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JUSTICE FOR DOGS

Alexander J. Lindvall*

The more I learn about people, the more I like my dog.
—Mark Twain¹

I. INTRODUCTION

On June 29, 2019, Wendy Love and Jay Hamm pulled their truck into a vacant parking lot in Loveland, Colorado, to let their three dogs stretch and drink some water.² A few moments later, Loveland Police Officer Matthew Grashorn pulled into the parking lot to investigate them for trespassing.³ After Officer Grashorn exited his vehicle, the couple’s fourteen-month-old puppy, Herkimer, ran up to greet the officer.⁴

Herkimer wasn’t threatening.⁵ He wasn’t intimidating.⁶ And he clearly didn’t pose a threat to the officer or anyone else.⁷ He was a puppy coming up to say hello. Nonetheless, as Herkimer approached, Officer Grashorn drew his firearm and shot Herkimer in the head and chest.⁸ “You just killed my baby! Why did you have to shoot him? He’s a puppy!” the owners

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1. *Mark Twain Quotes*, GOODREADS, [<https://perma.cc/E6HV-HRXY>] (last visited Oct. 7, 2022).

2. Andrea Salcedo, *Body-Cam Footage Shows Police Shoot a ‘Playful’ Puppy: ‘He was Curious and Excited to Greet This Officer’*, WASH. POST (Aug. 27, 2021, 6:27 AM), [<https://perma.cc/2DP4-Y6PT>].

3. *See id.*

4. *Id.*

5. *See* Sarah Schielke, *Loveland Cop Surprises Family, Shoots Their Dog in Broad Daylight*, YOUTUBE (Aug. 25, 2021), [<https://perma.cc/73T2-VD5Q>].

6. *See id.*

7. *See id.*

8. Dillon Thomas & Michael Abeyta, *Civil Lawsuit Filed Against Loveland Police Officer Seen on Video Shooting Dog 2 Years Ago*, CBS NEWS COLO. (Aug. 26, 2021, 8:46 AM), [<https://perma.cc/NPB4-DJ7G>].

pleaded, tears streaming.⁹ “Maybe you ought to have your dogs in your truck then!” the officer yelled back.¹⁰

As Herkimer laid there in the parking lot, bleeding and whimpering, his owners pleaded with the officer to let them take him to the vet.¹¹ “You’re not going to be able to help him,” the officer replied.¹² “Why did you have to shoot? You should have shocked him,” one owner exclaimed.¹³ “Yeah, thanks for telling me how to do my job,” he replied.¹⁴ The officer did not let them take Herkimer to the vet.¹⁵ Instead, he charged them with a “dangerous dog” offense (which was later dropped by the local prosecutor’s office).¹⁶ Herkimer was euthanized a few days later.¹⁷ The Loveland Police Department investigated the shooting and ultimately determined that the officer acted appropriately.¹⁸ Love and Hamm subsequently sued Officer Grashorn and the City of Loveland for violating their constitutional rights.¹⁹

This is an atrocious act of police misconduct. One of the quickest ways to erode the public’s trust in law enforcement is to let police officers kill family pets without consequences. These dog owners deserve to win their lawsuit—and this Essay will explain why they likely will.

This Essay summarizes the Fourth Amendment’s protection of dogs. The Fourth Amendment protects people from unreasonable seizures.²⁰ And nearly every circuit has held that it is unreasonable (and therefore unconstitutional) for an officer to shoot (seize) a dog without a very good reason.²¹ Killing a

9. Schielke, *supra* note 5.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Schielke, *supra* note 5.

15. *Id.*

16. Salcedo, *supra* note 2.

17. *Id.*

18. *Id.*

19. Michael Karlik, *No Immunity for Loveland Cop Who Shot Puppy*, GAZETTE (Oct. 4, 2022), [<https://perma.cc/TW9F-FT7R>].

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

21. See, e.g., *Maldonado v. Fontanes*, 568 F.3d 263, 270-72 (1st Cir. 2009); *Carroll v. Cnty. of Monroe*, 712 F.3d 649, 651 (2d Cir. 2013); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210-11 (3d Cir. 2001); *Brown v. Battle Creek Police Dep’t*, 844 F.3d 556, 566-67 (6th

nonthreatening family pet is one of the most egregious forms of police misconduct. The courts rightfully recognize that the unjustified harming of a dog violates the Fourth Amendment.²² My hope is that this Essay will help civil-rights attorneys whose clients have lost their pets to police misconduct.

II. CASELAW

The First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have recognized that it is unconstitutional for a police officer to shoot a nonthreatening dog.²³ Multiple district courts have also reached the same conclusion.²⁴ This Section summarizes some of the most instructive cases.

In *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, the Ninth Circuit held that the San Jose police acted unconstitutionally when they killed three dogs while executing pre-planned warrants.²⁵ The officers had been planning to execute high-risk search warrants at several residences owned by members of the Hells Angels Motorcycle Club.²⁶ Although the officers knew there were guard dogs at these residences, they “developed no realistic plan other than shooting the dogs while serving the search warrants.”²⁷ The officers, in other words,

Cir. 2016); *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008); *Andrews v. City of West Branch*, 454 F.3d 914, 916 (8th Cir. 2006); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 976-78 (9th Cir. 2005); *Mayfield v. Bethards*, 826 F.3d 1252, 1257-59 (10th Cir. 2016); *Robinson v. Pezzat*, 818 F.3d 1, 7-8, 11-12 (D.C. Cir. 2016).

22. *See, e.g., Brown*, 844 F.3d at 566-67; *Hells Angels*, 402 F.3d at 977-78.

23. *Maldonado*, 568 F.3d at 270-72; *Carroll*, 712 F.3d at 651-52; *Brown*, 269 F.3d at 210-11; *Brown*, 844 F.3d at 566-67; *Viilo*, 547 F.3d at 710; *Andrews*, 454 F.3d at 918; *Hells Angels*, 402 F.3d at 976-78; *Mayfield*, 826 F.3d at 1257-59; *Robinson*, 818 F.3d at 7-8, 11-12.

24. *E.g., Silva v. City of San Leandro*, 744 F. Supp. 2d 1036, 1057-58 (N.D. Cal. 2010); *Bateman v. Driggett*, No. 11-13142, 2012 WL 2564839, at *7 (E.D. Mich. July 2, 2012); *Taylor v. City of Chicago*, No. 09 CV 7911, 2010 WL 4877797, at *1-3 (N.D. Ill. Nov. 23, 2010); *Gaulden v. City of Desloge*, No. 4:07CV01637, 2009 WL 1035346, at *12 (E.D. Mo. Apr. 16, 2009); *Kincheloe v. Caudle*, No. A-09-CA-010, 2009 WL 3381047, at *7-8 (W.D. Tex. Oct. 16, 2009).

25. 402 F.3d at 965, 977-78.

26. *See id.* at 966-69.

27. *See id.* at 976.

planned to kill several dogs on private property without any notice or warning to the owners.²⁸

The Ninth Circuit found that these premeditated dog killings violated the Fourth Amendment.²⁹ Because the officers did not create (or even contemplate) a nonlethal plan to control the guard dogs, the court found that these killings (seizures) were unreasonable under the Fourth Amendment.³⁰ And the court went on to withhold qualified immunity from these officers, holding that “[a] reasonable officer should have known that to create a plan to enter the perimeter of a person’s property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment.”³¹

The *Hells Angels* decision shows that the courts do not consider dead dogs to be justified “collateral damage” of police work. The police cannot, as a matter of course, kill dogs while executing a search warrant—even large dogs guarding a known-to-be-dangerous motorcycle gang. To comply with the Fourth Amendment, the police must, at a minimum, develop a realistic plan to avoid killing dogs during the execution of a search warrant.³²

Similarly, in *Andrews v. City of West Branch*, the Eighth Circuit held that an officer violated the Fourth Amendment when he shot a dog because (a) the dog was in a fenced-in area, (b) it did not pose an imminent threat to anyone, and (c) the dog’s owner was nearby and capable of restraining the dog.³³ In *Andrews*, a resident called the police to complain about “a large black dog” that had been terrorizing her neighborhood and bothering other dogs.³⁴ The responding officer drove to the neighborhood to search for the dog.³⁵ He “spotted, then lost sight of, the loose dog several times.”³⁶ He eventually came across a

28. *See id.* at 976, 977.

29. *See id.* at 977-78.

30. *See Hells Angels*, 402 F.3d at 976-78.

31. *See id.* at 978.

32. *See id.*

33. *See Andrews v. City of West Branch*, 454 F.3d 914, 916, 918 (8th Cir. 2006).

34. *Id.* at 916.

35. *Id.*

36. *Id.*

large black dog in a fenced-in backyard.³⁷ He “walked toward the fenced backyard . . . and fired two shots at the dog,” severely wounding it.³⁸ The officer realized almost immediately that “he had shot the wrong dog” because he noticed that the dog’s owner “was standing on her back patio just a few feet away from her dog, Riker, when he was shot.”³⁹ The officer then “decided to shoot Riker a third time to end [his] suffering.”⁴⁰

Riker’s owner subsequently sued this officer under § 1983, arguing that the officer violated her clearly established constitutional rights by shooting her nonthreatening, fenced-in dog.⁴¹ The Eight Circuit agreed.⁴² “Riker was not on the loose, growling, acting fiercely, or harassing anyone at the time [the officer] killed him,” the court reasoned.⁴³ Even though the officer thought Riker was at-large and did not realize his owner was standing nearby, the court still found that his actions were unconstitutional because Riker did not pose a danger to anyone, as he was in a fenced-in backyard and was not acting aggressively.⁴⁴ The court concluded: “[A]n officer commits an unreasonable, warrantless seizure of property, in violation of the Constitution, when he shoots and kills an individual’s family pet when that pet presented no danger and when non-lethal methods of capture would have been successful.”⁴⁵

Likewise, in *Criscuolo v. Grant County*, the Ninth Circuit held that a police officer violated the Fourth Amendment when he shot a dog because the dog was retreating and the owner was standing by to leash the dog.⁴⁶ Even though this dog had attacked

37. *See id.*

38. *Andrews*, 545 F.3d at 916.

39. *Id.*

40. *Id.*

41. *See id.* at 916, 918.

42. *Id.* at 918.

43. *Andrews*, 545 F.3d at 918.

44. *See id.* at 917-18.

45. *Id.* (citing *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210-11 (3d Cir. 2001)). The *Andrews* court also went on to hold that the defendant-officer was not entitled to qualified immunity because a reasonable officer in his shoes would have realized that he cannot kill a dog who poses no imminent danger and whose owners were nearby and desirous of retaining custody, especially when the dog appears to be in an enclosed space and there were nonlethal means available. *Id.* at 918-19 (citing *Brown*, 269 F.3d at 211-12).

46. *See* 540 F. App’x 562, 563 (9th Cir. 2013).

the officer's K-9 moments before he fired, the court found that it was unreasonable to shoot this dog because (a) it was retreating toward its owner, (b) it no longer posed an immediate threat to the K-9 or anyone else, and (c) the owner was standing by and wanted to retain custody of the dog.⁴⁷ The court concluded that it was "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."⁴⁸

In contrast, in *Patino v. Las Vegas Metropolitan Police Department*, the Ninth Circuit held that an officer acted reasonably when he shot a dog because the dog was large, seemingly aggressive, and charging toward the officer.⁴⁹ In *Patino*, an officer entered a backyard after hearing a gunshot and moaning.⁵⁰ When he entered the backyard, a 120-pound pit bull charged across the lawn toward him.⁵¹ Though the officer yelled at the dog to stop, it did not, and the officer shot the dog when it was about two feet away from him.⁵² The *Patino* court found that this officer acted reasonably because (a) the officer had roughly five seconds to react to a 120-pound pit bull, (b) the dog was running at him aggressively, (c) another on-scene officer also drew his weapon and perceived the dog to be a threat, (d) the officer yelled at the dog to stop, and (e) the officer did not shoot the dog until it was within two feet of him.⁵³

Andrews, *Criscuolo*, and *Patino* show that a dog must present an *imminent* threat of *future* violence before deadly force will be justifiable. It doesn't matter whether the dog was previously aggressive; if the dog is retreating to its owner or in an enclosed space, it is unconstitutional for police to use deadly force on that dog. But if a large, seemingly dangerous dog is at-large

47. See *id.*; The Associated Press, *Grant County Deputy Kills Dog that Attacked K-9*, SEATTLE TIMES (Jan. 27, 2010, 3:31 PM), [<https://perma.cc/N4BH-LFEH>].

48. *Criscuolo*, 540 F. App'x at 564.

49. See (*Patino I*), 207 F. Supp. 3d 1158, 1164-65 (D. Nev. 2016), *aff'd*, (*Patino II*), 706 F. App'x 427 (9th Cir. 2017).

50. *Id.* at 1162.

51. *Patino II*, 706 F. App'x at 428.

52. *Patino I*, 207 F. Supp. 3d at 1164.

53. *Id.*

and poses an imminent danger to the police or others, deadly force against that dog is likely justified.

Following the same reasoning, in *Brown v. Battle Creek Police Department*, the Sixth Circuit held that the police acted reasonably when they shot and killed two large, aggressive pit bulls while executing a search warrant.⁵⁴ In *Brown*, the police were executing a raid on a known gang member's house.⁵⁵ "[T]he officers were on high alert going into the raid" because the target was known to be dangerous and it was likely that other gang members were also in the house.⁵⁶ As the officers approached the house, two large pit bulls began barking aggressively and jumping and scratching at the windows.⁵⁷

When the officers entered, one of the dogs immediately ran toward the door and lunged at the officers.⁵⁸ An officer shot and killed this dog almost immediately upon entry.⁵⁹ The other dog had run down into the basement.⁶⁰ When the officers entered the basement, the dog was standing in the middle of the room, barking.⁶¹ An officer then shot this dog as well because the officers "were unable to safely clear the basement" with this dog on the loose.⁶² The *Brown* court held that these officers acted reasonably in shooting these dogs because the dogs were large, aggressive, and preventing the officers from securing the house, which was being occupied by known-to-be-dangerous gang members.⁶³

It is well-settled that the "most important" factor in analyzing excessive-force cases is "the safety of the officers [and] others."⁶⁴ In *Brown*, the first dog clearly presented a risk of imminent harm to the officers because it was ninety-seven pounds, barking aggressively and lunging at the officers as soon

54. *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 566-70 (6th Cir. 2016).

55. *Id.* at 568-69.

56. *Id.* at 569.

57. *Id.*

58. *Id.* at 569-70.

59. *Id.*

60. *Id.* at 570.

61. *Id.*

62. *Id.*

63. *See id.* at 568-70.

64. *E.g.*, *Smith v. City of Hemet*, 394 F.3d 689, 700-02 (9th Cir. 2005) (en banc).

as they entered the home, and “preventing them from entering the basement and safely sweeping it.”⁶⁵ The second dog posed a considerable risk to the officers as well because it was fifty-three pounds, also barking aggressively, and preventing them from being able to clear the basement.⁶⁶ This basement, moreover, was “filled with various objects,” and with the second dog standing guard, it was “difficult to determine if there was anybody in the basement hiding behind one of the large objects.”⁶⁷ Because the dogs were seemingly trying to attack the officers and because they were preventing the officers from taking the necessary steps to ensure their own safety, the *Brown* court found that the officers acted reasonably in shooting these dogs.⁶⁸

III. THE LEGAL RULE REGARDING DOGS, THE POLICE, AND DEADLY FORCE

These cases show that the police must act reasonably when dealing with dogs—and their failure to act reasonably can lead to § 1983 liability for money damages.⁶⁹ This is the obviously correct legal conclusion, and courts that have not addressed the issue should have little trouble concluding that the Fourth Amendment prevents the police from harming dogs without a very strong justification.

Synthesizing these cases, a rule develops: The police may use deadly force on a threatening or aggressive dog only if it poses a risk of serious, immediate harm to others. As a corollary, officers may not use deadly force on a dog if it does not present a threat of serious, immediate harm to others.

The most important factors in analyzing whether a dog poses a sufficiently serious threat to warrant deadly force are (A) whether the dog, because of its age, size, or other factors, was capable of inflicting serious harm; (B) whether the dog was aggressive, threatening, or violent at the time force was used; (C)

65. See *Brown*, 844 F.3d at 569-70.

66. *Id.*

67. *Id.* at 570.

68. See *id.* at 568-70.

69. See, e.g., *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005); see also 42 U.S.C. § 1983.

whether the dog was retreating when force was used; (D) whether the dog's owner was nearby and desirous to retain custody of the dog; and (E) whether deadly force was avoidable.⁷⁰

These are common-sense factors when put in real-world terms. Factor A means that an officer obviously cannot use deadly force on a Chihuahua, a Pekingese, or a toy poodle, no matter how aggressive or threatening it is, because these breeds are simply incapable of seriously harming people. An officer also cannot use deadly force on elderly, disabled, or restrained dogs because they likewise cannot inflict serious harm on others. And factors B, C, D, and E are meant to show that deadly force against a dog must be a last resort and can only be used if the dog poses an imminent threat of future harm to others.⁷¹ And as a result, an officer cannot use deadly force on a dog when it is retreating or when the dog's owner is nearby and capable of restraining the dog, because the likelihood of the dog harming others under these circumstances is too low to justify actions as drastic as killing the dog.⁷²

In other words, phrased in terms of the necessary elements, an officer can use deadly force on a dog only if (i) the dog has the ability to inflict serious, immediate harm to the officer or others; (ii) it reasonably appears that the dog is about to inflict serious harm on the officer or others; and (iii) deadly force is the only practical way to prevent the dog from inflicting serious harm on others.⁷³ If all these elements are satisfied, deadly force is allowed. But if any of these factors is not present, deadly force is not allowed.

Applying these factors to the case involving Herkimer from this Essay's Introduction, it is clear that the officer's use of deadly

70. See, e.g., *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 211 (3d Cir. 2001); *Brown*, 844 F.3d at 568-70; *Criscuolo v. Grant Cnty.*, 540 F. App'x 562, 563-64 (9th Cir. 2013); *Hells Angels*, 402 F.3d at 977-78; *Robinson v. Pezzat*, 818 F.3d 1, 8, 12 (D.C. Cir. 2016); *Patino I*, 207 F. Supp. 3d 1158, 1164, 1166 (D. Nev. 2016).

71. E.g., *Brown*, 269 F.3d at 210-11; *Criscuolo*, 540 F. App'x at 563-64.

72. See *Hells Angels*, 402 F.3d at 977-78; *Criscuolo*, 540 F. App'x at 563-64; see also *Brown*, 844 F.3d at 568 (noting that "[t]here is no dispute that the shooting of . . . dogs" amounts to a "severe intrusion[]" on a person's Fourth Amendment rights "given the emotional attachment between a dog and an owner").

73. See *Brown*, 844 F.3d at 568; *Criscuolo*, 540 F. App'x at 563-64; *Hells Angels*, 402 F.3d at 978.

force was improper and unconstitutional.⁷⁴ Herkimer didn't meet any of the above necessary elements. First, he likely didn't have the ability to inflict serious harm on anyone. He was a playful, fourteen-month-old puppy who appeared to weigh about twenty-five pounds.⁷⁵ Second, even if Herkimer did have the ability to cause serious harm, he wasn't exhibiting any aggressive or threatening behavior that would have led a reasonable officer to believe he was about to immediately cause serious harm. He was trotting around an empty parking lot, and when the officer used force, he was clearly running up to the officer to say hello.⁷⁶ Third, deadly force was clearly not necessary in this case. The officer had many other avenues at his disposal: he could have gotten back into his car; he could have ordered the owners to restrain their dog; he could have tased Herkimer; he could have pepper-sprayed him; he could have fired a warning shot; and so on. But the officer didn't do any of this. Instead, he immediately escalated to deadly force with little hesitation.⁷⁷

This was a rude, trigger-happy officer who shot a puppy for no good reason. If this officer doesn't deserve liability under § 1983, I don't know who does. Herkimer's owners deserve serious compensation for this officer's blatant misconduct. And, as I hope this Essay made clear, they should have little trouble convincing a judge that this officer's shoot-first-ask-questions-later approach violated their clearly established Fourth Amendment rights.

IV. CONCLUSION

People love dogs.⁷⁸ When there is dog-related injustice, people tend to lose their minds. Knowing this, one of the quickest

74. *See supra* Part I.

75. *See* Schielke, *supra* note 5.

76. *See* Salcedo, *supra* note 2.

77. *Id.*

78. *See* Emma Bedford, *Number of Pet Owning Households in the United States in 2021/22, By Species*, STATISTA (Feb. 15, 2022), [<https://perma.cc/Q3XA-643C>] (finding approximately 69 million U.S. households own at least one dog); *The Wonderful Statistics and Facts Behind Dog Walking*, PETBACKER, [<https://perma.cc/4LZR-AP53>] (last visited Oct. 9, 2022) (an informal survey showing that 95.5% of dog owners consider their dog to be "part of the family").

ways to erode the public's trust or support for law enforcement is to let officers kill innocent dogs without (severe) consequences. Yet there are law enforcement officers out there who don't share the general public's love for dogs. I hope this Essay will help lawyers, litigants, and judges navigate this area of law and achieve justice for dogs.