensate a family for the animal's worth.<sup>80</sup>

### C. Canine Companion Seizures

The seizure of a canine companion may have Fourth Amendment implications. The Fourth Amendment protects citizens from unreasonable searches and seizures by the government, providing protective rights for people and their effects.<sup>81</sup> A seizure occurs when there is meaningful interference with one's possessory interests in its property.<sup>82</sup> So long as

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money to collect her and promised to return. *Id.* Although the shelter placed a "hold for owner" tag on the dog's cage, she was mistakenly euthanized, much to the family's dismay, and they sought to recover for her loss. *Id.* In a heartfelt opinion, with the judges seemingly upset at their duty to follow precedent, the court noted that

canine companions are treated—and treasured—not as mere personal property but as beloved friends and confidants, even family members. . . . No one disputes that a family dog—"in life the firmest friend"—is a treasured companion. . . . We understand that limiting recovery to market (or actual) value seems incommensurate with the emotional harm suffered. . . . Perhaps the Legislature will enact a more generous valuation formula for family pets.

*Id.* at 185, 197–98.

80. *See id.* at 186, 193.

81. U.S. CONST. amend. IV. Personal property, such as a dog, is an effect and falls within the scope of the Fourth Amendment. *See United States v. Place*, 462 U.S. 696, 701 (1983) (holding that a warrantless seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment); *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) (holding that dogs are effects within the meaning of the Fourth Amendment), *overruled in part by Robinson v. Solano Cnty.*, 278 F.3d 1007 (9th Cir. 2002). Although there are also Fifth Amendment implications for deprivation of property, this Comment declines to analyze them as most courts focus solely on Fourth Amendment violations in the context of canine seizures. *See* DAVID S. FAVRE & MURRAY LORING, *ANIMAL LAW* 169 (1983) (noting that the improper taking of private property is a Fifth Amendment individual right most often asserted as a limitation in the animal law area).

82. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Seizing a canine companion may fall within the scope of the Fourteenth Amendment as a due process claim because it is a deprivation of both property and liberty interests. *See Rabon v. City of Seattle*, 34 P.3d 821, 826 (Wash. Ct. App. 2001) (recognizing merit in an owner's claim that because he had a right in his dog akin to a liberty interest, the action to destroy his pet required more careful attention from the court). Nevertheless, because the liberty interest inherent in owning a companion animal is so closely tied to property interest, courts limit due process review because the Fourth Amendment protects all of the owner's interests sufficiently. *See id.*; *see also Andrews v. City of West Branch*, 454 F.3d 914, 916 (8th Cir. 2006) (recognizing that police officer's actions in shooting and killing a dog violates an owner's Fourth Amendment right to be free from unreasonable searches and seizures because a dog is considered property for Fourth Amendment purposes); *Brandon v. Vill. of Maywood*, 157 F. Supp. 2d 917, 931 (N.D. Ill. 2001) (holding that officers firing nineteen rounds at a dog that barked and approached, without knowledge of any prior propensity for violence, was not a deprivation of property because the dog did not die).

the legislature and judiciary consider dogs personal property, destruction of that property is a meaningful interference with another person's property rights, implicating the Fourth Amendment.<sup>83</sup>

However, a warrantless seizure—even that of a canine companion—is tolerable if exigent circumstances exist.<sup>84</sup> Exigencies include an imminent destruction of evidence, a safety emergency, or when officers are in hot pursuit of a suspect.<sup>85</sup> Of these exigent circumstances, the threat to safety is the one most often cited by officers when explaining their warrantless conduct.<sup>86</sup> Courts determine the existence of a safety exigency by looking at the totality of the circumstances from the officer's point of view.<sup>87</sup> The officer's conduct must be reasonable and cannot be a contributing factor to the creation of the exigency.<sup>88</sup> Because of the fact-specific nature of dog incidents and lack of adequate training for police officers, the reasonableness of the officer's conduct in a puppycide case is heavily debated in the courtroom.<sup>89</sup>

Canine companion seizures also implicate deadly force principles.<sup>90</sup> Law enforcement may only use deadly force to subdue human suspects

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83. See, e.g., *Jacobsen*, 466 U.S. at 113; *Fuller*, 36 F.3d at 68 (explaining that destruction of property constitutes a more meaningful Constitutional violation than the mere taking of property). In instances of lawful pet seizures, courts treat the owner's property rights as terminated. *Simpson v. City of Los Angeles*, 253 P.2d 464, 469 (Cal. 1953).

84. See *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 468 (1971).

85. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

86. See *infra* text accompanying notes 113–52.

87. James P. Gaffney, *Who Let the Dogs Out?*, L. ENFORCEMENT TODAY (May 15, 2012), <http://lawenforcementtoday.com/2012/05/15/who-let-the-dogs-out/>; see also *Starks v. State*, 49 S.W.3d 122, 125–26 (Ark. Ct. App. 2001) (finding that although officer was justified in entering the building without a warrant to render emergency aid, his subsequent warrantless search of the home was unlawful because the totality of the circumstances had changed once the injured person was removed from the home); *State v. Mielke*, 653 N.W.2d 316, 319 (Wis. Ct. App. 2002) (measuring an officer's actions against the totality of the circumstances by considering that he was aware of previous reports of domestic violence and that he saw the wife shaking and crying when he entered the home).

88. See *King*, 131 S. Ct. at 1852.

89. See Gaffney, *supra* note 87.

90. See *Grievance Settlement: Deputy Who Shot Retriever Suspended for Just Cause*, 180 Lab. Rel. Rep. (BNA) No. 14, at D-28 (Nov. 6, 2006). In this case, an officer's grievance to protest his suspension after shooting a dog was denied because his conduct violated the policy on deadly force. *Id.* (noting that “the dog's behavior, if compared to a human assailant, was intensive rather than life-threatening”). The officer arrived at a residence to assist a local company in repossessing property, initially petted one of the

in a handful of circumstances: (1) when the suspect poses an immediate safety threat, (2) when the suspect is actively resisting or evading arrest, or (3) when the crime at hand is severe enough to warrant it.<sup>91</sup> Even then, if the force used is disproportionate to the threat, it is unreasonable.<sup>92</sup> This reflects the notion that if a reasonable alternative exists for apprehension, it should be utilized.<sup>93</sup> In contrast, a lower standard commonly applies when subduing animals with deadly force because law enforcement officers may seize canine companions when they pose a safety risk, regardless of the proportionality of the threat to the force used.<sup>94</sup> No matter the situation, officers should use a force continuum whereby they attempt to gain control of the situation first by less intrusive means and then by gradually escalating to more forceful measures, including deadly force, upon necessity.<sup>95</sup>

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two Labrador retrievers present after entering the backyard, but then shot one after it growled and allegedly bit him, although no bite marks were found. *Id.*

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

92. *Tennessee v. Garner*, 471 U.S. 1, 2 (1985) (“Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment’s reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect’s rights under that Amendment must be balanced against the governmental interests in effective law enforcement.”).

93. See *Graham*, 490 U.S. at 395; *Brower v. Cnty. of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989).

94. See *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 704 (1897); Brett Snider, *When Are Police Allowed To Shoot, Kill Dogs?*, FINDLAW (July 2, 2013, 11:17 AM), <http://blogs.findlaw.com/blotter/2013/07/when-are-police-allowed-to-shoot-kill-dogs.html>. But see *Criscuolo v. Grant Cnty.*, 540 F. App’x 562, 564 (9th Cir. 2013) (“[I]t is unreasonable to shoot an unleashed dog—even if it surprises an officer on public property—if it poses no imminent or obvious threat, its owner is in close proximity and desirous of obtaining custody, and deadly force is avoidable.”); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (permitting the use of deadly force against a household pet only when the pet poses an immediate danger and no other option exists). Private citizens may subdue an animal using deadly force when (1) the animal acted in a way that would likely result in harm, (2) the harm would be greater than the subduing of the animal, and (3) the person reasonably believed that destroying the animal was the only option. See *Devincenzi v. Faulkner*, 344 P.2d 322, 325 (Cal. Dist. Ct. App. 1959).

95. See *Position Statements on Law Enforcement Response to Potentially Dangerous Dogs*, AM. SOC’Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statements-on-law-enforcement-response> (last visited Sept. 16, 2014). The force continuum for human interactions involve physical presence, verbal commands, chemical agents, hands-on control, impact weapons, and deadly force. BATHURST ET AL., *supra* note 8, at 31. The force continuum for animal encounters, however, should be physical presence, verbal commands, mechanical repellants, improvised dog repellants, chemical repellants, electronic repellants, physical capture, chemical capture, and deadly force. *Id.* These force continuum steps are explained in greater detail *infra* text accompanying notes 214–24.

## D. Special Status for Police K9s

Unlike their civilian counterparts,<sup>96</sup> police K9s<sup>97</sup> have a special status in the community as a valued member of the police force, enjoying special protection.<sup>98</sup> Each K9 is deemed an officer and receives a human handler-officer, medical treatment, and protective gear, highlighting the unique view and consideration extended to K9s by the police department.<sup>99</sup> K9 handlers hold their K9s in high regard, expressing grave concern for the dog's well-being upon its retirement and immense grief upon its death.<sup>100</sup>

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96. The author uses the term *civilian counterpart* to reference a normal canine companion kept as a pet.

97. To be a certified K9, dogs must pass certification testing in a variety of fields to ensure they can complete the tasks they may encounter while on duty. *See, e.g., Certification Testing Phases*, VA. POLICE CANINE ASS'N, <http://www.vapolicek9.com/certphases.html#obed> (last visited Sept. 16, 2014). K9s can be certified in specialty areas, such as narcotic detection, search and rescue, or patrol utility. *Id.* Most departments utilize K9s' extremely sensitive sense of smell, using the dogs to detect drugs, weapons, bombs, cadavers, and criminals. *See* Ed Grabianowski, *How Police Dogs Work*, HOWSTUFFWORKS, <http://people.howstuffworks.com/police-dog.htm> (last visited Sept. 16, 2014).

98. *See Law Enforcement Today Article Advises Police Not To Kill Family Dogs*, *supra* note 20. Similarly, the United States "treats its war dogs as full members of the military." Chris Hagerman, *The Dogs of the Navy SEALs*, NAVY SEALs (Apr. 4, 2013), <http://navyseals.com/2163/the-dogs-of-the-navy-seals/>. For example, Navy SEAL dogs detect and identify explosives, capture escapees, provide valuable intelligence, parachute jump from planes, and tandem rappel down mountains. *Id.*

99. *See* Gaffney, *supra* note 87.

100. *See* Charlotte Raschke, *Changing of the K9 Guard*, LAW ENFORCEMENT TODAY (Aug. 16, 2012), <http://lawenforcementtoday.com/2012/08/16/changing-of-the-k9-guard/>. Master Deputy Raschke highlights the "fierce love between the handler and the K9" when she laments how to ease K9 Turk's transition to retirement, asking

how do you explain to a dog that he could NEVER be replaced in your heart?  
How do you convey to a dog his importance and his WORTH even in his  
sickness? How do you thank a dog for his unwavering loyalty and reassure  
him that his HOME will be with you ALWAYS?

*Id.*; *see also* Laurie Kamens, *An Emotional Farewell: Police Officers Salute K-9 as He Goes on His 'Final Journey'*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-2334309/An-emotional-farewell-Police-officers-salute-K-9-goes-final-journey.html> (last updated June 1, 2013, 2:08 PM) reporting on the story of K9 Kaiser, renowned for "his 'legendary finds and the countless ass kicking of bad guys,'" who received a final salute on his walk to euthanasia following his diagnosis of severe kidney disease and was guarded by several officers following his burial).

Many state legislatures afford K9s special protections.<sup>101</sup> Oregon classifies any injury or attempt to injure a police animal as a misdemeanor, escalating the crime to a felony if the K9 is seriously injured or killed.<sup>102</sup> Massachusetts provides a fine of up to \$500 or imprisonment of up to two-and-a-half years for anyone who “tortures, torments, beats, kicks, strikes, mutilates, injures, disables, or otherwise mistreats, a dog . . . owned by a police department.”<sup>103</sup>

### III. 28 U.S.C. SECTION 1983 APPLICABILITY TO RECOVERY

#### A. *Elements of the Cause of Action*

Currently, the main avenue for owners to recover damages when police shoot their canine companion is the cause of action provided by 42 U.S.C. section 1983.<sup>104</sup> This federal statute provides a cause of action for deprivation of constitutional rights brought about by official state action.<sup>105</sup> A property owner deprived of their property must prove (1) law enforcement acted under the color of law, (2) the act constituted a seizure, and (3) the seizure was objectively unreasonable.<sup>106</sup>

Section 1983 subjects all local, state, and federal actors to liability.<sup>107</sup> Similar to the warrant exceptions under the Fourth Amendment, it does not subject private individuals who carry out canine companion seizures

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101. See *infra* notes 276–82 and the accompanying text (discussing the special protections afforded to K9s in California).

102. See OR. REV. STAT. §§ 167.337, 167.339 (2013).

103. MASS. GEN. LAWS ANN. ch. 272, § 77A (West Supp. II 2013). Conversely, Iowa classifies nonserious injury to a police K9 as a serious misdemeanor, and serious injury or killing of a K9 as a class D felony. IOWA CODE § 717B.9 (2013).

104. Section 1983 provides, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983 (2012). See e.g., *Viilo v. Eyre*, 547 F.3d 707, 708 (7th Cir. 2008) (suing defendants under the Fourth Amendment via 42 U.S.C. section 1983 after an officer shot and killed plaintiff’s dog); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 208–09 (3d Cir. 2001) (alleging a civil rights violation under 42 U.S.C. section 1983 when an officer intentionally and repeatedly shot plaintiff’s pet without any provocation).

105. 42 U.S.C. § 1983. Official state action must cause the deprivation of rights, even though the statute itself does not directly state causation is a required element to sustain a claim. See Teresa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 693 (2008).

106. Adam P. Karp, *Causes of Action Under 42 U.S.C.A. § 1983 for Death of or Injury to Animal*, in 48 CAUSES OF ACTION 2D 527, 554 (2011) (citing *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989)).

107. See *id.* at 637.

to liability, unless the individual acted in concert with public officials.<sup>108</sup> For example, in *Daskalea v. Washington Humane Society*, the D.C. district court classified the humane society as a state actor acting under the color of state law because it prosecuted violations of animal cruelty laws by obtaining warrants, searching residences, seizing pets, and collecting fines.<sup>109</sup> In most canine companion seizure cases, police officers are state actors acting under the color of state law because they are on duty during the course of the incident, thus satisfying the first element of section 1983.<sup>110</sup>

Owners in canine companion seizure cases must also prove that the act by the state actor constituted a seizure.<sup>111</sup> As previously noted, killing a canine companion is a seizure within the meaning of the Fourth Amendment because it interferes with the owner's possessory interests, establishing the second element.<sup>112</sup>

Owners must also satisfy the requirements of section 1983 by proving the canine companion seizure was unreasonable based on the law enforcement officer's actions.<sup>113</sup> A majority of section 1983 claims hinge

108. See *Daskalea v. Washington Humane Society*, 480 F. Supp. 2d 16, 27–28 (D.D.C. 2007).

109. *Id.* These powers are typical of a state's law enforcement, thereby subjecting the actor to section 1983 liability for acting under the color of state law. *Id.* But see *Sixth Angel Shepherd Rescue Inc. v. West*, 790 F. Supp. 2d 339, 344, 350, 360 (E.D. Pa. 2011) (finding that the Pennsylvania Dog Law Enforcement Bureau was subject to Eleventh Amendment immunity, which deprives federal courts of jurisdiction over lawsuits against nonconsenting state agencies and officials).

110. See Karp, *supra* note 106, at 637 (noting that because section 1983 claims require state action, potentially liable parties include all culpable state actors who caused the constitutional injury, and such individuals typically include animal control and law enforcement officers).

111. See 42 U.S.C. § 1983 (2012); see *supra* notes 81–83 and the accompanying text; see also *City of Akron ex rel. Christman-Resch v. City of Akron*, 159 Ohio App. 3d 673, 2005-Ohio-715, 825 N.E.2d 189, at ¶ 32 (finding that plaintiffs failed to prove deprivation of property rights resulting from the placement of humane traps because cats remaining lawfully on their owners' premises are not in danger of seizure).

112. See *supra* notes 81–83 and the accompanying text; see also *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994) (noting that the killing of a dog is a destruction of property under the Fourth Amendment); *Van Patten v. City of Binghamton*, 137 F. Supp. 2d 98, 107 (N.D.N.Y. 2001) (holding that euthanizing the plaintiff's dog was a seizure within the meaning of the Fourth Amendment).

113. See Karp, *supra* note 106, at 621; see also *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989) (explaining that only an unreasonable seizure will give rise to section 1983 liability); *Stanley v. Kirkpatrick*, 592 S.E.2d 296, 300 (S.C. 2004) (concluding seizure was reasonable because the plaintiff presented no facts showing that the officer

on reasonableness, requiring courts to balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”<sup>114</sup> Reasonableness depends on how law enforcement carried out the seizure.<sup>115</sup> Thus, courts typically consider multiple factors when evaluating reasonableness in canine companion seizures, including: (1) whether the owner was present, (2) whether the officer responded to a call regarding the dog, (3) whether the officer knew of the dog’s violent history, (4) whether the officer followed police protocol in the course of the incident, and (5) whether the officer provoked the dog.<sup>116</sup> The Seventh Circuit held that “the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable.”<sup>117</sup>

Courts often find that killing a pet is unreasonable when the owner is present and the dog poses no immediate threat to safety.<sup>118</sup> For example, in *Criscuolo v. Grant County*, the Ninth Circuit found that an officer acted unreasonably when he shot an unleashed dog moments before its owner retained custody.<sup>119</sup> The court explained that although the dog surprised the officer, it posed no imminent threat that would justify the officer’s actions.<sup>120</sup> In *Brown v. Muhlenberg Township*, a pet dog escaped its backyard and wandered about the neighborhood when an officer confronted

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made a deliberate choice to harm her by removing her dogs or that the City was deliberately indifferent to the officer’s alleged constitutional violations).

114. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

115. *Garner*, 471 U.S. at 8.

116. *Karp*, *supra* note 106, at 621.

117. *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008). In *Viilo*, officers responding to a tip about a felon’s whereabouts arrived at the residence where Bubba, a Labrador retriever-Springer spaniel mix, also resided. *Id.* at 708. Bubba approached the officers, although accounts conflict as to whether Bubba was happily greeting the officers or growling with his teeth bared. *Id.* at 708–09. Officer Carter shot Bubba twice with a shotgun, causing the dog to retreat to nearby bushes, and did not permit the owner to call a veterinarian. *Id.* at 709. When a separate officer coaxed the dog out of the bushes ten minutes later, testimony further conflicts as to whether the dog showed signs of aggression or was merely “limping and whimpering,” before Officer Carter shot Bubba two more times while gathering neighbors yelled at both officers to not shoot. *Id.* Corroborated expert and witness testimony showed that Bubba posed no safety threat to the officers. *Id.* at 712.

118. *See, e.g., Brown v. Muhlenberg Twp.*, 269 F.3d 205, 211 (3d Cir. 2001).

119. *Criscuolo v. Grant Cnty*, 540 F. App’x 562, 564 (9th Cir. 2013). The owner, Criscuolo, allowed his dog to run unleashed in the park when it encountered a police dog assisting a drug bust. Robert Pregulman, *Landmark Decision Holds Former Grant County Deputy Accountable for Killing Dog*, SEATTLE DOG SPOT (Mar. 11, 2014), <http://www.seattledogspot.com/blog/dog-blog/post/landmark-decision-holds-former-grant-county-deputy-accountable-for-killing-dog-in-moses-lake>. The officer kicked Criscuolo’s dog after it sniffed the police dog, then shot the dog three times. *Id.*

120. *Criscuolo*, 540 F. App’x at 564.

it.<sup>121</sup> Despite the fact that the dog tried to retreat, it “did not display any aggressive behavior,” and the owner begged the officer not to shoot, the officer still did.<sup>122</sup> The *Brown* court determined that the officer clearly acted unreasonably, as the dog was not dangerous and the owner was nearby.<sup>123</sup>

The mere presence of vicious dogs,<sup>124</sup> without more, does not constitute a safety emergency.<sup>125</sup> Courts may infer unreasonableness when there is conflicting testimony of witnesses and the officer exhibits prejudice against certain breeds.<sup>126</sup> However, if a dog of an aggressive breed clearly displays a propensity for violence, then courts typically determine that

121. 269 F.3d at 209. The officer was patrolling the neighborhood when he noticed the dog wandering about. *Id.* The dog, Immi, wore “a bright pink, one inch wide collar with many tags: her rabies tag, her microchip tag, a guardian angel tag, an identification tag with [her owner’s] address and telephone number.” *Id.* at 208–09.

122. *Id.* at 209.

123. *Id.* at 211–12.

124. Owners of supposedly aggressive breeds, such as pit bulls and rottweilers, may be subjected to higher premiums, less coverage, dog obedience requirements, or even denied coverage completely by homeowner insurance providers. See James Hirby, *How Will Owning a Pit Bull Affect My Homeowner’s Insurance Rates?*, LAW DICTIONARY, <http://thelawdictionary.org/article/how-will-owning-a-pit-bull-affect-my-homeowners-insurance-rates/> (last visited Sept. 16, 2014). This is likely due to the fact that pit bulls and rottweilers account for seventy-three percent of dog bite fatalities, seeming to support the notion that certain breeds do exhibit a propensity for violence. See Report: *U.S. Dog Bite Fatalities January 2006 to December 2008*, *supra* note 13. But see Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners’ Insurance Companies*, 11 CONN. INS. L.J. 1, 5 (2005) (“The popular notion that Pit Bulls and Rottweilers are inherently more likely to bite is simply not supported by the available statistics.”). Hospital staff rely on the victim, parents, or a witness to determine the breed of dog responsible, but “[n]o one does a DNA test to make sure. . . . A dog that looks nothing like a pit bull may have pit bull genes, while a dog that looks like a pit bull is nothing of the sort.” HARE & WOODS, *supra* note 13, at 211–12. Dog breed identifications are often incorrect, as a 2009 study showed dog adoption agencies misidentified dogs’ breeds two-thirds of the time. *Id.* at 211.

125. See *People v. Riddle*, 630 N.E.2d 141, 146–47 (Ill. App. Ct. 1994) (stating the presence of pit bulls is not enough to create an exigency). But see *Warboys v. Proulx*, 303 F. Supp. 2d 111, 117–18 (D. Conn. 2004) (finding that an unrestrained pit bull charging an officer constitutes an emergency exigency); *Hebert v. Broussard*, 2004-485, p. 4 (La. App. 3 Cir. 11/10/04); 886 So. 2d 666, 670 (La. Ct. App. 2004) (noting that the presence of a rottweiler that pinned a man, escaped a catchpole, and charged an officer is a safety exigency).

126. See *Thurman v. Gorman*, No. 09 C 6017, 2010 WL 5369088, at \*3 (N.D. Ill. Dec. 16, 2010). In *Thurman*, the court found that an officer’s actions may have been unreasonable when he shot a pit bull because he admitted to having a personal policy against pit bulls and witnesses did not corroborate his testimony that the dog charged, attacked, or acted aggressively. See *id.*

an officer's attempts to subdue the canine were reasonable.<sup>127</sup> In *Wethington v. Mann*, a Texas appellate court found that an officer acted reasonably in shooting a canine companion after it attacked a child and then charged at the officer.<sup>128</sup> Similarly, in *Warboys v. Proulx*, a Connecticut district court determined an officer acted reasonably in shooting a ninety- to one-hundred-pound unrestrained pit bull that charged at the officer.<sup>129</sup>

In some instances, even if a dog previously exhibited vicious behavior, there must be an imminent safety concern to justify the shooting of the canine.<sup>130</sup> In *Altman v. City of High Point*, the Fourth Circuit determined animal control officers acted reasonably in several dog shooting incidents.<sup>131</sup> In the first incident, an officer shot a rottweiler, despite the dog retreating, because the dog had already attacked one person that day and had a reputation for being violent and aggressive.<sup>132</sup> In the second incident, a pack of dogs attacked several people in the neighborhood before charging a different officer as he emerged from his vehicle upon arrival at the scene.<sup>133</sup> Although three of the pack dogs were small and did not present a grave threat, their combination with the other dogs and pack mentality led the officer to act reasonably given the circumstances.<sup>134</sup> In the third incident, an officer was on the scene investigating the report of a dog bite.<sup>135</sup> After speaking with the witness and seeing the dog charge firsthand, the officer reasonably shot and killed the dog when it proceeded to charge another officer.<sup>136</sup> In the final incident, an officer responding to a call about an aggressive pit bull mix acted reasonably when he followed a local ordinance that required him to kill the animal

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127. See *Wethington v. Mann*, 172 S.W.3d 146, 151 (Tex. Ct. App. 2005); *Warboys*, 303 F. Supp. 2d at 117–18.

128. *Wethington*, 172 S.W.3d at 149–51.

129. *Warboys*, 303 F. Supp. 2d at 117–18. The *Warboys* court's discussion suggests the facts were ambiguous, as it mentioned the dog may "have approached the officer and his police canine merely to greet and sniff them or to receive a friendly pat on the head." *Id.* at 118. An approaching animal and a charging animal have two distinct demeanors. See *infra* notes 208–13 and accompanying text.

130. See *Cadenhead v. Goodman*, 114 So. 124, 125 (Miss. 1927). A dog with violent propensities can only be killed when "it is roaming at large and endangering the safety of persons." *City of Garland v. White*, 368 S.W.2d 12, 16 (Tex. Civ. App. 1963). In *White*, while the dog had shown vicious behavior and was running loose prior to the police's arriving on scene, the dog was sitting in his owner's car and not presenting a threat at the time the police arrived. *Id.*

131. See *Altman v. City of High Point*, 330 F.3d 194, 205–06 (4th Cir. 2003).

132. See *id.* at 206.

133. See *id.*

134. *Id.* The officer fired his shotgun, killing two of the dogs and scaring away the remaining dogs. *Id.* at 198.

135. See *id.* at 198.

136. See *id.* at 198, 206.

if he could not capture it safely.<sup>137</sup> In this last instance, the court did not prefer the officer's actions, stating that they were not the "best possible responses. . . . [However,] under the circumstances existing at the time . . . their actions were objectively reasonable."<sup>138</sup>

In 2005, the Ninth Circuit adopted a stricter reasonableness standard for canine companion seizures in the context of warranted searches.<sup>139</sup> In *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, officers knew for two weeks that guard dogs were present at the location where they would be executing a warrant, yet planned to simply shoot the dogs if they encountered them.<sup>140</sup> The Ninth Circuit noted, "The officers, in effect, left themselves without any option but to kill the dogs in the event they—quite predictably—attempted to guard the home from invasion."<sup>141</sup> The court held the officers' conduct was unreasonable, suggesting that an officer who knows he will encounter a likely aggressive dog should have a plan to subdue the animal that does not involve discharging a firearm.<sup>142</sup>

In certain situations where a high standard is applied, unreasonableness may be inferred from insufficient training or a longstanding practice that

137. See *id.* at 206. The city ordinance states, "It shall be lawful for the animal control specialist or police officers of the city to tranquilize or kill any dog at large within the city which cannot safely be taken up and impounded." *Id.* at 197 (citing HIGH POINT, N.C., CODE OF ORDINANCES § 12-2-16 (2011), available at <http://library.municode.com/index.aspx?clientId=10918>).

138. *Id.* at 207. Although the majority found the officers' actions to be reasonable, Judge Gregory vehemently dissented from the finding of reasonableness, explaining that the facts presented contradicted the view taken by the majority and the officers did not follow regulations outlining the capture of dangerous animals. See *id.* at 217–18.

139. See *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975–76 (9th Cir. 2005).

140. *Id.* at 976. Officer Nieves, who was tasked with preparing a plan if the officers encountered the dogs, developed a three-part plan that involved (1) hoping the dogs would not appear, (2) poking the dogs with a shotgun if they did appear, and (3) shooting the dogs if they were not scared away by the poking. *Id.*

141. *Id.* at 977.

142. *Id.* at 976. The Supreme Court denied certiorari in this case, suggesting its agreement with the Ninth Circuit's ruling that a dog shooting is a seizure within the meaning of the Fourth Amendment and the officers acted unreasonably and are liable for their actions. See Seann Lenihann, *Colorado Requires Law Enforcement Training in Dog Behavior*, ANIMAL PEOPLE (July 3, 2013), <http://www.animalpeoplenews.org/anp/2013/07/03/colorado-requires-law-enforcement-training-in-dog-behavior/>. By denying certiorari, the Supreme Court effectively upheld this ruling. *Id.*

serves as the official policy of the agency.<sup>143</sup> As the U.S. Supreme Court explained in *City of Canton v. Harris*, inadequate training must equate to “deliberate indifference to the [constitutional] rights of persons with whom the police come into contact.”<sup>144</sup> There must be a direct correlation between the training program and the injury, with the alleged injury caused by lack of training.<sup>145</sup> Thus, courts have refused to hold entire departments responsible for insufficient training in cases where a single officer was poorly trained.<sup>146</sup>

### B. Qualified Immunity Defense to Section 1983 Liability

Even if dog owners prove all three elements required under section 1983, they may be precluded from recovering under the statute due to applicable defenses.<sup>147</sup> Qualified immunity, one of the more commonly

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143. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 661, 694–95 (1978) (holding that the city’s practice of forcing pregnant employees to take unpaid medical leave before their condition required such constituted an official policy). In *Monell*, the court stated that local governing bodies can be sued when an “action that is alleged to be unconstitutional implements or executes a policy . . . promulgated by that body’s officers.” *Id.* at 690.

144. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). See also *Thurston v. N. Las Vegas Police Dep’t*, 552 F. App’x 640, 643 (9th Cir. 2014) (dismissing claims against a police department because a single instance of an officer shooting a dog did not equate to “a formal governmental policy or longstanding practice which constitute[d] the standard operating procedure of the city”).

145. See *Monell*, 436 U.S. at 692 (explaining that Congress intended section 1983 liability to attach only where causation is present).

146. See, e.g., *Harris*, 489 U.S. at 390–91.

147. See generally Karp, *supra* note 106, at 591–636 (describing eighteen specific defenses to section 1983 liability). A possible but rarely asserted defense is the claim that adequate state law remedies exist. See *Heck v. Humphrey*, 512 U.S. 477, 488 (1994). For example, California permits recovery for violations of constitutional rights, stating,

Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages . . .

CAL. CIV. CODE § 52.1(b) (West 2013). Similar to section 1983 claims, plaintiffs must prove a deprivation of their rights; but unlike section 1983 claims, plaintiffs need not prove state action or reasonableness. See CAL. CIV. CODE § 52.1 (West 2013). However, the Supreme Court ruled it is not necessary for a plaintiff to exhaust all state remedies prior to filing a section 1983 suit. See *Heck*, 512 U.S. at 488–89. Nevertheless, a plaintiff could be barred by res judicata if state claims arising from the same incident are filed in state court prior to the filing of the federal claims. See Karp, *supra* note 106, at 601 (“A federal district court may not hear an appeal of a case already litigated in state court. A party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States.” (quoting *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995))).

asserted defenses to property seizure claims, shields law enforcement from liability when they act within their discretionary authority and their conduct does not clearly violate established law.<sup>148</sup> Courts typically analyze qualified immunity claims by deciding if (1) there was a violation of a clearly establish constitutional right and (2) the officer's actions were objectively unreasonable in light of the right.<sup>149</sup> Canine companion owners have a clearly established constitutional right in exercising dominion over their property.<sup>150</sup> Officers frequently claim their actions were reasonable due to an imminent safety threat requiring immediate action and therefore qualified immunity applies.<sup>151</sup> In general, this defense negates the third element of unreasonable action and is typically the issue in section 1983 canine companion shooting cases.<sup>152</sup>

### *C. The Hawthorne Case*

Not long after Max's death, Leon Rosby filed a claim seeking \$25,000 in damages.<sup>153</sup> Although the type of claim Rosby filed is currently unknown, it may not be successful if brought under section 1983.<sup>154</sup>

The first two elements that support a section 1983 claim would easily be met.<sup>155</sup> First, it is clear from the YouTube videos that a police officer

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148. See *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 490 (5th Cir. 2001).

149. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Fultz v. Whittaker*, 261 F. Supp. 2d 767, 773–74 (W.D. Ky. 2003).

150. See *supra* text accompanying notes 75–83. Other examples of constitutional rights include the right to free speech, right to bear arms, and right to freely exercise religion. U.S. CONST. amends. I, II. To own property, such as a dog, is to have exclusive control of something—to be able to use it as one wishes, to sell it, to give it away—a bundle of sticks, so to speak. See Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980).

151. See *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210–11 (3d Cir. 2001). Although many canine companion seizure cases involve officers acting to protect themselves, qualified immunity also applies when officers seize the dog to protect it. See *People v. Chung*, 110 Cal. Rptr. 3d 253, 261 (Ct. App. 2010) (hearing high pitched whining from a dog who was badly injured and not responsive constituted an emergency exigency).

152. For a more detailed discussion of reasonability, see *supra* Part III.A.

153. See Angie Crouch, *Claim Filed in Hawthorne Police Shooting of Dog*, NBC LOS ANGELES, [www.nbclosangeles.com/news/local/Hawthorne-Police-Hand-Dog-Shooting-Case-To-Outside-Agencies-215172541.html](http://www.nbclosangeles.com/news/local/Hawthorne-Police-Hand-Dog-Shooting-Case-To-Outside-Agencies-215172541.html) (last updated Jul. 12, 2013 10:50 AM).

154. At the time this Comment was published, Rosby's complaint was not currently obtainable to discern the type of claims he made following the incident.

155. See *supra* text accompanying notes 105–12.

acting under his discretionary authority shot and killed Max.<sup>156</sup> Second, because Max is a canine companion and personal property in the eyes of the law, the shooting constituted a seizure under the Fourth Amendment.<sup>157</sup> However, the third element, the objective reasonableness of the officer's actions, is debatable.<sup>158</sup>

On the day of the incident, Max trotted alongside Rosby as he filmed a police standoff in the neighborhood.<sup>159</sup> After an inaudible exchange between the police officers and Rosby, Rosby placed Max in the backseat of his car.<sup>160</sup> Max barked incessantly as police placed Rosby under arrest, clearly distraught that his owner left him.<sup>161</sup> Max then jumped out of the car's open window, approached the officers, and an officer drew his gun.<sup>162</sup> Max's stance indicated nervousness and fear, and no growling or snarling can be heard on the videos.<sup>163</sup> When an officer attempted to grab Max's leash, Max jumped and the officer fired on him several times until Max was fully immobilized.<sup>164</sup>

A court applying the factors used to determine reasonableness under section 1983 would likely find the Hawthorne officer's actions were unreasonable.<sup>165</sup> Max's owner, Rosby, was present, and although officers

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156. See *supra* note 5. This satisfies the first two elements of the cause of action: (1) state action and (2) deprivation of a constitutional right. See *supra* text accompanying note 106.

157. See *supra* text accompanying notes 113–14.

158. The videos and newspaper articles on the incident effectively set the stage for determining the fact pattern. See *supra* notes 1–4.

159. *Videos*, *supra* note 5.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*; *infra* text accompanying notes 205–15; see also *Understanding Dog Body Language and Verbal Clues*, DOGSTER, <http://www.dogster.com/dog-training/dog-body-language> (last visited Sept. 16, 2014) (explaining that signs of fear or anxiety include a lowered stance, downward ears, a tucked under tail, and a panting mouth). Max exhibited a lowered head and body, tucked tail, and pushed-back ears, mirroring the images of dog behavior that indicate fear rather than aggression. See *Dog Language*, AFFECTION & PRAISE FAMILY DOG TRAINING, INC., [http://affectionpraise.com/dogstrain/Dog\\_Language.html](http://affectionpraise.com/dogstrain/Dog_Language.html) (last visited Sept. 16, 2014). When the officer grabbed Max's leash, his behavior eventually escalated to fearful aggression, exhibited only when a dog "feel[s] there's no escape." See *Canine Body Language*, AM. SOC'Y FOR PREVENTION CRUELTY TO ANIMALS, <http://www.asPCA.org/pet-care/virtual-pet-behaviorist/dog-behavior/canine-body-language> (last visited Sept. 16, 2014).

164. *Videos*, *supra* note 5.

165. See *supra* text accompanying notes 117–18. "It is clearly established that it is unreasonable to shoot an unleashed dog—even if it surprises an officer on public property—if it poses no imminent or obvious threat, its owner is in close proximity and desirous of obtaining custody, and deadly force is avoidable." *Criscuolo v. Grant Cnty.*, 540 F. App'x 562, 564 (9th Cir. 2013) (citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210–11 (3d Cir. 2001)).

were placing Rosby under arrest, it was not for a violent crime.<sup>166</sup> When Max exited the vehicle, Rosby shouted at him, “No[!]” and begged the officers not to shoot.<sup>167</sup> Because canines typically become upset and protective when their owners are confronted in their presence,<sup>168</sup> the officers should have initially asked Rosby to fully contain his dog within the car whose windows were down.<sup>169</sup>

Although Max was a rottweiler, a breed commonly associated with aggression,<sup>170</sup> he did not show any other signs of aggression leading up to the altercation besides barking.<sup>171</sup> Merely being a member of a particular breed is not enough for an officer to reasonably fire upon a canine.<sup>172</sup> Max did not display a violent propensity, maintaining a generally guarded, frozen position, until the officer tried to grab his leash with his gun drawn and pointed towards him.<sup>173</sup> Although the officer may have had good intentions, a nervous Max likely perceived this act as aggressive, causing him to jump at the officer.<sup>174</sup>

The officer’s attempt to grab the leash could be seen as creating the safety exigency, thus precluding a finding of reasonableness.<sup>175</sup> Many things can provoke a dog depending on temperament, but in this particular situation, by approaching and grabbing the dog’s territory—his leash—combined with the unusual circumstances, the officer likely

166. See Hartung, *supra* note 1.

167. *Id.* “[T]he state [cannot] . . . destroy a pet when it poses no immediate danger and the owner is looking on, obviously desirous of retaining custody.” *Brown*, 269 F.3d at 211.

168. See *People v. Trevathan*, No. D036693, 2002 WL 171236, at \*3 (Cal. Ct. App. Feb. 4, 2002) (“The dog was a leader, was protective of [his owner] as a possession, and attacked . . . to protect his possession that was under attack.” (emphasis omitted)).

169. See BATHURST ET AL., *supra* note 8, at 23. The officer should ensure that the windows are rolled up enough to prevent escape but left down enough to provide sufficient ventilation and that all the doors are closed. *Id.* at 24.

170. See *supra* notes 124–25.

171. See *Videos*, *supra* note 5.

172. See *supra* notes 124–29 and accompanying text.

173. See *infra* text accompanying notes 205–13.

174. For example, grabbing the leash, a common human behavior, was likely threatening to Max. Max exhibited signs of “fear-motivated aggression,” misperceiving the leash grab as an attack and instinctively biting at the officer out of protection. See *Dog Aggression*, HUMANE SOC’Y (June 14, 2013), <http://www.humanesociety.org/animals/dogs/tips/aggression.html>.

175. See *id.*; *supra* text accompanying note 88.

provoked Max's biting response.<sup>176</sup> Like the officers in *San Jose Charter*, the officer arresting Rosby had sufficient time to address the canine situation without rushing Rosby's arrest.<sup>177</sup> Because Max barked incessantly, an officer should have requested that Rosby close the car windows or allow Rosby to calm his dog once Max jumped out.<sup>178</sup> Instead, the officer readily fired, illustrating the "shoot first, think later" mentality often exhibited in law enforcement encounters with animals.<sup>179</sup>

The Hawthorne officers should have been prepared to deal with canine companions they knew were present by using methods other than lethal force.<sup>180</sup> Unfortunately, the officers were not prepared to deal with canine companions due to their lack of training, as evidenced by one of the officers quickly drawing his gun—as opposed to utilizing a baton, mace, or other method to subdue Max<sup>181</sup>—and then firing upon Max four times.<sup>182</sup> To gain control of situations involving dogs, an officer should not aim to kill.<sup>183</sup> By shooting Max four times, the officer's attempt to establish control was excessive.

The Hawthorne officer likely acted unreasonably because the canine incident unfolded as other officers were engaged in a standoff.<sup>184</sup> Although Rosby may have interfered with police actions by filming, the swiftness

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176. See *Assessing Shelter Dogs and Temperament Testing*, PAW RESCUE, [http://www.paw-rescue.org/PAW/PETTIPS/DogTip\\_Temperament.php](http://www.paw-rescue.org/PAW/PETTIPS/DogTip_Temperament.php) (last updated Aug. 17, 2014).

177. See *supra* text accompanying notes 139–42. The amount of time matters because the threat to safety was not imminent. Officers failed to adequately address Max's presence. Thus, by arresting his owner, they triggered his protective and concerned response.

178. See Dawn Turner Trice & Jeremy Gerner, *Are Police Too Quick on the Draw Against Dogs?*, CHI. TRIB. (Aug. 6, 2013), [http://articles.chicagotribune.com/2013-08-06/news/ct-met-cops-shooting-dogs-20130806\\_1\\_police-shootings-police-officer-rottweiler](http://articles.chicagotribune.com/2013-08-06/news/ct-met-cops-shooting-dogs-20130806_1_police-shootings-police-officer-rottweiler). However, Rosby could be blamed for failing to properly contain his canine companion. See GROGAN, *supra* note 49, at 179 ("[T]here are no bad dogs, only inept, clueless owners . . ."). It is also possible the officer felt that allowing Rosby to secure his dog once more, after already giving him the opportunity to do so, would further complicate the situation.

179. See *supra* note 20 and accompanying text.

180. See *supra* text accompanying note 142.

181. See *infra* text accompanying notes 214–23. Perhaps, the officers had a lack of training that led them to inadequately ascertain how to handle dog encounters—specifically confinement—when arresting the owner.

182. See Hamilton, *supra* note 1. Although the first two shots may have been reasonable, the subsequent shots fired after Max was clearly debilitated were probably not. See *Criscuolo v. Grant Cnty.*, 540 F. App'x 562, 564 (9th Cir. 2013).

183. See BATHURST ET AL., *supra* note 8, at 10; see also Trice & Gerner, *supra* note 178 (discussing a proposed bill that would require the Illinois Law Enforcement Training and Standards Board to approve guidelines for training law enforcement officials on nonlethal ways to subdue dogs).

184. See Hamilton, *supra* note 1; Hartung, *supra* note 1. The standoff followed officers' response to an armed robbery. *Id.*

at which the officer fired upon Max is perplexing under the circumstances. Many spectators gathered to watch the standoff, and the officer could have easily shot a bystander by mistake when he fired upon Max.<sup>185</sup> Additionally, the presence of bystanders and the trauma they suffered from witnessing this event<sup>186</sup> runs counter to police officers' duties to protect and serve the public.<sup>187</sup>

The public outrage over the incident also suggests that the officer acted unreasonably in shooting Max.<sup>188</sup> Because the Hawthorne police chief vowed to look extensively into this incident, reevaluate the department's animal encounter protocols, and implement suggestions from the U.S. Department of Justice's publication,<sup>189</sup> it appears the officer's actions were unreasonable given the circumstances.<sup>190</sup>

#### IV. CURRENT DEVELOPMENTS REGARDING ANIMAL WELFARE LAWS

##### A. Canine Encounter Training Suggestions

Although the need for adequate training is readily apparent nationwide, it is an institutional problem that exceeds a single department.<sup>191</sup> In 2011, COPS released a publication titled *The Problem of Dog-Related Incidents and Encounters* to serve as a guide for law enforcement when diffusing

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185. See *Videos*, *supra* note 5; see also BATHURST ET AL., *supra* note 8, at 11 (noting that if an officer shoots a dog, bystanders and other officers can be shot by friendly fire). In *Brandon v. Village of Maywood*, officers shot a bystander in the leg while firing upon a dog. 157 F. Supp. 2d 917, 924 (N.D. Ill. 2001). The court, however, did not permit the bystander to maintain a cause of action for excessive force. *Id.* at 924–25.

186. Several onlookers filmed the altercation, and many bystanders can be heard screaming in the YouTube videos. See *Videos*, *supra* note 5.

187. See *What is the Law Enforcement Oath of Honor?*, INT'L ASS'N CHIEFS POLICE, <http://www.theiacp.org/What-is-the-Law-Enforcement-Oath-of-Honor> (last visited Sept. 16, 2014). Occasionally, officers may do things that are traumatizing or even dangerous for bystanders in order to protect them. See *Scott v. Harris*, 550 U.S. 372, 386 (2007) (holding that an officer's ending of a high-speed car chase, although it endangered bystanders and placed the fleeing driver in danger of death or serious injury, was necessary to preserve the bystanders' safety).

188. See *Mai-Duc*, *supra* note 5.

189. See *supra* notes 22–26 and accompanying text.

190. See July 12, 2013 Press Release, *supra* note 6;

191. See *Armentano*, *supra* note 10.

canine situations that arise in the field.<sup>192</sup> The publication offers a comprehensive compilation of tips to assess a dog's behavior and employ varying force-continuum tactics to diffuse encounters.<sup>193</sup>

COPS acknowledged that police action is not the single contributing factor in unreasonable canine companion seizures.<sup>194</sup> Part of the blame falls on reckless or uneducated owners who are absent, negligent, or fail to control or contain their dogs with leashes or enclosures.<sup>195</sup> However, the lack of proper training for law enforcement officials is the main factor in unreasonable canine companion seizures.<sup>196</sup> Ideally, officers would receive training on animal encounters with actual canines and handlers, as this would reduce fear and instill confidence when encountering a canine in the line of duty.<sup>197</sup>

There are numerous measures that police departments can undertake to minimize fatal dog incidents.<sup>198</sup> Police departments can form strong bonds in the community with "animal control, animal advocates, humane investigators, [and] veterinarians."<sup>199</sup> This bond would help establish a strong foundation of trust within the community and an understanding of the goals for overall canine welfare.<sup>200</sup> Responding officers should also assess the scene for any sign of a dog, which may be indicated by signs, dog toys, barking, or worn paths along property lines.<sup>201</sup> If possible, an officer should alert animal control when a dog's presence is suspected.<sup>202</sup> If this is not possible, an officer can amplify the sounds of his actions to alert a dog to his presence and prevent fear induced responses.<sup>203</sup> Police

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192. See BATHURST ET AL., *supra* note 8; see also Cathy Scott, *New Law Enforcement Resource for Dealing with Dogs*, FORBES (Nov. 7, 2011, 3:42 AM), <http://www.forbes.com/sites/crime/2011/11/07/new-law-enforcement-resource-for-dealing-with-dogs/>.

193. See BATHURST ET AL., *supra* note 8, at 29–34. The publication also recommends that law enforcement departments conduct thorough investigations following an incident. *See id.* at 34–40.

194. *See id.* at 10.

195. *Id.*

196. *See id.* at 10–11.

197. *See Dogs Shot by Cops: Companion Animals and Law Enforcement*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/resources/when-your-companion-animal-has-been-harmed/dogs-shot-by-cops-companion-animals-and-law-enforcement/> (last visited Sept. 16, 2014).

198. *See* PETS ADVISER, *supra* note 8, at 12. There are fourteen different nonlethal methods to subdue canines. *Id.*

199. *See* BATHURST ET AL., *supra* note 8, at 18.

200. *See id.*

201. *See id.* at 22.

202. *Id.* Unfortunately, some instances require split-second decisionmaking when time is of the essence and animal control or similar agencies cannot be called.

203. *See id.* at 22–23. Max's jumping at the leash was likely a fear-induced response to the officer trying to gain control of him. *See supra* notes 173–74 and accompanying text.

should ask owners to enclose a dog if possible, as questioning owners in front of a dog can trigger its protective instincts and lead to an incident.<sup>204</sup>

Officers should assess a canine's behavior once it is determined a canine is present, regardless of the context of the encounter.<sup>205</sup> In many instances, dogs perceive an officer's direct eye contact or approach as a threat, and thus officers should divert their gaze when nearing a canine companion.<sup>206</sup> Officers should not approach injured or frightened dogs, as they are nervous and may not comprehend the officer's intentions to help, perceiving such actions as signs of dominance and aggression.<sup>207</sup> A frightened dog will typically tuck its tail between its legs, or it may whine or bark.<sup>208</sup> A barking or lunging dog, whether restrained or not, communicates a warning to police to stay back.<sup>209</sup> A friendly dog may bound towards officers or chase them, which can be perceived by untrained law enforcement officers as signs of aggression.<sup>210</sup> Friendly dogs will frequently exhibit wiggling, but officers should not assume that tail wagging is evidence of friendliness.<sup>211</sup> They should look for other signs of a dog's discomfort with the situation, such as yawns, furrowed brows, deep stares, and a tensed body.<sup>212</sup> Identifying the dog's sentiment is crucial because scared dogs will seldom bite unless provoked.<sup>213</sup>

Discharging a firearm should be the last method utilized to subdue a canine, as other options on the force continuum can prove extremely

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204. See BATHURST ET AL., *supra* note 8, at 23.

205. See *id.* at 20. Whether an officer is responding to an animal incident or an animal happens to be present in the context of another incident, officers should assess the canine's behavior. See *id.* The COPS publication provides sketches of various dog behaviors and what an officer should do in response. *Id.* at 28.

206. See *id.* at 27.

207. See *id.* at 20–21. If the dog is injured, officers should call animal control instead. See *id.* at 22.

208. See *id.* at 25, 27. Unfortunately, many indications of a dog's fear can also be indications of aggressive fear, so understanding any verbal clues is extremely important in order to determine the best tactical approach to diffusing the situation. *Understanding Dog Body Language and Verbal Clues*, *supra* note 163.

209. See BATHURST ET AL., *supra* note 8, at 21–22.

210. See *id.* at 21.

211. See *id.* at 25; Trice & Gerner, *supra* note 178. For photographs showing friendly dog stances and behavior, see BATHURST ET AL., *supra* note 8, at 24–25.

212. *How To Avoid a Dog Bite*, HUMANE SOCIETY (May 15, 2013), [http://www.humanesociety.org/animals/dogs/tips/avoid\\_dog\\_bites.html#.UnnLJvnks\\_Y](http://www.humanesociety.org/animals/dogs/tips/avoid_dog_bites.html#.UnnLJvnks_Y).

213. See BATHURST ET AL., *supra* note 8, at 21.

useful in canine altercations.<sup>214</sup> Instead, officers should literally give a dog a bone, using treats to establish a relation of trust to show they are not a threat.<sup>215</sup> Officers can also stand sideways looking down with their hands at their side, which shows the dog that no threat or harm is intended.<sup>216</sup> An officer should always use a calm, friendly voice when speaking to a dog.<sup>217</sup>

If a canine displays aggression and a willingness to bite, officers can use batons and umbrellas as bite sticks.<sup>218</sup> Fire extinguishers and air horns can frighten a dog away.<sup>219</sup> Additionally, citronella spray and pepper spray are effective ways to subdue a canine, with the latter method having an almost one hundred percent rate of success.<sup>220</sup>

If the officers must use force, a properly used taser is an effective way to subdue a dog without harming it or bystanders.<sup>221</sup> Tranquilizer guns

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214. See *id.* at 31; *Position Statements on Law Enforcement Response to Potentially Dangerous Dogs*, *supra* note 95.

215. See BATHURST ET AL., *supra* note 8, at 29. This is not recommended for encounters with multiple dogs in the same place. *Id.* Officers should toss the treats underhandedly, as dogs will likely perceive overhand throws as aggressive maneuvers. *Id.*

216. See *id.* Officers should not face forward and maintain eye contact, as it is aggressive towards a dog, or walk away with their back to the dog, as it indicates weakness. See *id.* at 29–30.

217. See *id.* at 30. “[S]aying ‘Sit’ in a pleasant tone and then tossing treats if the dog responds can sometimes distract the dog and defuse the situation.” *Id.*

218. See *id.* at 32. Officers should look to the dog’s behavior to determine if the dog displays fearful aggression, defensive aggression, or offensive aggression, as nonlethal techniques could be effectively used before resorting to “bite-stick” tactics. See *Canine Body Language*, *supra* note 163. Additionally, “[t]hreatening or warning behavior is not necessarily a predictor of biting behavior. . . . There are other reasons that a dog shows upsetting behavior. From the dog’s perspective, the officer often appears as dangerously unpredictable to the dog as the dog appears to the officer.” BATHURST ET AL., *supra* note 8, at 27.

219. See *id.* at 32.

220. See *id.* at 33. Pepper spray is a viable alternative to lethal force with few lasting consequences, as the aerosol chili spray’s effects subside within a few hours. Caitlin Uttley, *How Pepper Spray Works*, HOWSTUFFWORKS, <http://home.howstuffworks.com/home-improvement/household-safety/security/pepper-spray.htm> (last visited Sept. 16, 2014). Private citizens and law enforcement officials both use pepper spray to ward off attackers because the spray irritates the skin, mouth, throat, and lungs of the target, providing time to either escape or gain control of the situation. *Id.* To be effective, the pepper spray’s line of fire must be aimed at the dog’s nose or else it could aggravate a dog further. See Felissa Elfenbein, *Mailmen at the German Postal Service Taking Classes in Dog Defense*, TWO LITTLE CAVALIERS (June 27, 2012), <http://twolittlecavaliers.com/2012/06/mailmen-at-the-german-postal-service-taking-classes-in-dog-defense.html>.

221. See BATHURST ET AL., *supra* note 8, at 12. Although controversial, tasers shoot an electrical current through a person—or dog’s—body, stunning and subduing the aggressor. See Jeff Black, *Are Tasers Too Deadly To Be Called ‘Non-Lethal’?*, NBC NEWS (Sept. 4, 2013), [http://usnews.nbcnews.com/\\_news/2013/09/04/20330077-are-tasers-](http://usnews.nbcnews.com/_news/2013/09/04/20330077-are-tasers-)

can disable an animal from a distance but are ineffective with an already biting dog.<sup>222</sup> With all of these other options available, discharging a firearm should be the last resort for law enforcement officers.<sup>223</sup> Instead, officers should aim to injure, not kill, the canine.<sup>224</sup> If an officer employs lethal force, police departments should conduct a thorough investigation, including interviewing witnesses, gathering evidence, and writing a detailed report.<sup>225</sup>

### B. Colorado's Law and Its Effect on 42 U.S.C. Section 1983

In March 2013, a bipartisan group of Colorado legislators sponsored a bill to adopt measures to prevent dog shootings by law enforcement officers.<sup>226</sup> The bill included several suggestions set forth in the COPS

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too-deadly-to-be-called-non-lethal. Less than one percent of those tasered have died as a result of the electrical shock. *See id.*

222. *See* BATHURST ET AL., *supra* note 8, at 34. The use of a tranquilizer is considered a chemical repellant because the dart contains an anesthetizing drug which, when used effectively, temporarily incapacitates the animal. *See* AM. HUMANE ASS'N, OPERATIONAL GUIDE: CHEMICAL CAPTURE 1 (2010), available at <http://www.americanhumane.org/assets/pdfs/animals/operational-guides/op-guide-chemicalcapture.pdf>. Tranquilizing may not be effective because officers typically do not know the weight of the dog and therefore how much of the drug is necessary. *See id.* It can also be dangerous to the dog, causing physical injury, hyperthermia, hypothermia, capture stress myopathy, respiratory stress, bloat, and circulatory failure, which may lead to death. *Id.* at 9–10.

223. *See* BATHURST ET AL., *supra* note 8, at 30–31.

224. *See id.* at 31 (urging police departments to adopt policies reflecting a force-continuum approach when dealing with potentially dangerous dogs); *see also* Trice & Gorner, *supra* note 178 (noting that police shootings of dogs appear to be unnecessary when animal care organizations report that they have “seen dogs that have been shot in the foot to slow them down, rather than shot in the head”). If officers must use lethal force, they should do so in a humane manner that prevents suffering. *Position Statements on Law Enforcement Response to Potentially Dangerous Dogs*, *supra* note 95. Officers did not humanely incapacitate Rosby's dog, Max, as “he bled in the streets for hours” before dying. *Filmmakers Expose Cops Shooting Dogs Nationwide: Video and Interview*, OC COPWATCH (Nov. 15, 2013), <http://occopwatch.com/video-filmmakers-expose-cops-shooting-dogs-nationwide-video-and-interview/>.

225. *See* BATHURST ET AL., *supra* note 8, at 34, 36–38. Most police departments conduct insufficient, “less than objective” internal reviews of canine companion seizures. *See* PETS ADVISER, *supra* note 8, at 5.

226. S.B. 13-226, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); *UPDATE: Colorado Signs Pro-Animal Bills Into Law*, DOG TIME (May 14, 2013), <http://dogtime.com/update-colorado-signs-pro-animal-bills-into-law.html>. “[I]t is the policy of this state to prevent, whenever possible, the shooting of dogs by local law enforcement officers in the course of performing their official duties.” COLO. REV. STAT. § 29-5-112(2) (2013).

publication, such as lethal force as a last resort, dog behavior training, and the composition of a task force/community team.<sup>227</sup> A month later, the Colorado legislature passed the Dog Protection Act, making Colorado the first state in the nation with such a statute.<sup>228</sup> The law compels police departments to “teach old officers new tricks” by requiring additional training on dog behavior, alternative nonlethal methods to control dogs, and procedures for owners to remove a dog in certain situations.<sup>229</sup> Financially speaking, the cost of implementing the law is expected to be minimal.<sup>230</sup>

The Dog Protection Act created a task force responsible for developing minimum requirements for officer training curriculum.<sup>231</sup> The task force is composed of veterinarians, animal welfare agency representatives, animal behaviorists and experts, animal control officer representatives, sheriffs and law enforcement representatives, and three individuals appointed by the Colorado Bar Association.<sup>232</sup> The task force’s recommendations must be set forth before July 1, 2014, because the mandatory training program must be in place by September 1, 2014, and completed by January 1, 2015.<sup>233</sup> Although the law passed just last year, the task force is currently fulfilling its duties.<sup>234</sup>

The Dog Protection Act’s passage followed a culmination of events sparked by Brittany Moore after her German shepherd was shot and killed

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227. See Colo. S.B. 13-226; BATHURST ET AL., *supra* note 8, at 17, 34.

228. See Moreno, *supra* note 29.

229. COLO. REV. STAT. § 29-5-112(4).

230. SB13-226 *Final Fiscal Note*, COLO. LEGIS. COUNCIL STAFF (July 17, 2013), [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/F6A67EF8FEE8F10787257AFD005A97C8?Open&file=SB226\\_fl.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/F6A67EF8FEE8F10787257AFD005A97C8?Open&file=SB226_fl.pdf). The Colorado legislature did not appropriate any funds to implement the law. *Id.* The expected costs are limited to (1) assembling and administering the task force and (2) possible overtime pay for officers and support staff for the three-hour training component. *Id.*

231. COLO. REV. STAT. § 29-5-112(5)(d)(I). The task force must develop video or web-based training. COLO. REV. STAT. § 29-5-112(5)(d)(III). However, because there are provisions in the Act that still allow officers to use their discretion, many wonder if anything will change. *Colorado’s Dog Protection Act is the First in US*, LIFE WITH DOGS (Aug. 30, 2013), <http://www.lifewithdogs.tv/2013/08/colorados-dog-protection-act-is-the-first-in-us/>.

232. COLO. REV. STAT. § 29-5-112(5)(b)(I)(A)–(H). The Colorado Bar Association must appoint two attorneys with experience in animal law and one person who owns or owned a dog shot by law enforcement. *Id.* § 29-5-112(5)(b)(I)(H).

233. COLO. REV. STAT. § 29-5-112(4)(a)(II)(B), (5)(d), (6)(a)(I).

234. See John Davidson, *Colorado Dog Protection Task Force Begins Work on Training for Law Officers*, EXAMINER (Sept. 11, 2013), <http://www.examiner.com/article/colorado-dog-protection-task-force-begins-work-on-training-for-law-officers>. The law mandated the task force meet by September 1, 2013. COLO. REV. STAT. § 29-5-112(5)(c)(I).

by police.<sup>235</sup> Moore initially contacted the police regarding a threatening phone call she received, but when an officer arrived on the scene and her dog Ava approached him, the officer walked backwards, fired his gun, and killed the dog.<sup>236</sup> Moore sued the town of Erie, Colorado, under section 1983 for violating her Fourth Amendment right to property and for the police department's failure "to instruct, supervise, control, equip, train, or discipline police officers in their duties to refrain from unlawfully killing dogs."<sup>237</sup> These claims survived summary judgment and her case remains in litigation.<sup>238</sup> The town may very well end up paying tens to hundreds of thousands of dollars at the close of the case as compensation for the seizure of her canine companion, which amounted to a deprivation of her constitutional right to property.<sup>239</sup>

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235. Peter Marcus, *Committee Gives Unanimous Wags to Dog Protection Act*, COLO. STATESMAN (Apr. 5, 2013), <http://www.coloradostatesman.com/content/994086-committee-gives-unanimous-wags-dog-protection-act>.

236. *Moore v. Town of Erie*, No. 12-cv-02497-CMA-MJW, 2013 WL 3786646, at \*1 (D. Colo. July 19, 2013). Ava, a German shepherd, allegedly had a rawhide bone in her mouth and was facing her owner when the officer shot her. Mitchell Byars, *Owner Suing Town of Erie, Police Officer Over Fatal 2011 Dog Shooting*, DAILY CAMERA (July 5, 2013, 6:56 AM), [http://www.dailycamera.com/ci\\_21010869/owner-suing-erie-police-over-fatal-dog-shooting?IADID=Search-www.dailycamera.com-www.dailycamera.com/](http://www.dailycamera.com/ci_21010869/owner-suing-erie-police-over-fatal-dog-shooting?IADID=Search-www.dailycamera.com-www.dailycamera.com/).

237. *Moore*, 2013 WL 3786646, at \*1.

238. Plaintiff Moore initially alleged four causes of action against Defendants: (1) violation of her Fourth Amendment rights, (2) failure to instruct, supervise, control, and train police officers to refrain from unlawfully killing dogs, (3) intentional infliction of emotion distress, and (4) willful and wanton negligence. *Id.* at \*1. The district court dismissed plaintiff's third and fourth claims for relief as barred by the one-year statute of limitations. *Id.* at \*6.

239. See Martha Neil, *\$65K Award in Dog's Demise May Be Largest Ever in Colo. for Death of Pet*, A.B.A. J. (Apr. 19, 2012, 1:35 PM), [http://www.abajournal.com/new.s/article/65k\\_award\\_in\\_dogs\\_demise\\_may\\_be\\_largest\\_ever\\_in\\_colo\\_for\\_death\\_of\\_pet/](http://www.abajournal.com/new.s/article/65k_award_in_dogs_demise_may_be_largest_ever_in_colo_for_death_of_pet/) (reporting that Colorado allows owners to recover for negligent infliction of emotional distress for the death of their pet and a court awarded \$65,000 in April 2012 on such a claim). Unfortunately, Moore's claim for intentional infliction of emotional distress was time-barred. See *Moore*, 2013 WL 3786646, at \*6. Nevertheless, many cases regarding police killing canine companions have settled outside of the courtroom for large sums of money. See Lenihann, *supra* note 142. A Chicago federal jury awarded \$330,000 for the shooting death of a black lab. *Id.* The city of Des Moines, Washington, settled a similar dog shooting case for \$51,000. See Jennifer Sullivan, *Des Moines To Pay \$51,000 over Fatal Shooting of Dog*, SEATTLE TIMES, [http://seattletimes.com/html/localnews/2020398702\\_rosiesettlementxml.html](http://seattletimes.com/html/localnews/2020398702_rosiesettlementxml.html) (last modified Feb. 21, 2013, 5:54 AM). In La Grange, Missouri, the city settled a police dog shooting case for \$50,000. See *Case Involving Police Officer Who Shot, Killed Man's Dog in LaGrange, Mo., Settled*, ST. LOUIS POST-DISPATCH (May 1, 2013, 8:35 PM), <http://www.stltoday.com/news/local/crime-and-courts/case-involving-police-officer-who-shot-killed-man-s-dog/article9d52f191-c>

Sheriff Grayson Robinson of Arapahoe County, Colorado, noted that the Dog Protection Act “presents [a] unique opportunity for government to avoid or prevent any potential future liability.”<sup>240</sup> In the context of section 1983 liability, the implications of the Dog Protection Act are threefold. First, section 1983 litigation may be reduced because the Act attempts to minimize the number of dog shooting incidents.<sup>241</sup> The new training regimens and procedures aim to “eliminate or reduce the number of dogs shot in the context of law enforcement encounters.”<sup>242</sup> Assuming the law achieves its goal, fewer canine companion shootings would result.<sup>243</sup>

Second, the purpose of the Dog Protection Act naturally lends itself to reduced section 1983 liability.<sup>244</sup> As previously noted, the U.S. Supreme Court held a supervising authority may be liable under section 1983 for inadequate police training “only where the failure to train amounts to deliberate indifference to the [constitutional] rights of persons with whom the police come into contact.”<sup>245</sup> Colorado’s Dog Protection Act mandates training and acknowledges the constitutional rights of dog owners.<sup>246</sup> By setting forth requirements for dog behavior recognition and nonlethal substitutes for confrontations, the Colorado legislature is essentially preventing liability arising from an inadequate training program.<sup>247</sup> Once the training program is in place and functioning properly, Colorado will likely not be found liable for an unsatisfactorily trained officer or a negligently administered training program.<sup>248</sup>

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718-5633-a285-00ada171bc16.html. Minneapolis police paid \$225,000 in a settlement for shooting a family dog. See Matt McKinney, *April 6: Family Wins \$225,000 Settlement Against Minneapolis Police*, STAR TRIB. (June 1, 2013, 9:41 PM), <http://www.startribune.com/local/minneapolis/201693541.html>.

240. See Marcus, *supra* note 235.

241. See COLO. REV. STAT. § 29-5-112(2) (2013) (declaring that the Act’s purpose is to prevent police dog shootings).

242. S.B. 13-226, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013).

243. *Id.*

244. Fewer shootings would result in fewer instances of litigation.

245. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

246. See COLO. REV. STAT. § 29-5-112(2)(a), (2)(b)(II)(3)(b) (mandating additional training, allowing dog owners the opportunity to remove the canine in specific situations, and defining dog owner as one “having financial or property interest in . . . a dog”).

247. Colorado successfully circumvents the possibility of inferred section 1983 liability because it acknowledged the need for more or different training and took steps to meet this need. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985) (stating that an organization can be held liable under section 1983 when its policy constitutes the “moving force of the constitutional violation” (quoting *Polk County v. Dodson*, 454 U.S. 312, 326 (1981))).

248. See *Harris*, 489 U.S. at 391 (noting that for section 1983 liability to attach, the training program deficiency must be closely related to the ultimate injury).

Third, the Dog Protection Act also creates a more concrete standard for reasonableness.<sup>249</sup> The mandated training on nonlethal alternatives and allowance for removal of the dog by the owner ensures that employing deadly force is a last resort.<sup>250</sup> Although officers are still permitted to use their discretion to ensure public safety, especially for calls regarding violent behavior, the exigency exception applies only when officers acted reasonably given the totality of circumstances.<sup>251</sup> Generally, courts will be able to determine reasonableness by assessing whether an officer followed the new protocols set forth by the task force.

Thus, the Dog Protection Act is a win for dog owners and law enforcement alike. If implemented effectively, police officers will shoot fewer dogs, law enforcement agencies will have less section 1983 liability, and parties litigating section 1983 claims for canine companion seizures will have a clearer standard of reasonableness.<sup>252</sup>

### C. Existing California Legislation

California is renowned as one of the best places for both dogs and owners,<sup>253</sup> enacting numerous legislative measures to protect companion animals.<sup>254</sup> California takes a staunch position advocating appropriate

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249. Abiding by these requirements would render an officer's behavior reasonable, and failing to do so would render the officer's actions unreasonable.

250. See *supra* text accompanying notes 227–29.

251. See, e.g., *Colorado's Dog Protection Act is the First in US*, *supra* note 231; Trice & Gorner, *supra* note 178; *supra* text accompanying notes 151–52.

252. See *supra* text accompanying notes 240–51.

253. See *Has California Gone to the Dogs?*, SEE CAL., <http://www.seecalifornia.com/dogs/california-dogs.html> (last visited Sept. 16, 2014). Pet communicators and psychics are some of the services offered to canine companion owners. See *id.* Two Californian cities, San Diego and San Francisco, currently make the top ten list of the most dog friendly cities. See *Top 10 Dog-Friendly Cities 2013*, RENT.COM (Oct. 2, 2013), <http://www.rent.com/blog/top-10-dog-friendly-cities-2013/>. The California Department of Parks and Recreation even maintains a webpage for pet owners visiting state parks, listing best practices for owners and highlighting the most dog friendly parks in the state. See *Visiting Parks with Your Dog*, CAL. DEP'T PARKS & RECREATION, [http://www.parks.ca.gov/?page\\_id=21305](http://www.parks.ca.gov/?page_id=21305) (last visited Sept. 16, 2014). California has over one thousand attractions for pets and their owners, from parks to beaches to hiking trails to shopping destinations. See *Dog Friendly Attractions in California*, BRINGFIDO, <http://www.bringfido.com/attraction/state/california/> (last visited Sept. 16, 2014).

254. See Carol J. Williams, *California Leads U.S. in Animal Protection*, *Human Society Says*, LOS ANGELES TIMES (Feb. 8, 2010), <http://articles.latimes.com/2010/feb/08/local/la-me-animal-laws9-2010feb09> (applauding California for having the strongest animal protection laws in the country, such as outlawing animal product testing,

care of animals by pet stores.<sup>255</sup> Pet stores must provide animals with adequate space to move about or relax with “limbs outstretched” and a resting board if the housing consists of a wire floor.<sup>256</sup> They must also provide animals with “objects or activities . . . that stimulate the animal and promote the animal’s well-being” and allow for “adequate socialization and exercise.”<sup>257</sup>

California also adopted specific statutes regarding owners’ care of canines.<sup>258</sup> The state does not allow dog owners to tether or chain their

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permitting alternatives to student animal dissection, and prohibiting animal fighting); *see also* Kristina N. Lotz, *The Puppy Selling Ban Debate*, CESAR’S WAY, <http://www.cesarsway.com/dog-rescue/adoption-tips/The-Puppy-Selling-Ban-Debate> (last visited Sept. 16, 2014) (listing various California cities that enacted bans on puppy mills). Puppy mills are for-profit businesses that provide deplorable care for dogs, keeping them in small cages, cutting their vocal cords, performing operations without a veterinarian present, and breeding animals to exhaustion. HARE & WOODS, *supra* note 13, at 260–61. A former rescue worker raiding a puppy mill described it gruesomely:

Kennels have plenty of dogs in them but no food and water. They are filthy from one end to another; the concrete is covered with excrement. There are dead dogs here, some only skeletons, some so badly decayed that only hair and skeletal forms remain. Most of the dogs have missing pieces of ears, eaten away by flies. At this mill[,] a mother dog is found with a litter of pups. The windows and doors are shut, there is no water, and it is 98 degrees. Two of the pups are dead.

*Id.* at 261.

255. *See* CAL. HEALTH & SAFETY CODE § 122125 (West 2012) (defining “pet dealers” as anyone engaged in the sale of dogs or cats); CAL. HEALTH & SAFETY CODE § 122135 (West 2012) (requiring the separation of sick dogs from healthy dogs); CAL. HEALTH & SAFETY CODE § 122210 (West 2012) (mandating pet dealers have routine veterinary examinations for their animals). A new owner of a sick dog is permitted to (1) return the dog for a full refund and veterinarian fees, (2) return the dog for a replacement dog and veterinarian fees, or (3) keep the dog and receive veterinarian fees up to 150% of the original purchase price of the dog. *See* CAL. HEALTH & SAFETY CODE § 122190 (West 2012). Compensation options are only available if the dog became sick within fifteen days of purchase. *Id.* Pet dealers who knowingly sell ill dogs may be fined anywhere from \$1000 to \$10,000 and prohibited from selling dogs for various time frames depending on the offense. *See* CAL. HEALTH & SAFETY CODE § 122205 (West 2012). Nearly half of the U.S. municipalities that ban pet stores from selling animals are located in California. Janet L. Kaminski Leduc, *Municipalities That Ban Pet Store Sales of Dogs*, CONN. GENERAL ASSEMBLY (Aug. 20, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0328.htm> (listing thirteen California municipalities out of twenty-eight total municipalities). One municipality, San Diego, provides an exception if the store obtained the dog, cat, or rabbit from an animal shelter, animal control agency, humane society, or nonprofit rescue organization. SAN DIEGO, CAL., MUNICIPAL CODE ch. 4, art. 2, div. 7, § 42.0706, *available at* <http://docs.sandiego.gov/municode/MuniCodeChapter04/Ch04Art02Division07.pdf>.

256. CAL. HEALTH & SAFETY CODE §§ 122350(a), 122352(a) (West 2012).

257. CAL. HEALTH & SAFETY CODE §§ 122065(e), 122350(d) (West 2012).

258. *See* Hazel Lodevico-To’o, *Glendora Enforces Strict Dog Laws*, PATCH (Oct. 17, 2011, 5:39 PM), <http://glendora.patch.com/groups/police-and-fire/p/glendora-enforces->

animal using a choke collar or to keep the dog tethered for a prolonged period of time.<sup>259</sup> Dog owners must license their pets every two years and vaccinate them for rabies no more than once a year.<sup>260</sup> Depending on the location of the owner's residence and the breed of the canine, the local government may require the dog be spayed or neutered.<sup>261</sup> Additionally, the California legislature outlined ordinances that local public agencies may adopt regarding appropriate dog food, shelter, and general care related to keeping animals strong, healthy, and protected.<sup>262</sup> Failure to provide appropriate care to a dog is punishable as a misdemeanor,<sup>263</sup> as is an owner's willful abandonment of a companion

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strict-dog-ownership-codes (reporting one California city's strict enforcement of leash and animal care laws).

259. CAL. HEALTH & SAFETY CODE § 122335(c) (West 2012). Additionally, owners cannot permit their dogs to run at large on farms without consent of the owner of the farm. CAL. FOOD & AGRIC. CODE § 30955 (West Supp. 2014).

260. CAL. HEALTH & SAFETY CODE § 121690 (West 2012). An exception to rabies vaccination is permitted only if a veterinarian determines the vaccination would endanger the dog's life. *Id.* However, local agencies vary greatly in their enforcement of the dog-licensing law. See Cynthia Hubert, *California Bill Aims To Boost Dog Licensing*, SACRAMENTO BEE (Oct. 2, 2011, 10:54 AM), <http://www.sacbee.com/2011/10/02/3953515/california-bill-aims-to-boost.html#storylink=cpy>.

261. See CAL. HEALTH & SAFETY CODE § 122331(a) (West 2012) ("Cities and counties may enact dog breed-specific ordinances pertaining only to mandatory spay or neuter programs and breeding requirements, provided that no specific dog breed, or mixed dog breed, shall be declared potentially dangerous or vicious under those ordinances."). These provisions are enforced when animal control agencies or shelters impound a dog that has not been spayed or neutered. See CAL. FOOD & AGRIC. CODE § 30804.7 (West 2001 & Supp. 2014). Cities and counties enacting such dog breed-specific ordinances are required to measure the effects of such a law by gathering information on dog bites such as severity, frequency, and dog breeds involved in the bites. See CAL. HEALTH & SAFETY CODE § 122331(b) (West 2012).

262. See CAL. HEALTH & SAFETY CODE § 121918 (West 2012). In San Diego, for example, humane care to animals includes providing an annual examination by a veterinarian and forgoing leaving a pet unattended in a car on a warm day. *Animal Related Laws*, COUNTY OF SAN DIEGO, <http://www.sddac.com/laws.asp> (last visited Sept. 16, 2014).

263. CAL. PENAL CODE § 597.1 (West 2010). The punishment is a fine ranging from \$250 to \$1000. *Id.*

animal.<sup>264</sup> These statutes serve to eliminate the irresponsible owner as a contributing factor for dog behavior incidents.<sup>265</sup>

California also embraces a strong position regarding animal welfare generally.<sup>266</sup> Any nonprofit animal welfare organization whose primary purpose is to prevent abuse, neglect, or exploitation of animals qualifies for tax-exempt status, which encourages the creation and sustenance of organizations aimed at helping pets.<sup>267</sup> Additionally, pet owners can establish a trust to provide for their dog's care in the event of the owner's death.<sup>268</sup> It is also a felony to maliciously or intentionally kill, mutilate, torture, or wound an animal,<sup>269</sup> and it is a misdemeanor to consume domesticated pets as food.<sup>270</sup> These statutes exist to protect animals no matter the status of their owner, whether they are neglectful, responsible, or nonexistent.<sup>271</sup>

Further, California has numerous statutes that protect owner-pet relationships. Before declaring a dog vicious, an established process must be followed and an owner must be given an opportunity to be heard and to appeal, ensuring that a judge's final determination of a canine companion's vicious propensities is just.<sup>272</sup> Common interest developments,

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264. CAL. PENAL CODE § 597s (West 2010). Technically, this statute applies to any willful abandonment of any animal, not solely companion animals, unless the caretaker is a person who rehabilitates and releases "native Californian wildlife." *Id.* Abandonment is "an intentional act of cruelty" because the animal will likely suffer harm following the act of abandonment. FAVRE, *supra* note 59, at 229.

265. See BATHURST ET AL., *supra* note 8, at 9. Several factors that trigger dog aggression, such as lack of supervision and restraint, reproductive status, and abuse, are combatted by these laws. *Id.*

266. See Williams, *supra* note 254.

267. See CAL. REV. & TAX CODE § 6010.40 (West 1998).

268. See CAL. PROB. CODE § 15212 (West Supp. 2014). For more information about animal trusts, see *supra* note 68.

269. CAL. PENAL CODE § 597(a) (West 2010). Depending on the severity of the crime, an offender may only be charged with a misdemeanor. CAL. PENAL CODE § 597(d) (West 2010). Courts can award exemplary damages for injuries to pets when the offender acts "in disregard of humanity." CAL. CIV. CODE § 3340 (West 2013). Determining whether an act is malicious "requires a consideration not of the effect of the act on an animal but upon the motivations of the actor." FAVRE, *supra* note 59, at 205.

270. CAL. PENAL CODE § 598b (West 2010). However, exceptions to this statute exist in the event of game hunting or certain scientific experiments. See CAL. PENAL CODE § 599c (West 2010).

271. See Williams, *supra* note 254.

272. See CAL. FOOD & AGRIC. CODE § 31622 (West 2001); see also *Dangerous Dog Laws*, DOG LAW, [http://doglaw.hugpug.com/doglaw\\_090.html](http://doglaw.hugpug.com/doglaw_090.html) (last visited Sept. 16, 2014) (outlining the general process of having a dog declared dangerous). However, the owner cannot appeal the decision of the court of appeal, which reviews the case de novo. CAL. FOOD & AGRIC. CODE § 31622 (West 2001). A dog acting to protect a human in its close proximity, against a willful tortfeasor, or within his duties as a hunting, herding, or predator control dog shall not be declared vicious. CAL. FOOD & AGRIC. CODE § 31626

such as apartment complexes, cannot prohibit owners from keeping any pet within the development.<sup>273</sup> Dog owners can recover exemplary damages from anyone committing wrongful injuries to their pet.<sup>274</sup> Also, it is a crime to steal another person's dog.<sup>275</sup> These statutes indicate California's acknowledgment of the special relationship between an owner and a dog and the desire to protect that relationship from outside interference.

There are even more protections in place for police dogs.<sup>276</sup> Any willful or malicious harm to K9s used by law enforcement is a public offense.<sup>277</sup> If the K9 is merely wounded, an offender is imprisoned for a minimum

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(West 2001). The term *vicious* does not refer to a dog's temperament, but rather their likeliness of hurting someone, "even if by being overly friendly." *Dog Owner Liability*, DOG LAW, [http://doglaw.hugpug.com/doglaw\\_081.html](http://doglaw.hugpug.com/doglaw_081.html) (last visited Sept. 16, 2014). If a court declares a dog vicious, animal control may seize and euthanize the dog, or the owner may be subjected to stricter standards regarding animal ownership. *See* CAL. FOOD & AGRIC. CODE §§ 31642, 31645 (West 2001).

273. CAL. CIV. CODE § 4715(a) (West Supp. 2014). A "common interest development" is defined as a community apartment project, a condominium project, a planned development, or a stock cooperative. CAL. CIV. CODE § 4100 (West Supp. 2014). Although developments can limit the number of pets, such rules cannot retroactively apply to existing owners. CAL. CIV. CODE § 4715(c) (West Supp. 2014).

274. CAL. CIV. CODE § 3340 (West 2013). Animals held as property encompass any companion animal, including dogs. *See* CAL. CIV. CODE § 4715 (West Supp. 2014) (defining a "pet" as "any domesticated bird, cat, dog, aquatic animal kept within an aquarium"); CAL. PENAL CODE § 491 (West 2010) (declaring "dogs are personal property"). This code section also permits owners to recover reasonable and necessary costs incurred for treatment related to an injury caused by another, even if such costs exceed the animal's market value. *See* *Martinez v. Robledo*, 147 Cal. Rptr. 3d 921, 926–27 (Ct. App. 2012).

275. CAL. PENAL CODE § 487e (West 2010) ("Every person who feloniously steals, takes, or carries away a dog of another which is of a value exceeding nine hundred fifty dollars (\$950) is guilty of grand theft."); CAL. PENAL CODE § 487f (West 2010) ("Every person who feloniously steals, takes, or carries away a dog of another which is of a value not exceeding nine hundred fifty dollars (\$950) is guilty of petty theft."). Grand theft is punishable by up to one-year imprisonment, and petty theft is punishable by up to six months' imprisonment or a \$1000 fine or both. CAL. PENAL CODE §§ 489–90 (West 2010). Stealing someone else's dog for commercial purposes is a crime punishable by up to one-year imprisonment. CAL. PENAL CODE § 487g (West 2010).

276. *See* CAL. PENAL CODE § 600 (West 2010). Those convicted of interfering with a dog used by police officers must pay restitution for the injuries caused, including veterinary bills, replacement costs if applicable, and lost wages. *Id.* at § 600(e). A similar statute applies to service dogs injured or killed in the official discharge of their duties. CAL. PENAL CODE § 600.2 (West 2010).

277. CAL. PENAL CODE § 600(a).

of one year or fined one thousand dollars.<sup>278</sup> If the dog suffers a serious physical injury or death, the offense becomes a felony<sup>279</sup> punishable by imprisonment of up to three years.<sup>280</sup> Police departments are not liable for any dog bites from K9s in the course of their work.<sup>281</sup> Under these statutes, police dogs are “valued members of the force.”<sup>282</sup>

#### V. PROPOSAL FOR CALIFORNIA TO ADOPT A MEASURE SIMILAR TO COLORADO’S DOG PROTECTION ACT

When addressing the crowd that gathered following the passage of the Dog Protection Act, Colorado senator David Balmer stated, “We’re going to be a giant movement nationwide that began here in Colorado.”<sup>283</sup> In the wake of the Hawthorne shooting and public outcry, he may be correct, as other states consider implementing similar legislation.<sup>284</sup> Because California’s current statutes support and promote the human-canine bond, adopting Colorado’s law in California would be a natural fit. California’s demonstrated history of canine companion seizure incidents and the legislature’s modern, protective stance regarding animal welfare lend themselves to the adoption of a law that will reduce future canine companion shootings and liability stemming therefrom.<sup>285</sup>

##### A. *California’s Demonstrated History of Canine Companion Seizures*

The Hawthorne incident is not a rare occurrence in California. In May 2013, highway patrol officers shot and killed two huskies that left their

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278. *Id.* Penalties are also assessed for offenders who frighten, tease, or agitate K9s during the course of the animal fulfilling its police duties. CAL. PENAL CODE § 600(b).

279. CAL. PENAL CODE § 600(c).

280. *Id.*; CAL. PENAL CODE § 1170(h)(1) (West 2010) (“[A] felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.”).

281. CAL. CIV. CODE § 3342(b) (West 2013). A K9 is exempt from liability if it “was defending itself from an annoying, harassing, or provoking act” or partaking in official K9 activities such as apprehending suspects, investigating crimes, or executing warrants. *Id.*

282. *See Law Enforcement Today Article Advises Police Not To Kill Family Dogs*, *supra* note 20; *supra* Part I.

283. *See* Marcus, *supra* note 235.

284. *See supra* notes 5, 26.

285. *See* Martinez v. Robledo, 147 Cal. Rptr. 3d 921, 926 (Ct. App. 2012) (noting that “[i]n California, the Legislature has recognized since 1872 that animals are special, sentient beings [that] unlike other forms of property [ ] feel pain, suffer and die”).

backyard to chase a burglar away.<sup>286</sup> In June 2013, a Concord police officer in search of a suspect for a nonviolent offense shot an allegedly aggressive thirteen-year-old cocker spaniel after entering its backyard.<sup>287</sup> In August 2013, a month after police killed Rosby's dog, cops in San Diego shot a terrier mix when breaking up an altercation.<sup>288</sup> In October 2013, officers in Antioch responded to a call of two loose dogs in a neighborhood, shooting one of the dogs and later calling animal control to locate and capture the other.<sup>289</sup> While these events did not garner as much media attention as the Hawthorne incident, perhaps because they were not caught on video, they are likely unreasonable dog shootings.

These incidents, however, are not an emerging trend, as cases of California law enforcement shooting dogs have been documented for decades. In 1991, officers killed a pet dog after it approached them as they walked past its yard.<sup>290</sup> In 2005, officers executing a search warrant

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286. *Husky Owner Says CHP Wrongfully Shot Dogs*, CBS SACRAMENTO (May 30, 2013, 11:50 PM), <http://sacramento.cbslocal.com/2013/05/30/husky-owner-says-chp-wrongfully-shot-dogs/>. Allegedly, the officers mistook the huskies for wolves after receiving reports that wolves had attacked a deer. *Id.*

287. Rick Hurd, *Concord: Owners of Cocker Spaniel Shot by Police Seek Apology*, MERCURY NEWS (June 24, 2013, 5:05 PM), [http://www.mercurynews.com/breaking-news/ci\\_23530614/concord-owners-cocker-spaniel-shot-by-police-seek](http://www.mercurynews.com/breaking-news/ci_23530614/concord-owners-cocker-spaniel-shot-by-police-seek). The dog was barking at the officer and protecting its home, which the officer perceived as an aggressive act despite the dog's old appearance and small stature. *See id.* The dog survived a single shot to its shoulder. *Id.*

288. *Cop Shoots Attacking Dog During Disturbance, Dog Survives*, CBS8 NEWS, <http://www.cbs8.com/story/23133950/cop-shoots-attacking-dog-during-disturbance-dog-survives> (last updated Aug. 14, 2013, 12:15 PM). Cops responded to a call regarding a fight between roommates when the dog displayed aggressive behavior, lunging at police and biting. *Id.* While the officer did not kill the dog, he discharged his firearm immediately without seeking other avenues to diffuse the situation. *See id.* Further, the details regarding the events that led up to the dog displaying aggressive behavior were unreported. *See id.*

289. Henry K. Lee, *2 Dogs Run Amok in Antioch—4 People Injured*, S.F. GATE, <http://www.sfgate.com/bayarea/article/Two-loose-dogs-bite-four-in-Antioch-cops-kill-1-4942674.php> (last updated Oct. 31, 2013, 8:42 AM). Police responded to a call about two loose dogs that were terrorizing the neighborhood, biting people and dogs alike. *Id.* Interestingly, the police did not request animal control assistance despite the nature of the call, but later utilized animal control to capture one of the dogs that ran off after police opened fire on them. *See id.*

290. *See Fuller v. Vines*, 36 F.3d 65, 66 (9th Cir. 1994). There is conflicting testimony as to whether the dog merely walked up to the officers or charged them. *Id.* Because the case settled out of court for over \$500,000, it seems likely the dog did not charge the officers. *See Lenihann, supra* note 142.

killed two guard dogs they knew were on the premises prior to the search.<sup>291</sup> In that same year, police officers trying to locate a suspect shot a pit bull after opening the gate that enclosed it.<sup>292</sup> In 2007, after arresting a suspected gunman, police shot a dog that emerged from the property as they searched for evidence of a gun.<sup>293</sup> In 2010, officers shot a dog that was merely following his owner.<sup>294</sup> Although California's legislature has displayed a commitment towards animal advocacy,<sup>295</sup> it has not enacted a law to prevent future canine companion seizures despite the state's demonstrated history of dog shootings.<sup>296</sup>

### *B. A Dog Protection Law Is the Next Logical Step*

In 2010, the Humane Society of the United States boasted that California led the way in animal protection laws.<sup>297</sup> In 2012, California doubled the punishment for cockfighting and dogfighting convictions, and prohibited landlords from requiring tenants to declaw their pets.<sup>298</sup> In 2013, California banned lead bullets for hunting purposes to protect wildlife.<sup>299</sup> Recently,

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291. See *supra* text accompanying notes 139–42.

292. See Lenihann, *supra* note 142. Although details of the case are scant, the \$210,000 settlement stemming from the pit bull's death suggest officers acted unreasonably when they entered the dog's backyard and subsequently shot him. See *id.*

293. See *People v. Jackson*, No. E039974, 2007 WL 1207257, at \*7 (Cal. Ct. App. Apr. 25, 2007). The court does not discuss the dog's behavior, but suggests that it may have been aggressive, as "[the officers] tried to protect themselves from attack by an animal perceived to be dangerous." See *id.*

294. See *Silva v. City of San Leandro*, 744 F. Supp. 2d 1036, 1044–45 (N.D. Cal. 2010). The officer shot Boo Boo moments after the owner gestured for the officer to wait so he could restrain his pet, which had followed him from the bedroom and was not growling or barking. *Id.* Boo Boo was a large pit bull mix and likely "came running out" of the bedroom to follow the owner, behavior possibly perceived as threatening to officers who did not know Boo Boo's disposition. *Id.* at 1040, 1045. However, the officers knew there was a dog present when they arrived and did not request the owner restrain the dog at any time. *Id.* at 1057–58.

295. See *supra* Part IV.C.

296. See *California Makes Progress on Animal Protection Legislation*, HUMANE SOC'Y (Sept. 17, 2013), [http://www.humanesociety.org/news/press\\_releases/2013/09/cali-animal-protection-legislation-091713.html](http://www.humanesociety.org/news/press_releases/2013/09/cali-animal-protection-legislation-091713.html). Despite progressive laws restricting lead ammunition to shoot wildlife, adding no-trapping buffer zones, limiting civil liability for local governments that operate dog parks, and requiring certain standards of treatment of animals for sale at swap meets, no measures to protect canine companions have been implemented. See *id.*

297. See Williams, *supra* note 248.

298. Paul Rogers, *California Lawmakers Pass a Wave of New Animal Protection Laws*, SAN JOSE MERCURY NEWS (Sept. 30, 2012, 10:07 AM), [http://www.mercurynews.com/ci\\_21656416/california-lawmakers-pass-wave-new-animal-protection-laws](http://www.mercurynews.com/ci_21656416/california-lawmakers-pass-wave-new-animal-protection-laws).

299. See *Lead-ing the Way in California*, HUMANE SOC'Y (Oct. 11, 2013), <http://hsus.typepad.com/wayne/2013/10/lead-ing-the-way-in-california.html>. Lead bullets were a danger to wildlife, such as the condor, because they developed lead poisoning from eating

California passed a law requiring state residents “to use nonlethal procedures when removing or taking any mountain lion perceived to be an imminent threat to public health or safety unless the mountain lion can reasonably be expected to cause immediate death or physical harm.”<sup>300</sup> Despite these enactments, the California legislature has failed to propose a law similar to Colorado’s Dog Protection Act, mandating additional police training in regards to canine companions.

While California currently has a canine seizure statute in place, which requires animal control or law enforcement officers to impound any dog which poses “an immediate threat to public safety” until a hearing is held to determine if the pet is vicious, the statute is seldom applied and rarely litigated.<sup>301</sup> As a result, over half of all intentional firearm discharges by California law enforcement officials involve canine companions.<sup>302</sup> This startling statistic highlights the apparent difference between the treatment of K9s and canine companions: K9s enjoy a special status among the force but canine companions enjoy a special status only within the confines of their family.<sup>303</sup>

Adopting a measure similar to Colorado’s Dog Protection Act would put K9s and canine companions on equal footing, as both owners and officers share similar bonds with their dog.<sup>304</sup> Mandating that law enforcement departments implement increased training on animal behavior recognition and alternative methods of subduing an animal would likely reduce the number of canine companion shootings.<sup>305</sup> Further, these

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lead tainted meat, causing them to get sick or die. See *Lead Bullet Risks for Wildlife & Humans*, NAT’L PARK SERV., <http://www.nps.gov/pinn/naturescience/leadinfo.htm> (last visited Sept. 16, 2014). Lead tainted meat “become[s] part of scavengers’ food supplies when any of the following occur: a wounded animal escapes a hunting attempt, an animal shot as a pest is not retrieved from the field, or when gutpiles remain on the landscape after a hunt.” *Id.*

300. *California Makes Progress on Animal Protection Legislation*, *supra* note 296. Although not endangered, “[t]here are an estimated 30,000 mountain lions in the western United States.” *Basic Facts About Mountain Lions*, DEFENDERS WILDLIFE, <http://www.defenders.org/mountain-lion/basic-facts> (last visited Sept. 16, 2014).

301. CAL. FOOD & AGRIC. CODE § 31625 (West 2014).

302. BATHURST ET AL., *supra* note 8, at 10 (citing Lisa L. Spahr, *The Canine Factor: To Shoot or Not To Shoot*, SUBJECT TO DEBATE, Jan. 2007, at 4, 4).

303. See *supra* text accompanying notes 277–82.

304. See *Law Enforcement Today Article Advises Police Not To Kill Family Dogs*, *supra* note 20.

305. Scott Noll, *Are Local Police Shooting Dogs First, Asking Questions Later?*, KHOU, <http://www.khou.com/news/investigative/Are-local-police-shooting-dogs-first-asking-questions-later-207423191.html> (last updated May 15, 2013, 9:36 AM).

alternative methods for subduing dogs and procedures permitting removal of the dogs when possible bode well for public approval and community trust.<sup>306</sup>

By adopting a law in California similar to Colorado's Dog Protection Act, incidents like the Hawthorne shooting would be minimized, as would governmental liability for section 1983 claims.<sup>307</sup> As shown in *San Jose Charter*, the liability incurred from inadequate training methods is costly, both for the pet owners who suffer emotionally and the local government that suffers financially.<sup>308</sup> Adoption of a law similar to the Dog Protection Act will effectively limit litigation in the same manner as Colorado because police officers will shoot dogs less often, resulting in fewer instances of liability.<sup>309</sup> In addition, like the effect of the Dog Protection Act in Colorado, a similar law in California will create a concrete standard of reasonableness to effectively preclude any liability.<sup>310</sup>

In 2005, the Ninth Circuit stated, "The Fourth Amendment forbids the killing of a person's dog . . . when less intrusive, or less destructive, alternatives exist."<sup>311</sup> The COPS publication shows that alternatives to lethal force are abundant and deadly force is usually unnecessary to begin with.<sup>312</sup> The alternatives are compatible with the overall goals and needs of law enforcement, as evidenced by Colorado's adoption and widespread support for the Dog Protection Act.<sup>313</sup> California must unleash a stronger stance to protect canine companions from unnecessary harms due to insufficiently trained law enforcement officials.<sup>314</sup>

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306. See BATHURST ET AL., *supra* note 8, at 11 ("When an officer kills or injures a dog that is not a serious threat, other significant harms can result. Such incidents often do serious damage to community trust in the department and profession.").

307. See *supra* Part IV.B.

308. See Carter, *supra* note 9 (finding that cities were liable for up to \$1.8 million to the families of two Hells Angels whose pet dogs were shot by police); Lenihann, *supra* note 239 (noting other canine companion seizure cases, which resulted in lesser but still significant awards of \$170,000 and \$210,000). In contrast, the cost of implementing a law similar to Colorado's Dog Protection Act is minimal. See *supra* note 230 and accompanying text.

309. See *supra* text accompanying notes 241–48.

310. See *supra* text accompanying notes 249–52.

311. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977–78 (9th Cir. 2005).

312. See *supra* Part IV.A.

313. See Marcus, *supra* note 240.

314. The term *stronger stance* is meant to encompass the training necessary to provide equal protections to canine companions as Colorado now affords them.

## VI. CONCLUSION

The astounding number of canine companion shootings account for a majority of police firearm discharges.<sup>315</sup> Although grieving owners may institute a section 1983 claim to recover damages for deprivation of property, this is a tedious process that will not bring back their beloved four-legged family member.<sup>316</sup> Local governments may establish a qualified immunity defense in a canine companion shooting case by showing that the officer's actions were reasonable.<sup>317</sup> However, courts should adopt a view that an officer's use of lethal force to subdue a canine is seldom reasonable because there are numerous alternative options available.<sup>318</sup>

In order to mitigate the instances of canine companion seizures, law enforcement agencies should make several changes.<sup>319</sup> Officers should be trained extensively in canine behavior, with law enforcement departments establishing clear procedures for (1) identifying animal presence, (2) deferring to animal control officers or allowing owners to remove a dog, (3) assessing a dog's behavior, (4) establishing trust with any dog encountered, (5) subduing aggressive dogs, and (6) investigating instances of puppycide.<sup>320</sup> Distinguishing between a nervous, friendly, or aggressive dog involves attention to detail.<sup>321</sup> Simple assessments can diffuse perceived threats and ensure that subsequent actions will be positive for officers, canines, and owners alike.<sup>322</sup>

In 2013, Colorado recognized that the current policies and protocols for law enforcement dog encounters were inadequate and passed the Dog Protection Act in an effort to prevent future shootings of canine companions by police.<sup>323</sup> While agencies consider adopting similar measures on a

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315. See *supra* text accompanying note 8.

316. See *supra* Part III.A.

317. See *supra* text accompanying notes 113–17.

318. See *supra* text accompanying note 198.

319. See generally BATHURST ET AL., *supra* note 8 (providing effective strategies to law enforcement to improve their dog encounter process); see also *Dogs Shot by Cops: Companion Animals and Law Enforcement*, *supra* note 197 (outlining eleven specific steps that law enforcement can take to mitigate dog shootings).

320. See *supra* Part IV.A.

321. See *supra* text accompanying notes 205–11.

322. See BATHURST ET AL., *supra* note 8, at 20. Proper identification of the canine's attitude—whether scared, frightened, or friendly—will allow officers to diffuse the situation before using deadly force, ensuring pets are not unnecessarily killed, owners are not outraged, and officers are not injured. See *supra* text accompanying notes 205–13.

323. See *supra* text accompanying notes 226–30.

smaller scale, the need for greater action persists, especially in California.<sup>324</sup> Because California has numerous laws focused on the well-being of man's best friend, the legislature should adopt a similar act mandating extensive animal encounter training to prevent unnecessary instances of puppycide.

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324. See *supra* Parts IV.C, V.B.