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WHEN K-9s CAUSE CHAOS-AN EXAMINATION OF POLICE DOG POLICIES AND THEIR LIABILITIES

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NOTES

WHEN K-9s CAUSE CHAOS—AN EXAMINATION OF POLICE DOG POLICIES AND THEIR LIABILITIES

"With a nick, nack, paddy whack, throw your dog a [suspect]."[1] Although this nursery rhyme distortion grossly oversimplifies the law enforcement tactics employed by K-9 division police officers, nonetheless, the amount of force permissible in a K-9 assisted arrest has come under increasing scrutiny.[2] More specifically, an intense controversy has arisen over the "seek, find, and seize the suspect, by biting if necessary" policy;[3] its

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[1] NICHOLAS TUCKER & ROGER MCGOUGH, THE OXFORD BOOK OF RHYMES 123 (1992). It should be noted that the exact quotation, "With a nick, nack paddy whack throw your dog a bone," relates to the reward and punishment style of training used to motivate an animal to accomplish a desired goal. *Id.* The concept of allowing a K-9 police officer to bite a suspect as a reward for finding the suspect is frightening. This type of conduct was exemplified on a videotape broadcast nationally on the CBS Evening News in December, 1991. *LAPD, Dogs and Videotape; Police Commission Must Examine Allegations About Police Dog Attacks*, L.A. TIMES, Dec. 27, 1991, at B6 [hereinafter *Dogs and Videotape*]. The tape showed a police dog repeatedly biting an unarmed 14 year old suspect of auto theft, who was hiding under a sofa in a back yard. A K-9 handler explained on the tape that a "patrol dog's reward is to bite the suspect." *Id.* Moreover, on September 20, 1989, Christopher Brizelle, a suspect in a stolen car case, claims his arresting officer told him, "[y]ou know, we must reward the dog for finding you." Andrea Ford, *Critics Call for LAPD K-9 Unit Moratorium*, L.A. TIMES, Dec. 24, 1991, at B3. Though convicted of joyriding, he later won a $95,000 award from the City of Los Angeles in a police misconduct suit. *Los Angeles Police Dogs Routinely Bite Suspects*, NPR radio broadcast, Jan. 8, 1992, *available in* LEXIS, News library, Omni file.

[2] Sheryl Stolberg, *Lawsuit Charges Improper Use of Police Dogs; Law Enforcement: Rights Group Says Hundreds of People Who Posed No Threat to Officers Have Been Mauled by LAPD Canines. Most of Those Attacked by Animals are Blacks or Latinos, Attorneys Assert*, L.A. TIMES, June 25, 1991, at B1.

[3] Under this policy, the K-9 officer's goal is to subdue the suspect by biting his arm or leg. Kerr v. City of West Palm Beach, 875 F.2d 1546, 1550 (11th Cir. 1989). Should such appendage be inaccessible, the dog is taught to bite any other available area of the suspect's body. *Id.* Once bitten, the suspect often tries to release the dog's grip

constitutionality, purpose and implementation have all been questioned.[4] This manner of K-9 training is notable for its "aggressive nature"[5] because the dog will attempt to seize a suspect even if the suspect obeys orders, until the handler rescinds his order.[6] "Thus, injury to the apprehended suspect is often inevitable."[7] Yet, the "find and bite" policy remains the municipal standard over the less aggressive "circle and bark"[8] policy for many jurisdictions with

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in an attempt to escape. *Id.* However, the dog is trained to maintain its hold until ordered by the handler to release. *Id.* The ensuing struggle often causes serious injury to the suspect from multiple bite wounds. *Id.* Also, it is not unusual for the suspect to attempt to swat the dog away or to use a stick or knife against the dog, which provokes the animal to bite. *See* Bob Pool, *Erko's Bite is Worse Than His Bark; Officer Almost Always Gets His Suspect*, L.A. TIMES, Aug. 30, 1985, at B6; Bob Petrie, *Police Tip: Never Punch a K-9; Suspect Learns the Painful Way*, ARIZ. REPUBLIC, Oct. 10, 1993, at B8.

[4] Charles Brugnola, a former K-9 unit officer on the Hawthorne, California Police Department, for instance has stated the bite syndrome is a "very easy trap to fall into" having only punishment as its purpose. *Larry King Live: Police Dogs: Are They Safe?*, CNN television broadcast, Jan. 6, 1992, *available in* LEXIS, News Library, Omni file [hereinafter *Police Dogs: Are They Safe?*]. Similarly, retired Captain Charles Beene, who was a member of the San Francisco Police Department Canine Unit for eight years, stated that during that time, he made almost 400 arrests and, "[i]n all that time, the dog bit one suspect. Eliminating cruel and unnecessary use of police dogs is the only thing that will save police dog units around the country." Charles Beene, *Jaws*, L.A. TIMES, Mar. 15, 1992, (Magazine), at 6.

[5] *Kerr*, 875 F.2d at 1550.

[6] *Id.*

[7] *Id.* However, the severity of such injury can be diminshed provided the handler possesses complete control over the K-9. *Id.* Establishing such control, by using leash commands (requiring a physical touching or tugging), or oral commands (for those occasions when a suspect is far in front of the handler), enables the handler to recall or restrain the dog before any serious injuries occurs. *Id.* According to Joe Hicks, spokesman for the American Civil Liberties Union, under the "find and bite" policy, even handlers themselves have been bitten at times. *Citizens File Suit Against Police Use of Dogs*, UPI, June 24, 1991, *available in* LEXIS, News library, Omni file.

[8] *See* David Beers, *A Biting Controversy; Los Angeles Police Dogs Bite Hundreds of People Every Year, Many of Them Never Charged With a Crime. Officials Say the Dogs are Just Doing Their Job. The Victims Say They are Instruments of Terror*, L.A. TIMES, Feb. 9, 1992, (Magazine), at 23. Under this policy, the dog's task is complete upon cornering the suspect, and barking an alarm. *Id.* The dog is trained to knock down a fleeing suspect with a quick bite, if necessary, and immediately release. *Id.* Holding bites are only permitted if the dog or handler is attacked. *See infra* notes 102-04 and accompanying text.

a K-9 division.[9] In particular, the Los Angeles Police Department has been the focus of vociferous criticism, stemming from an unusually high bite-ratio[10] especially within its minority communities.[11] These criticisms, coming on the heels of the Rodney King beating,[12] have spawned a class action which will highlight the issue of whether a governmental agency can be held liable under 42

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[9] *Kerr*, 875 F.2d at 1550.

[10] A bite-ratio is defined as the number of bites per number of apprehensions. *Id.* Experts indicate that bites should result, on average in less than 30% of all K-9 assisted apprehensions. *Id.* Some K-9 divisions require an automatic review should the bite-ratio exceed 20% to ensure "that misbehaving dogs receive prompt corrective training." *Id.*

[11] *See Dogs and Videotape*, *supra* note 1, at B6; *see also* Paul Hoffman, *The Feds, Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1474 n.77 (1993), in which the author, the legal director of the ACLU Foundation of Southern California, states:

> Another example of the racial dimension of the excessive force problem within both the L.A. Police Department (LAPD) and the L.A. Sheriff Department (LASD) is abuse associated with the use of police canine units. Both the LAPD and the LASD have deployed canine units aggressively in the minority communities of Los Angeles. In recent years, hundreds of city and county residents have been bitten, many suffering severe injuries. Evidence disclosed in civil rights litigation suggests the large majority of people bitten have been African-Americans and Latinos.

Id. Recently, the K-9 units of Spokane, Washington and Miami, Florida have also come under similar scrutiny and criticism. The Spokesman-Review of Spokane reported "more than 80 criminal suspects have been bitten by police dogs since the K-9 unit was formed in 1988." *Newspaper Seeks Police Dog-Bite Records*, EDITOR & PUBLISHER MAG., Sept. 18, 1993, at 8. Additionally, the Miami Herald reported that K-9s were disproportionately released on black suspects and with greater regularity than other local K-9 units: "[B]lacks make up 27% of the city's population and 50% of those arrested but account for 67% of dog bite victims." Yvette Ousley, *Miami K-9 Corps Under Fire*, MIAMI HERALD, Nov. 22, 1993, at A1.

[12] Stolberg, *supra* note 2, at B1; *see* Sharman Stein & William Recktenwald, *Chicago, L.A. Cops are a World Apart*, CHI. TRIB., May 1, 1992, at C5; Tom Blair, *Dots and Doggerel*, SAN DIEGO UNION TRIB., Feb. 16, 1992, at B1.

U.S.C. § 1983[13] for a policy or custom which deprives individual constitutional rights under color of law.[14]

This Note focuses on the use of K-9s by law enforcement. Section I discusses the elements that must be established under § 1983 and other legal standards in order to hold a municipality liable for a K-9 attack. Section II analyzes the competing rationales for the use of dogs in law enforcement, examining whether K-9s should be used as tools or weapons by the police. Section III discusses whether the use of police dogs to apprehend suspects constitutes excessive force. More specifically, this section examines the standards used by courts in determining the reasonableness of K-9 assisted arrests. Section IV examines the issue of municipalities' and police officers' qualified immunity in the context of K-9 attacks. This Note concludes that, in order to protect civil rights and to avoid liability, municipalities must implement the less violent "circle and bark" policy for their K-9 units.

I. Municipal Liability

Illustrative of the scenario in which a municipality is sued for a K-9 injury is the case of *Starstead v. City of Superior*.[15] In *Starstead*, the District Court for the Western District of Wisconsin denied a motion to dismiss filed by the City, its mayor and its police chief for failure to state a claim against them.[16] The claim alleged that there was a violation of rights guaranteed under the Fourth

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[13] 42 U.S.C. § 1983 (1988) provides that:

> 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.

[14] Stolberg, *supra* note 2, at B1.

[15] 533 F. Supp. 1365 (W.D. Wis. 1982).

[16] *Id.* at 1373.

Amendment,[17] among others,[18] and under § 1983.[19] These violations were in connection with intentional attacks by defendants' police dogs "without reasonable cause for their use"[20] on five separate occasions, injuring seven individuals.[21]

The court's recounting of these K-9 attacks in sequential fashion has a powerful effect. The first plaintiff, Starstead, was a passenger in the van his girlfriend was driving, and was attacked by a K-9 unit after being stopped by a police car, though no traffic violation ticket was issued.[22] He withstood bites to his upper hip and arm and almost lost his thumb.[23] The second plaintiff, Breezee, was involved in a car accident and left the scene.[24] He then went home and tried to call the police.[25] Meanwhile, police officers forcibly entered his home, handcuffed him, and ordered a K-9 to attack.[26] Breezee suffered bites to his left leg.[27] The third plaintiff, Hill, tried to evade the defendant officer while dining in a club.[28] However, when Hill was ordered to come forward, he did so.[29] He was

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[17] The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[18] The complaint also alleged violations under the Eighth, Ninth, and Fourteenth Amendments, but these allegations were summarily dismissed. *Starstead*, 533 F. Supp. at 1366.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* The court noted there was no reasonable cause for the defendant to order the police dog under his command to attack. *Id.* at 1366.

[23] *Starstead*, 533 F. Supp. at 1366.

[24] *Id.* at 1367. Breezee returned later to the scene to discover the other party had already left. *Id.*

[25] *Id.*

[26] *Id.* Again, the court noted there was no reasonable cause for the attack order. *Id.* at 1367.

[27] *Starstead*, 533 F. Supp. at 1367.

[28] *Id.*

[29] *Id.*

"unarmed, made no threatening moves" and, specifically, said that he was surrendering.[30] Nonetheless, the police dog attacked, and was ordered to attack again shortly afterwards.[31] Hill suffered bites to his inner left thigh.[32] The fourth plaintiff, Dolsen, was engaged in the apparent misdemeanor theft of siphoning gasoline.[33] Without heeding Dolsen's cry of surrender, and despite his being unarmed, a K-9 was ordered to attack.[34] Only after the dog was physically pulled away from Dolsen, was it ascertained that he withstood multiple bites to his left arm and shoulder.[35] The fifth, sixth, and seventh plaintiffs, Bartsias, Bjork and Orak respectively, were all involved in the same incident.[36] Police stopped them in a parking lot and a scuffle ensued.[37] All three were consequently attacked by orders of the presiding officer[38] and suffered multiple dog bite wounds.[39]

The *Starstead* court was quick to point out that under *Monell v. New York City Department of Social Services*,[40] cities are "persons" under § 1983,[41] and, therefore, can be held liable for their agents' unconstitutional acts.[42] However, from *Monell* it is likewise clear that a "municipality cannot be held liable under § 1983 on a

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[30] *Id.*

[31] *Id.*

[32] *Starstead*, 533 F. Supp. at 1367.

[33] *Id.*

[34] *Id.* The court pointed out that because the dog failed to heed oral commands, the defendant had to forcibly pull the dog off its victim. *Id.*

[35] *Id.*

[36] *Id.* at 1367-68.

[37] *Starstead*, 533 F. Supp. at 1367.

[38] *Id.*

[39] *Id.*

[40] 436 U.S. 658 (1978).

[41] 42 U.S.C. § 1983 (1988).

[42] *Starstead*, 533 F. Supp. at 1368; *see Monell*, 436 U.S. at 701. The Court found that "Congress, in enacting . . . [the statute] intended to give a broad remedy for violations of federally protected civil rights." *Id.* at 685. Thus the Supreme Court overruled the earlier case of Monroe v. Pape, 365 U.S. 167 (1961), which held that Congress had sought to exclude municipalities from § 1983 liability. *Id. See generally* Karen M. Blum, *From* Monroe *to* Monell*: Defining the Scope of Municipal Liability in the Federal Courts*, 51 TEMP. L.Q. 409 (1978) (arguing that *Monell* corrects the error of *Monroe* and convincingly establishes that Congress did not intend to exclude municipalities from the scope of § 1983 liability).

respondeat superior theory."[43] Hence, "a municipality cannot be held liable *solely* because it employs a tortfeasor."[44] Consequently, if one unconstitutional act by a lone municipal employee is alleged, it will not suffice to infer this particular conduct was followed in order to execute official policies.[45] Conversely, "where the plaintiff alleges a pattern or series of incidents of unconstitutional conduct, then the courts have found an allegation of policy sufficient to withstand a dismissal motion."[46]

It, therefore, follows that a city can only be held liable if the alleged unconstitutional act was committed due to a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[47] Furthermore, even if the constitutional deprivation arose out of a governmental "custom,"[48] without having been formally approved through the "official decision making channels,"[49] municipal liability may still attach.[50]

From this analysis, the *Starstead* court asserted, "proof of two elements is necessary to establish municipal liability under § 1983: Plaintiffs must establish that (1) they have suffered deprivation of constitutionally or statutorily protected interests; and (2) that the

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[43] 436 U.S. at 691. This principle, "which in itself means nothing more than look to the man higher up," postulates that a master is vicariously liable for any and all tortious conduct of his servant which is "within the scope of employment." Dan Dobbs et al., PROSSER AND KEETON ON TORTS, § 69, at 500-02 (5th ed. 1984).

[44] *Monell*, 436 U.S. at 691.

[45] Powe v. City of Chicago, 664 F.2d 639, 649 (7th Cir. 1981). "[W]hen an individual offical breaks with official policy, and in doing so violates the constitutional rights of another, then that official, and not the municipality whose policies he breached, should be made to bear the liability." *Id.*

[46] *Id.* at 650.

[47] *Monell*, 436 U.S. at 690.

[48] In *Monell*, the Court pointed out, "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

[49] *Id.* at 691.

[50] *See id.* at 694. The Court concluded that it is when a custom "[w]hether made by its lawmakers or those whose edicts or acts may be fairly be said to represent official policy, inflicts the injury that the government as an entity is reponsible under § 1983." *Id.*

deprivation was caused by an official policy."[51] In *Starstead*, because the plaintiffs alleged both elements—a constitutional deprivation suffered through use of unreasonable force, and a "systematic pattern of misuse of police dogs,"[52] their allegations were sufficient to overcome defendants' motion to dismiss.[53]

The decision in another, more recent case, *Kerr v. West Palm Beach*,[54] was founded on similar principles. The facts in *Kerr* involved several specific apprehensions made by the West Palm Beach Police Department's K-9 unit.[55] Suit was brought, not only against the offending police officers, but also against the City and its former police chief under § 1983.[56] At trial, plaintiffs argued there was a failure to train on defendants' part.[57] Specifically, the plaintiffs

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[51] 533 F. Supp. at 1368.

[52] Specifically, the plaintiffs alleged that defendants City of Superior, Police Chief Martinson, and Mayor Hagen tacitly encouraged the defendant officers' unconstitutional behavior and that their insufficient training as well as their supervision of the defendant officers amounted to "gross negligence" and "deliberate indifference." *Id.* at 1368-69.

[53] *Id.* at 1372.

[54] 875 F.2d 1546 (11th Cir. 1989).

[55] Among the bite victims in *Kerr* were John Terrel, Jimmy Jerome Arnold, and Uwaine Kerr. *Id.* at 1548. Terrel, lying drunk in some bushes, was mistaken by police to be a burglar, dragged out of the bushes by the mouth of a police dog, and suffered multiple bite wounds. *Id.* at 1551-52. Arnold pled guilty to stealing fishing equipment, but not before he was bitten by a disobedient police dog, in the course of arrest. *Id.* at 1552. The dog had to be hit over the head with a flashlight before releasing Arnold. *Id.* Kerr, against whom no charges were filed, tried to evade police once they discovered him walking through a park at night. *Id.* Believing he eluded his pursuers, Kerr stopped to urinate against a building, and was then attacked by a K-9 from behind. *Id.*

[56] *Id.* at 1547.

[57] *Id.* at 1550. "Testimony at trial established that in assessing whether to use canine force, an officer did not need to have probable cause to believe that the suspect committed a felony; instead a 'reasonable suspicion' was sufficient." *Id.* Moreover, undisputed testimony uncovered the existence of an oral policy within the West Palm Beach Police Department allowing officers to use the canine unit against "fleeing and concealed individuals suspected of a 'serious misdemeanor.'" *Id.* Rather than defining this type of crime, it was left to the officers' discretion to determine what was a "serious misdemeanor." *Id.* Hence, the scope of this undefined crime was very broad, and canine force was being used against fleeing or concealed individuals "suspected of prowling, of drunkenness, of petty larceny, of prostitution, of traffic offenses—even individuals whose only offense was being in a city park after hours." *Id.* In fact, it was within the officer's discretion to use canine force on any suspect who failed to heed an

alleged that the City and its former police chief inadequately trained the K-9 division in the extent of force permissible under the Constitution, and failed to see that misbehaving dogs receive corrective training.[58] The evidence submitted to advance the theory of inadequate training included the following: (1) more frequent use of K-9 force relative to other cities with K-9 units; (2) other K-9 units viewed West Palm Beach's high bite-ratio as an indication of irresponsible use of force; (3) "bite reports" filed by K-9 handlers were reviewed by supervisory officials, including the police chief, a policymaking official; and (4) direct evidence that the city was cognizant of the inadequacies in the K-9 training program and its supervision.[59] A trial on the issue of liability yielded a verdict for the plaintiffs against the individual officers.[60] The jury also found against the defendant-city and its former police chief,[61] who asked the court for a judgment notwithstanding the verdict.[62] The lower court granted the defendants' motion.[63] The Eleventh Circuit reinstated the jury verdict, concluding that Kerr had mustered sufficient evidence for a reasonable jury to find the City of West Palm Beach and its former police chief liable for its actions.[64]

In sharp contrast, the District Court for the Eastern District of Louisiana ordered summary judgment against the plaintiff in *Banks*

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order to stop, since failure to obey an officer's command was, in itself, a misdemeanor. *Id.*

[58] *Id.* at 1551. The Department maintained no "specialized internal procedures for monitoring the performance of the canine unit." *Id.* And though "force reports," written documentation describing force used by an officer to apprehend a suspect, were prepared by the shift commander, the court deemed these reports to be an ineffective monitoring mechanism. *Id.*

[59] *Kerr*, 875 F.2d at 1551-56; *see* Karen M. Blum, Monell, DeShaney, & Zinermon: *Official Policy Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983*, 24 CREIGHTON L. REV. 1, 13 n.50 (1990).

[60] *Kerr*, 875 F.2d at 1548.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] At trial, William M. Barnes, acting chief of the West Palm Beach Police Department from October, 1984 until March, 1985, admitted that he was notified by the city manager as well as "general conversation around" that "[m]aybe we were having too many bites." *Id.* at 1557.

v. Goines.[65] In this case, the plaintiff brought an action for damages under § 1983 against the City of New Orleans and individual police officers.[66] The plaintiff alleged that he was bitten by a police dog,[67] and "that the City was negligent . . . by failing to have any guidelines or standards governing the use of canines during search and arrest operations, and by failing to provide safeguards against the exertion of excessive force by the officers."[68] Yet, the court, noting that the plaintiff failed to attach any exhibits to prove his position, summarily stated that "the plaintiff has not offered a scintilla of evidence to support its contention that the procedure for training the canine animals is insufficient, improper or imprudent in any way."[69]

In *Kerr*, however, the Eleventh Circuit applied the "deliberate indifference" legal standard[70] enunciated in *City of Canton v. Harris*.[71] This standard necessitates that two related elements be established in order to hold a municipality liable.[72] First, a city must have, in fact, inadequately trained its employees in the lawful execution of their duties.[73] Second, this failure to adequately train must have been the result of an actual city policy.[74] In general, this

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[65] No. 88-553, 1989 U.S. Dist. LEXIS 267 (E.D. La. Jan. 5, 1989).

[66] *Id.* at *1.

[67] *Id.*

[68] *Id.*

[69] *Id.* at *4.

[70] *Kerr*, 875 F.2d at 1555.

[71] 489 U.S. 378, 388 n.8 (1989). In *Harris*, the Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388.

[72] *Id.* at 390.

[73] *Id.*

[74] The *Kerr* court acknowledged that it may "'seem contrary to common sense'" to argue that a municipality will actually embrace a policy of inadequate employee training. 875 F.2d at 1555 n.14 (quoting *City of Canton*, 489 U.S. at 390). Yet, if "'the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights . . . the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Id.* *But see* Hoffman, *supra* note 11, at 1475 (concluding that "[t]he LAPD's pattern of excessive force was not merely a collection of isolated or aberrational incidents. Instead, it was attributable to the *policies* of the LAPD management, policies supported, at least indirectly, by the city's political leaders and the voting community." (emphasis added)).

standard "approaches intentionality and poses significant problems of proof."[75] Expounding on the second element, the *Kerr* court noted that "only where a municipality's failure to train its employees in a relevant aspect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a policy or custom actionable under § 1983."[76] This statement comes to life in an admission made by Captain Don Burt, overseer of the Los Angeles Sheriff's Department's K-9 unit.[77] Burt confessed he found some supervisors "providing inadequate or no training to canine handlers" when he first assumed command.[78]

Contrary to Burt's admission, Los Angeles Deputy City Attorney, Mary E. House, emphatically defended the unit claiming that "[w]e have one of the finest and highly trained canine units in the United States, . . . [w]e are a model for many jurisdictions . . . in both ongoing training and certification and the use of dogs in the field."[79] Notwithstanding these conflicting views, the *Kerr* court stated that if "the need for more or different training is so obvious . . . the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."[80] In Los Angeles, police dogs have actually caused injury 1035 times during the period extending from 1988 to 1991.[81] Despite House's downplaying of the severity of the bite statistics by asserting eighty percent could have been treated by applying a mere Band-Aid,[82] this large number of bites is significant when compared with the 215 bites

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[75] David Rudovsky, Note, *Police Abuse: Can the Violence be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 486 (1992). However, where the causal connection between training and discipline and the incidence of abuse are well established, the *Harris* ruling should prompt further advances toward increased municipal liability. *Id.*

[76] 875 F.2d at 1555 (quoting *City of Canton*, 489 U.S. at 389).

[77] Beers, *supra* note 8, at 23.

[78] *Id.* However, since that time, Captain Burt declares that he "beefed up training and made all the handlers responsible to one person." *Id.*

[79] Victor Merina, *Police K-9 Unit in Dog Fight with Critics; Law Enforcement: Lawsuit Claims Hundreds of People Have Been Needlessly Mauled. LAPD Contends Most Bites Are Provoked*, L.A. TIMES, July 8, 1991, at B1.

[80] 875 F.2d at 1555 n.14 (quoting *City of Canton*, 489 U.S. at 390).

[81] Merina, *supra* note 79, at B1.

[82] *Id.*; *see* Beers, *supra* note 8, at 23 (discussing abuses by police dogs).

reported in Washington, D.C.,[83] or the twenty in Philadelphia over the same period of time.[84] Only thirty bites were reported in Baltimore in 1991,[85] and only one bite was reported in Houston in 1991.[86] San Diego's seven year old canine unit has a one in thirty bite-ratio, which is also relatively low.[87]

II. "Find and Bite" Versus "Circle and Bark"

The sizable number of police dog bites reported in Los Angeles[88] underscores the debate over which policy should govern: the "find and bite" or the "circle and bark."[89] The varying rationales for these competing policies are rooted in two distinctly different perceptions as to how K-9s should be, and how they are, used in law enforcement. Some claim that a dog should be used as a a tool; others claim that it should be used as a weapon.[90] In particular, Sheriff Ted Sexton of Tuscaloosa County, Alabama, argues that "the primary use of a dog is the dog's nose, whether its to find persons via a track, find a person in a building . . . the main objective of the

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[83] Beers, *supra* note 8, at 23.

[84] *Dogs and Videotape*, *supra* note 1, at B6. However, in 1984, as a result of a three and one half month investigation, five police dogs were to be permanently retired from the force, and 12 officers were to be temporarily reassigned within the department. *Around the Nation; Philadelphia Officers in Inquiry on Dog Use*, N.Y. TIMES, Aug. 10, 1984, at A8. The investigation was prompted by reports in the *Philadelphia Inquirer* of a loss of control of police dogs, and ordered attacks on unarmed men and women. *See id.*; *Taking Huggy Off the Beat*, NEWSWEEK, July 16, 1984, at 26.

[85] Beers, *supra* note 8, at 23.

[86] *Id.*

[87] Blair, *supra* note 12, at B1.

[88] *See supra* text accompanying notes 81-87.

[89] *Id.*

[90] As a tool, the dog can be used to search buildings, track down criminals or lost persons, detect narcotics or hidden explosives, and for patrol. Robert L. O'block et al., *The Benefits of Canine Squads*, 7 J. POLICE SCI. & ADMIN. 155, 157-58 (1978). Alternatively, the dog can be used as a weapon to defend the handler against attack, control unruly crowds, and, in general, as a psychological deterrent. *Id.*

dog is the nose."[91] This sentiment is echoed by Dave Reaver of the Alderhorst Police Dog School located in Riverside, California, one of the biggest private suppliers and trainers of such dogs in the United States.[92] Reaver, speaking from a trainer's point of view, notes that "[w]e use police dogs for their sense of smell—to find people and things. The reason the dog is trying to find something is because he wants to bite it. A good trainer works with this drive, uses it."[93] Similarly, Charles Brugnola, a K-9 officer on administrative leave from the Hawthorne, California Police Department, believes that:

> A dog is not used—should not be used for a weapon. It's not a weapon. It is a search tool. The nose on the dog is the thing that's valuable, and the nose is used to go out and hunt down the suspect . . . and this type of thing-has nothing to do with guns.[94]

In support of this view, experts claim that dogs home in on the scent of "sweat and fear emitted by people who know they are being chased."[95] In fact, the dog's sense of smell is said to be 100,000 times more sensitive than a human's.[96] Accordingly, animals which are part of the K-9 unit are referred to as "search dogs" rather than "patrol dogs," a term commonly used to characterize their military counterparts.[97]

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[91] *Police Dogs: Are They Safe?*, *supra* note 4. Another advantage that K-9s have over their human counterparts is speed, which can "top out at 25 miles per hour." Bob Petrie, *A Bite Out of Crime; Chandler Police Dogs Eager to Enter the Chase*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Jan. 5, 1994, at 1.

[92] Robert Ferrigno, *Guard Dogs Muscle in on Hulking Job*, CHI. TRIB., Aug. 6, 1985, at C1.

[93] *Id.*

[94] *Police Dogs: Are They Safe?*, *supra* note 4.

[95] Pool, *supra* note 3, at B6.

[96] O'block et al., *supra* note 90, at 157; *see* John Holliman, *Competitions Show Usefulness and Safety of Police Dogs*, (CNN television broadcast, Sept. 16, 1992) *available in* LEXIS, News Library, Omni file. *See generally* Alison Grant, *Getting Dogged Police Work; Bentleyville Puts Czech-Only German Shepherd on Force*, PLAIN DEALER, Dec. 28, 1993, at B1 (stating that a police tracking hound's nose is 50 to 100 times keener than a human's).

[97] Ford, *supra* note 1, at B3.

Alternatively, the views of those who perceive police dogs as dangerous weapons, and are used more for their mouth than their nose, are voiced with more force and color. For example, Barry Litt, a public interest lawyer, declares that dogs are like "a live chain saw."[98] Likewise, in the opinion of Don Cook and Robert Mann,[99] lawyers who represent dog bite victims in Los Angeles, "the dogs are instruments of terror."[100] Considering that the force of a dog bite impacts with at least 1,200 pounds per square inch,[101] it is not difficult to understand why the "circle and bark" philosophy is being advocated. Under the "circle and bark" policy, the K-9's assignment is completed when it has trapped the suspect and barked an alarm.[102] For a fleeing suspect, the dog is trained to "knock him down with a quick bite, if necessary, and immediately let go."[103] Holding bites are permitted only in a case where the dog or his handler is attacked.[104]

In one such case, *Kopf v. Wing*,[105] the Fourth Circuit reversed the district court's grant of summary judgment, against appellant's § 1983 claim.[106] Although some facts were in dispute,[107] the court narrated the sequence of events in a dramatic fashion. In essence, the police responded to a report of armed robbery, managed to apprehend an unarmed perpetrator, and sought to capture two others still at large, suspecting they were still in possession of a weapon.[108] A

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[98] Stolberg, *supra* note 2, at B1.

[99] Robert Mann represented Mirian C. Rose, the plaintiff in Rose v. City of Los Angeles, 814 F. Supp. 878 (C.D. Cal. 1993). In that case, the plaintiff alleged that her son, an armed robbery suspect, was mauled by a police dog which severed his femoral artery. *Id.* at 879. The suspect was ultimately shot and killed by the arresting officer in claimed self-defense. *Id.* The court concluded that the "plaintiff, however, can not maintain on her own behalf an action for a violation of the decedent's [her son's] constitutional rights." *Id.* at 885.

[100] Beers, *supra* note 8, at B3.

[101] Ferrigno, *supra* note 92, at C1.

[102] Beers, *supra* note 8, at B3.

[103] *Id.*

[104] *Id.*

[105] 942 F.2d 265 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1179 (1992).

[106] *Id.* at 270.

[107] *Id.* at 266.

[108] *Id.*

police dog was summoned, and after a disputed shouted warning, a police officer released the dog in pursuit of the suspects.[109] When the officer next saw the dog, he was biting a battling suspect.[110] The officer moved in and a struggle ensued between one of the suspects, Anthony Casella, the officer, and the K-9.[111] As a result of this struggle, Casella was "frightfully mauled."[112] He was hospitalized thirty-seven days for reconstructive surgery, and for treatment of dog bites to his upper lip, chest, knee, leg, and scrotum, and other severe injuries.[113]

The *Kopf* court, in considering the county's liability, held that although the county's written policies regarding the use of excessive force were "exemplary,"[114] the appellant had cited particular incidents where such force was used.[115] Therefore, though the court felt the appellant had a marginal case against the county, a case nonetheless existed.[116] As for the liability against individual officers, the court of appeals looked to the "objective reasonableness" test prescribed in *Graham v. Connor*,[117] to determine whether the arrest was undertaken with excessive force.[118] Given that a police officer must often make

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[109] *Id.*; *see* Gregg Henderson, *High Court Allows Police Brutality Suit Against County*, UPI, Washington News, Feb. 24, 1992, *available in* LEXIS, News Library, UPI file.

[110] *Kopf*, 942 F.2d at 266.

[111] *Id.* at 267.

[112] *Id.*

[113] Debbie M. Price, *P.G. Officer in Brutality Case was Drunk Driver's Nemesis; DWI Arrests Won Him Commendations*, WASH. POST, July 16, 1989, at D1. Casella later pled guilty to armed robbery and was sentenced to five years in prison. Henderson, *supra* note 109. Casella brought the federal civil rights suit on February 21, 1989. *Id.* Casella, himself, was killed five months later in a prison fight. *Id.* However, his mother, Ada Sandra Kopf has pursued the suit. *Id.*

[114] *Kopf*, 942 F.2d at 269.

[115] *Id.*

[116] *Id.*

[117] 490 U.S. 386 (1989). According to one commentator, "[p]erhaps the most significant effect of the Court's decision in *Graham* will be to provide much needed consistency in analyzing excessive force claims brought by arrestees against police officers. Those circuits that have applied a substantive due process analysis, considering subjective motivations, must now turn to a purely objective standard." Jill I. Brown, Note, *Defining "Reasonable" Police Conduct:* Graham v Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1269 (1991).

[118] *Kopf*, 942 F.2d at 267.

split-second decisions, the reasonableness test suggests that the use of a particular force should be judged from the viewpoint of a reasonable officer at the scene, instead of with "20/20 hindsight."[119] In terms of sufficient evidence to quash a summary judgment motion, the Fourth Circuit, unlike the district court, believed that the appellant had mustered enough proof to permit a fair-minded trier of fact to conclude that the officer's force was objectively unreasonable.[120] The court noted several places where the district court resolved issues of material fact where it should have accepted appellant's version as the truthful one.[121] For instance, the court characterized the officer's shouted warning, heard by other police officers, but not by civilian witnesses, as a crucial point of contention, because a forewarning that a dog will attack offers the suspect an opportunity to surrender, and is more reasonable than a surprise attack.[122] Furthermore, the appellant provided expert testimony[123] to support his argument that the use of a police dog in a case where the suspect is "cornered and escape impossible,"[124] notwithstanding any opportunity for surrender, is unreasonable.[125] In addition, the district court found Casella had refused to surrender, though ordered to do so.[126] On this point, the court of appeals poignantly noted that "[w]e believe that a jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites his scrotum."[127] The

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

[120] *Kopf*, 942 F.2d at 268.

[121] *Id.*

[122] *Id.*

[123] According to Thomas Knott, appellant's expert and a retired canine unit trainer for the Baltimore City police, "the primary purpose of a police dog . . . is to locate supects, not to bite them." *Id.*

[124] *Id.*

[125] *Kopf*, 942 F.2d at 268. Appellees argued that, because they feared that the suspect was armed, it was reasonable to send the K-9 in first, rather than subject an officer to the possibility of getting shot. *Id. But see* Chew v. Gates, 744 F. Supp. 952, 956 (C.D. Cal. 1990) (holding that even though the suspect was surrounded and escape was virtually impossible, because the suspect could still have ambushed police officers, he posed a threat to their safety).

[126] *Kopf*, 942 F.2d at 268.

[127] *Id.* at 268.

Supreme Court, without comment, later refused to hear an appeal brought by the county to disallow the suit.[128]

A K-9 attack victim, similar to the one in *Kopf,* was sitting in a park reading a book when a LAPD dog leapt onto him.[129] "I was fighting for my life," victim Jose Ricardo Rivera said, "[w]hen I opened my legs to try and kick the dog, that's when he bit my testicle."[130] No warning was heard and the officers involved admitted at a deposition that "the dog just got too far out in front."[131]

Yet, according to Sherif Sexton, not every suspect needs to be bitten by a police dog in the act of a K-9 assisted arrest.[132] He claims that "[t]here are ways to train the dog to be able to decide whether it should [bite] or not."[133] Sergeant Duane Pickel, trainer of Tallahassee's K-9 teams in the "circle and bark" technique, claims that the policy has not prevented the unit from making arrests and has reduced liability suits dramatically.[134] Tallahassee's six dog unit has effected over 200 arrests with only six bites reported.[135] Moreover,

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[128] Prince George County v. Kopf, 112 S. Ct. 1179 (1992).

[129] Beers, *supra* note 8, at 23.

[130] *Id.* In a similar incident, a 66 year old grandmother filed a claim alleging a police dog attacked her in her own backyard, as she let out her small dog and checked to see if any cats were outside. Jim Newton, *Grandmother Joins List of Plaintiffs Alleging Attacks by Police Dogs,* L.A. TIMES, May 20, 1992, at B3. She was bitten on the upper parts of both legs. *Id.*

[131] *Id. But see* Kenneth Reich, *Deputy Asked Him to Lie, Witness Testifies; Suit: A Business Man Says in a Deposition that the Officer Requested Him to Go Along with the Official Version of a Dog Bite Incident but that He Refused to Change His Story,* L.A. TIMES, June 25, 1992, at B1 (explaining how a convicted burglar sued the Los Angeles Sheriff's Department for allowing a police dog to bite him several times after he was handcuffed). A deputy involved in the case requested a witness to alter his account so that it corresponded precisely with the official report. *Id.* According to sworn testimony, the deputy told the witness that unless he went along with the official version of the incident the deputy "could lose his job." *Id.*; *see Two Officers Cleared in Dog Bite Case,* L.A. Times, July 9, 1992, at B2 (reporting that two officers were cleared through an internal investigation of falsifying reports on the arrests of two people bitten by a police dog); Patrick McCartney, *Ventura County News Roundup: Simi Valley; City Sued Over Use of Police Dog,* L.A. TIMES, July 3, 1992, at B2 (alleging that officers lied in explaining injuries received by prisoners and arrestees as a result of police dogs).

[132] *Police Dogs: Are They Safe?, supra* note 4.

[133] *Id.*

[134] Beers, *supra* note 8, at 23.

[135] *Id.*

the unit has not been sued in the past twenty years.[136] Furthermore, Charles Brugnola, formerly of the Hawthorne, California police K-9 unit, compares the "find and bite" policy to a "search and destroy mission."[137] He believes that handlers encourage biting to punish the suspect, and, acting on this belief, has trained officers to detach themselves from the "bite syndrome."[138] He maintains that police dogs should be used to reduce "man hours to search buildings and for finding suspects . . . not for attacking people."[139]

III. Excessive Force

Whichever view is taken, it is irrefutable that a police dog's jaws can exert an incredible amount of force.[140] As an illustration, of the three most popular breeds of dog used in police work, the German Shepherd and Doberman Pinscher boast a jaw grip strength of 1,200 to 1,500 pounds per square inch of force.[141] The Rottweilers' jaws can summon 2,000 pounds per square inch of force.[142] Moreover, the hefty 110 pound Rottweiler can overmatch a suspect just by using body weight alone.[143] Hence, some believe that the police dog's greatest service is as a deterrent;[144] "[t]heir mere presence on the street, even the knowledge that they may be lurking

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[136] *Id.*

[137] *Police Dogs: Are They Safe?*, *supra* note 4.

[138] *Id.* Brugnola described this syndrome as police officers allowing and actually encouraging their dogs to bite suspects or alleged suspect. *Id.*

[139] *Id.*

[140] *See* Ferrigno, *supra* note 92, at C1.

[141] *Id.* "German shepherds are considered the best all-around protection dog, preferred by the military and civilian police departments around the world." *Id.* Dobermans, on the other hand, "are a recently created breed (late 1800s), a 'man made' dog designed for strength and agility . . . developed in Germany—a combination of Rottweiler, black-and-tan hound, and Manchester terrier—for use as bouncers in rowdy German bars." *Id.* "Dobermans are one of the most intelligent of all animals." O'block et al., *supra* note 90, at 159.

[142] *See* Ferrigno, *supra* note 92, at C1.

[143] *Id.* "Rottweilers are the linebackers of the dog world. They're big, strong and stubborn, real bruisers who love the sensation of slamming meat against meat." *Id.*

[144] *See* O'block et al., *supra* note 90, at 157.

near, exerts a powerful restraint upon lawbreakers."[145] This view is corroborated by Brugnola's estimation that in his six year career, ninety percent of the suspects he encountered surrendered willingly the moment they discovered he had a K-9.[146]

However, it is the police dogs' propensity to react with immense force that forms the central issue of excessive force that courts must grapple with when determining what amount of force is constitutionally permissible. In *Robinette v. Barnes*,[147] the force used to apprehend a suspect resulted in the suspect's death.[148] In this case, a police dog killed a hiding felony suspect by seizing his throat.[149] However, the nighttime burglary suspect was warned at least twice to emerge from a car dealership, wherein he was hiding, and was also notified that a police dog would be unleashed if he disobeyed.[150] In *Robinette*, the Sixth Circuit affirmed the district court's ruling that "the use of a properly trained police dog to seize a felony suspect does not constitute deadly force."[151] Moreover, the court held that even if use of a police dog could constitute deadly force, the facts in this particular case would have justified such force.[152]

The court's decision was adduced from the Model Penal Code's definition of deadly force.[153] The definition reads:

> [F]orce which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or

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[145] *Id.*

[146] Beers, *supra* note 8, at 23.

[147] 854 F.2d 909 (6th Cir. 1988).

[148] *Id.* at 910.

[149] *Id.* at 911; *see Riding the Circuits Part II*, NAT'L. L.J. Feb. 27, 1989, at 35.

[150] The suspect, Daniel Briggs, was eventually found lying face down on the floor in a darkened bay area of the Superb Motors car dealership in Nashville. *Robinette*, 854 F.2d at 911. The police dog had the suspect's neck in his mouth. *Id.* Half of Briggs' body was situated underneath a car. *Id.*

[151] *Id.* at 910.

[152] *Id.*

[153] *Id.* at 912.

> at a vehicle in which another person is believed to be constitutes deadly force.[154]

From this definition, the court formulated two factors which are necessary to determine whether a police officer's use of a tool can be considered deadly force.[155] The first is the police officer's intent to cause death or serious bodily harm; the second is the probability, known to the officer, notwithstanding his intent, that the particular tool when used to affect an arrest creates a substantial risk that death or serious bodily harm will result.[156] Therefore, because no evidentiary disclosure suggested that the officer involved intended to inflict death or serious bodily harm, or that the officer strayed from acceptable building search procedures with a police dog, the court concluded that no deadly force was employed.[157]

Moreover, the court declared this particular case to be "an extreme aberration from the outcome intended or expected," based upon two facts.[158] First, the records of The United States Police Canine Association corroborated the defendant-officer's testimony that no trained police dog had ever before killed a suspect upon apprehension.[159] Second, considering the manner in which the dog was trained to apprehend suspects,[160] the court believed that there was only "a remote chance that this particular scenario would occur."[161] Hence, the court of appeals, in affirming the lower court's decision stated that, "although in this particular case the use of a police dog to apprehend a suspected felon resulted in that felon's death, deadly force was not used to seize the felon"[162] because "no substantial risk

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[154] MODEL PENAL CODE § 3.11 (2) (Proposed Official Draft 1962).

[155] *Robinette*, 854 F.2d at 912.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 913.

[160] The court noted that, although "the dogs are trained to seize suspects by the arm and then wait for an officer to secure the arrestee . . . the dog had been trained to seize whatever part of the anatomy was nearest if an arm wasn't available." *Robinette*, 854 F.2d at 912.

[161] *Id.* at 912.

[162] *Id.* at 913.

of causing death or serious bodily harm" was involved.[163] Finally, the court approved of the use of K-9s in the apprehension of criminals, noting that the dogs can often help prevent officers from having to use or be the target of deadly force.[164]

Additionally, the court held that even if a K-9 assisted arrest comes under the definition of deadly force, such force was not unreasonable considering the particular circumstances of the case.[165] The court then analyzed the holding in *Tennessee v. Garner*.[166] The Supreme Court in *Garner* held that when a suspect is apprehended by deadly force, the seizure is "subject to the reasonableness requirement of the Fourth Amendment."[167] The *Garner* Court elaborated by stressing that deadly force used in the act of an arrest is not unreasonable per se under constitutional standards.[168] Instead, the Court adopted the balancing test articulated in *United States v. Place*.[169] The *Place* test weighs "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[170] Taking the test one step further, the *Garner* Court concluded that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the

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[163] *Id.* at 912.

[164] *Id.* at 914.

[165] *Robinette*, 854 F.2d at 913.

[166] *Id.* at 911-12. In *Garner*, the Supreme Court held that a Tennessee statute allowing a police officer to use all the necessary means to effect an arrest, after giving a criminal suspect notice of intent to arrest, to be "unconstitutional insofar as it authorizes the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect." 471 U.S. 1, 6 (1985). The Court also held that deadly force may be used only if necessary to "prevent [a suspect's] escape and the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3.

[167] *Id.* at 7.

[168] *Id.* at 11.

[169] *Id.* at 8.

[170] 462 U.S. 696, 703 (1983). In *Garner*, the Court noted, however, "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape." 471 U.S. at 11.

officers or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[171]

Upon applying the balancing test to the set of facts established in *Robinette*, the court of appeals concluded that "the circumstances warranted the use of deadly force."[172] Reiterating the lower court's finding, the court stated:

> [A] reasonably competent officer would believe that a nighttime burglary suspect, who, the officers had good reason to believe, knew the building was surrounded, who had been warned . . . that a dog would be used, and who gave every indication of unwillingness to surrender, posed a threat to the safety of the officers.[173]

Consistent with *Robinette*, though reached by alternative methods, the decision rendered in *Chew v. Gates*,[174] concluded that excessive force was not used in a K-9 assisted arrest of a hiding suspected felon.[175] In *Chew*, the plaintiff-suspect fled on foot into a large junkyard after having been stopped for a traffic violation, but before the police officer could search him for weapons.[176] Chew brought an action under § 1983 claiming his constitutional rights were violated when, in the supposed act of arrest, a police dog attacked his left forearm, causing serious injury.[177]

In reaching its decision, the *Chew* court examined the Supreme Court's ruling in *Graham v. O'Connor*,[178] which pre-dated *Robinette*.[179] *Graham* explicitly reiterated the *Garner* analysis in holding that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . should

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[171] *Id.*

[172] 854 F.2d at 913.

[173] *Id.* at 913-14.

[174] 744 F. Supp. 952 (C.D. Cal. 1990).

[175] *Id.*

[176] *Id.* at 953.

[177] *Id.*

[178] 490 U.S. 386 (1989).

[179] *Id.* at 955.

be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ."[180] While acknowledging that the Fourth Amendment's reasonableness test is incapable of "precise definition or mechanical application,"[181] the Court held that:

> [I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.[182]

Consequently, the *Chew* court applied the *Graham* criteria, and concluded that "the use of a police dog to search for, find and seize Chew, by biting if necessary, was objectively reasonable."[183] In short, the court's three part analysis went as follows: (1) Chew, known to be wanted for three outstanding felony warrants was arrested because of a serious crime; (2) having fled to a large unknown area before being checked for weapons, he posed an immediate threat to the officers' safety, and; (3) his fleeing from the initial officer, compounded with his outstanding felony warrants, reveal a pattern of evasion.[184] Moreover, his hiding from police for over two hours constitutes actively resisting arrest.[185]

After this analysis, the *Chew* court continued by aligning the earlier *Robinette* decision with the three prongs of *Graham*.[186] Thus, *Chew* points out that *Robinette* also dealt with a severe crime—burglary.[187] Also, because the felon in *Robinette* knew that

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[180] *Id.* at 395; *see* Brown, *supra* note 117, at 1270. "[C]ourts that treated the right to be free from excessive force as a general constitutional right without specifying its constitutional grounding are unambiguously instructed that the fourth amendment is the source of the right." *Id.*

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

[182] *Id.*

[183] 744 F. Supp. at 956.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

the building in which he was hiding was surrounded and he had been warned that a dog would be used, yet still refused to surrender, he threatened the officers' safety and actively resisted arrest.[188] In sum, both the *Robinette* and *Chew* decisions, although two years apart, are models for the objectively reasonable standard in terms of the use of a police dog to search for, find and seize a suspect by biting, if necessary.

However, the case of *Luce v. Hayden*,[189] preceding *Graham*, seems inconsistent with the three prong test used in *Graham*. In *Luce*, a state police officer directed a police dog to attack a jail escapee, even after he had been arrested and handcuffed.[190] Relying on precedent, the United States District Court of Maine denied a motion to dismiss filed by the police officer, citing *Rochin v. California*.[191] In *Rochin*, the Supreme Court declared some conduct to be so offensive as to "shock the conscience" and, therefore, to be violative of due process.[192] The *Luce* court used several factors to determine what constitutes a "shock [to] the conscience," thereby overstepping constitutional bounds.[193] Among them were: (1) the need for force; (2) the amount of force used to meet the need; (3) the severity of the injury; and (4) whether the force was motivated by a good faith effort to maintain or reestablish discipline or merely for the purpose of punishment or inflicting injury.[194] The *Luce* court concluded that the plaintiff's allegations depict conduct which "indeed shocks the conscience,"[195] considering that the officer had already gained full control of the situation, and only ordered the dog's attack

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[188] *Chew*, 744 F. Supp. at 956.

[189] 598 F. Supp. 1101 (D. Me. 1984).

[190] *Id.*

[191] *Id.* at 1103.

[192] 342 U.S. 165, 172 (1952).

[193] 598 F. Supp. at 1104.

[194] *Id.* at 1104 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d. Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)). The *Johnson* factors are criticized in R. Wilson Freyermuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L.J. 692 (1987). Wilson contends that "[c]onsideration of the *Johnson* factors therefore allows the decisionmaker to short-circuit the fourth amendment's objective inquiry and bestows upon officials a potential subjective good faith immunity that the Supreme Court has repeatedly upheld they do not possess." *Id.* at 701.

[195] 598 F. Supp. at 1104.

to maliciously "frighten and injure" the plaintiff.[196] A federal jury later acquitted the officer.[197]

In *Marley v. City of Allentown*,[198] yet another case of a K-9 assisted arrest brought under § 1983, which implicated Fourth Amendment rights, the District Court for the Eastern District of Pennsylvania denied the defendant-officer's motion for a judgment notwithstanding the verdict, based primarily on *Graham*.[199] In *Marley*, the plaintiff-suspect, instead of pulling over to the side of the road when beckoned by a police officer, sped away and ultimately fled on foot.[200] A police dog, ordered to hunt down the plaintiff, eventually captured him by biting his right thigh and calf.[201] Citing *Graham* and its objectively reasonable test, the court held that "[i]n this case, the plaintiff was, at most, a suspected misdemeanant, not a suspected felon. Additionally, the officer unleashed the canine when the unarmed plaintiff was either fleeing or stopping. Accordingly, one could reasonably conclude that the plaintiff posed no threat to the officer."[202] As a result, the use of the K-9 here failed the *Graham* test.[203]

Athough it is certainly secondary to the human rights issue involved, the issue of cost with regard to K-9 unit liability suits are yet another point of concern surrounding the "find and bite" policy.[204] For example, in Alexandria, Virginia, a federal jury awarded a Fairfax City woman $3,000 for severe bites on the thigh and waist.[205] Similarly, Louis Rendon obtained a $90,000 settlement against the

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[196] *Id.*

[197] UPI, Aug. 1, 1986, *available in* LEXIS, News library, Omni file.

[198] 774 F. Supp. 343 (E.D. Pa. 1991).

[199] *Id.* at 345.

[200] *Id.* at 344.

[201] *Id.*

[202] *Marley*, 774 F. Supp. at 345.

[203] *Id.* at 346.

[204] In Los Angeles, "[t]he settlement of [all] excessive force lawsuits against the Sheriff's Department has cost taxpayers $32 million over the last four years." Eric Malnic, *Deputies Use Dogs in Indiscrimante Attacks, Panel Told; Law Enforcement: Nearly Two Dozen People Testify in East L.A. on the Sheriff's Department Use of Force*, L.A. TIMES, Mar. 13, 1992, at B3.

[205] Carlyle Murphy, *Va. Woman Wins $3,000 in Attack by Police Dog*, WASH. POST, Oct. 30, 1986, at A24.

Los Angeles Sheriff's Department after being beaten and bitten by a police dog while he was handcuffed.[206] In Norfolk, Virginia, a $6,750,000 suit was filed against city officials in connection with a police dog attack that inflicted more than twenty-five bites on an enlisted Navy man.[207] In Santa Ana, California, the City Council settled with a police dog victim for $32,000.[208] The attack on the victim, Robert E. Cole, occurred while the police were arresting him on drunk driving charges.[209] Although City Attorney Edward J. Cooper denied the use of excessive force, he admitted, "we have had an adverse jury verdict in another similar case, so we decided to settle."[210] Astonishingly, records from the Vancouver, British Columbia Police Department's legal division reveals that "the city paid almost as much in one year for dog bite claims as it did in five years to settle [all] excessive force complaints [against officers]."[211] Specifically, in the first five months of 1992, fourteen dog bite claims have been filed there.[212] Eight of them were settled for an aggregate total of $16,800.[213] The settlements ranged from $36 to $8,500.[214]

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[206] Gregg LaMotte, *L.A.P.D. Force Subject of Amnesty International Report* (CNN television broadcast, June 26, 1992), *available in* LEXIS, News Library, Omni file.

[207] *Dog Attack Leads to Lawsuit*, UPI, Sept. 21, 1984, *available in* LEXIS, News Library, Omni file. Similarly, in El Paso, Texas, the Fifth Circuit awarded bite victim Luis Balandran (suspected of breaking into a car and then fleeing from police) $150,000 payable by the arresting officer himself. UPI, Mar. 18, 1988, *available in* LEXIS, News library, Omni file. Oscar Lee Dewberry, who was arrested for trespass, filed a $9,000,000 lawsuit against the Port Authority of New York, after a police attack dog bit him 18 times. Emily Sachar, *Man Bites Back, Sues in Police Dog Attack*, N.Y. NEWSDAY, July 17, 1991.

[208] Gebe Martinez, *Orange County Focus: Santa Ana; Excessive Force is Settled for $32,000*, L.A. TIMES, July 3, 1992, at B2.

[209] Cole was sentenced to one year in prison and three years of probation. *Id.* The dog bit him twice on the thigh during the arrest, according to the Santa Ana City Attorney. *Id.*

[210] *Id.*

[211] Gordon Hamilton, *Canine Claims Costly*, VANCOUVER SUN, May 15, 1992, at B7.

[212] One of the lawsuits, brought by the son of a University of British Columbia professor, claimed that due to the lacerations and wrist fractures from the multiple dog bites, his future as a basketball star was jeopardized. *Id.* The youth was arrested for possession of a narcotic for the purpose of trafficking. *Id.* The city's counsel claims the suit has been withdrawn. *Id.*

[213] *Id.*

In comparison, Vancouver paid out only $19,500 in claims brought against officers in the last five years.[215]

Ironically, the police dog is supposed to be a "cost-effective deterrent to crime."[216] Despite the approximate $5,000 price tag for each two to four year old imported dog, they boast a "very inexpensive pension plan."[217] Additionally, any officer would eagerly admit he or she would rather lose the money invested in a police dog, than a fellow officer.[218] However, several police departments have shut down their K-9 programs claiming that the cost outweighed its worth and effectiveness.[219]

IV. Qualified Immunity and Discretion

In *Marley*, the court used the *Graham* test to deny the defendant officer qualified immunity.[220] Qualified immunity is routinely granted to a governmental official who performs discretionary functions upon establishing that his conduct, "[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[221] The *Marley* court believed that the defendant wrongly relied on *Robinette* to contend that he could not have known that using a police dog to stop a fleeing suspect would overstep constitutional bounds.[222] Furthermore, the court distinguished *Robinette*, recognizing that case as one involving a suspected felon, and thus the officer there had probable cause to believe the suspect posed a threat.[223] Finally, the *Marley* court declared that the officer "should have been aware of the constitutional

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[214] Hamilton, *supra* note 211, at B7.

[215] *Id.*

[216] O'block et al., *supra* note 90, at 155.

[217] Ferrigno, *supra* note 92, at C1; *see* Pool, *supra* note 3, at B6.

[218] Beers, *supra* note 8, at 23; *see* Pool, *supra* note 3, at B6 ("As much as we love [the dogs], they're expendable.").

[219] O'block et al., *supra* note 90, at 159.

[220] 744 F. Supp. at 346.

[221] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[222] 774 F. Supp. at 345-46.

[223] *Id.* at 345.

constraints enunciated in *Garner*, and it was not objectively reasonable for him to think that unleashing a trained attack dog to apprehend a fleeing misdemeanant comported with those constraints"[224] and accordingly denied qualified immunity.[225]

The issue of qualified immunity also appears in *Chew*, raised by several defendant-police officers in their attempt to escape individual liability.[226] The *Chew* court observed that there was no federal statute forbidding the use of police dogs to forcefully apprehend suspects.[227] Moreover, state law did not clearly prohibit such apprehension.[228] The court commented that immunity was granted by the California Civil Code[229] in cases where a written Canine Unit Manual existed at the time of the incident.[230] The court further noted that such a manual did exist at the time, though its policy for such apprehensions was limited to the "find and bark" technique.[231] However, the court concluded that the Code did not sufficiently require the use of the dog to be consistent with the manual's regulations.[232] Hence, neither federal nor state law clearly forbade the training and/or the use of police dogs under the "find, seize and hold the suspects, by biting if necessary" policy, the defendants were allowed to use their discretion.[233] Thus, the court granted qualified immunity as to their individual liability under *Harlow v. Fitzgerald*.[234]

The justification of discretion has often been the smokescreen behind which police officers' racial prejudices are hidden. In stating that "the handler has a great deal of discretion out there in calling those dogs off or staying close with them to make sure that those dogs are responding responsibly," Karol Heppe of Police Watch, an

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[224] *Id.* at 345-46.

[225] *Id.* at 346.

[226] 744 F. Supp. at 953-54.

[227] *Id.* at 954.

[228] *Id.*

[229] CAL. CIV. CODE § 3342 (West 1988).

[230] *Chew*, 744 F. Supp. at 954.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

organization that monitors police abuses, maintains that there is "definitely a racial impact on the use of the dogs."[235] K-9 abuse against minorities intensified in April, 1963, in Birmingham, Alabama, as police dogs attacked civil rights demonstrators.[236] At that time, Birmingham Police Commissioner, Eugene "Bull" Connor was alleged to have declared to newsmen that, "I want them to see the dogs work. Look at those niggers run."[237] Birmingham presently uses the "bark and hold" policy and has one of the top K-9 programs in the United States.[238]

Today, in Los Angeles, based on LAPD statistics, K-9 bites occur most often in neighborhoods where the population is mostly black.[239] More specifically, reports indicate that in those bite cases where race has been determined[240] more than ninety-seven percent of the dog bite victims were black or Latino.[241] Police dogs were most frequently summoned to the Seventy-seventh, Southwest, and Newton divisions, which patrol primarily minority communities.[242] However,

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[235] *Police Dogs: Are They Safe?*, *supra* note 4; *see* Daniel E. Georges-Abeyie, *Law Enforcement and Racial and Ethnic Bias*, 19 FLA. ST. U. L. REV. 717 (1991). "Police discretion is, essentially, selective law enforcement, potentially impacted by police discrimination based on the race, ethnicity, and social class of the victim and alleged assailant." *Id.* at 720.

[236] Samuel G. Chapman, *Police Dogs Versus Crowds*, 8 J. POLICE SCI. & ADMIN., 316, 316 (1980).

[237] *Id.*

[238] *Police Dogs: Are They Safe?*, *supra* note 4.

[239] Stolberg, *supra* note 2, at B1; *see* Dean E. Murphy, *Rights Study Cites Serious Police Abuse in L.A.; Law Enforcement: Amnesty International Finds an 'Unchecked' Pattern of Excessive Force by Officers*, L.A. TIMES, June 27, 1992, at B1 (suggesting that African-Americans and Latinos suffer the most from police excesses in Los Angeles).

[240] *See* Merina, *supra* note 79, at B1. Such cases constitute only a minority of the 6,400 K-9 searches conducted from 1984 to April, 1990. *Id.*

[241] *Id.*; *see* Tim Rutten, *Politicians Show Double Standards on Race*, L.A. TIMES, July 9, 1992, at E1. "Police dogs also appear to have been used to inflict unwarranted injury on suspects, particularly in black or Latino neighborhoods." *Id.*

[242] Merina, *supra* note 79, at B1.

whites commit almost twenty-five percent of all burglaries and auto thefts in the Los Angeles Area.[243] Lieutenant Pete Durham of the LAPD argues that whites are inclined to steal in suburban neighborhoods, too distant from K-9 units.[244] According to Bill Lann Lee, western regional counsel for the NAACP Legal Defense and Educational Fund, "if you use the dogs the same way in the Anglo community, there would be tremendous outrage . . . it's a sad and tragic fact that those dogs are used disproportionately in minority communities and at the very least should be investigated."[245] In contrast, Chief Raymon Morris, overseer of the Los Angeles Sheriff's Department's K-9 Unit, claims that it is "not a factor so much of race as it is a factor of the sort of activities that go on in certain areas of our community."[246] In response to the apparent racial discrepency in the deployment of K-9s in the Los Angeles area, the American Civil Liberties Union of Southern California, along with the NAACP Legal Defense and Educational Fund and civil rights lawyers Cook and Mann, have filed a class action lawsuit charging the LAPD and the Los Angeles Sheriff's Department with having

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[243] Beers, *supra* note 8, at 23.

[244] *Id.*

[245] Merina, *supra* note 79, at B1.

[246] *Id.*

misused their K-9s through "systematic policies and practices."[247] The suit is currently pending.[248]

V. Conclusion

Without question, the K-9 has emerged as a practical adjunct to modern day law enforcement. However, the prudence with which K-9 units are deployed must be strictly monitored to ensure their liabilities do not outweigh their advantages. Several preventive measures should be adopted by all municipalities which have a K-9 unit. The measures, aimed at maintaining an acceptable bite-ratio, would allow K-9 officers to perform their functions unhampered by any controversy.

The aforementioned reforms adopted by the LAPD and currently being implemented need to be taken even further. The "circle and bark" policy should prevail in all municipalities with a K-

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[247] Beers, *supra* note 8, at 23. On August 18, 1992, the Los Angeles Police Commission adopted nine policy reforms including the requirement to issue a verbal warning before the deployment of a police dog, the creation of a special panel to review serious injuries, the creation of a standardized bite report form and additional clerical assistance to manage the newly created paperwork. *Commission Adopts Interim Report on use of Police Dogs*, Aug. 18, 1992, UPI, *available in* LEXIS, News Library, Omni file. Furthermore, the changes make it mandatory for a supervisor to be present at the scene of any K-9 deployment. *Id.* The changes also called for improved training for dogs and handlers alike. *Id.*; *see* Leslie Berger, *Report Calls for Changes in LAPD K-9 Unit*, L.A. TIMES, Aug. 16, 1992, at B1 (discussing the Commission Report that suggests that the Los Angeles police should issue verbal warnings when using dogs, improve their methods of investigating bites and convene a special panel to review injuries). However, Paul Hoffman, legal director of the ACLU, was dissatisfied with the changes. *Citizens Unit Urges Los Angeles Police to Curb Use of Dogs*, N.Y. TIMES, Aug. 17, 1992, at A14 (stating that although some good recommendations have been included, Hoffman argues that the key issues still are whether minorities are subject to a disproportionate amount of K-9 attacks, and whether the K-9s have been allowed to bite people who pose no threat, has not been addressed).

[248] However, on September 29, 1992, a report submitted to the Los Angeles Police Commission stated that by the end of 1992 the K-9 unit would complete retraining of its 16 dogs to comply with the "circle and bark" policy. Michael Connelly, *LAPD Begins Warnings on the Use of Dogs; Police: Policy is Intended to Encourage Surrenders and Reduce Bites. Animals are Being Retrained to Bark First*, L.A. TIMES, Sept. 30, 1992, at B3. Captain David J. Gascon, commander of the Metro Division, including the 17 officer K-9 unit, stated, "[w]e are taking this as a top priority." *Id.*

9 unit. The police dog should be used predominantly as a tool (to locate suspects) and should only be allowed to exert force in self defense or in defense of its handler. Nevertheless, a warning announcing the presence of the K-9 should always precede its deployment. The dog handlers should be psychologically tested before being assigned to the K-9 unit, to insure their mental preparedness. After a biting incident, the dogs should immediately undergo a miniature simulation of that exact biting incident, and the dogs' performance should be reviewed by supervising officers. If the dog reacts in an identical manner, and the behavior is contrary to the "circle and bark" policy, the dog should be immediately retrained. Moreover, periodic retraining should be instituted, regardless of the number of bites inflicted between retraining periods.

Furthermore, in the event of a bite, the dog handler at the scene should be required to photograph all bite wounds, and maintain a bite book; an album depicting the extent of all bite inuries. The victim should be treated as a shooting victim, for purposes of investigation, review, and documentation. Treatment and medical attention should be pursued immediately. With such reforms in place, it will be hard for any plaintiff to make out a *Monell* type claim against the municipality.

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