

The Racialized Violence of Police Canine Force

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* Assistant Professor of Law, University of South Carolina School of Law. <https://orcid.org/0000-0002-3445-0478>. © 2023, Madalyn K. Wasilczuk. To the Black, teenage boys of Baton Rouge who have been victims of police dogs and their families, especially L.A. and his mother, T.W., who fought to make sure that other boys wouldn't go through what he did. And to Jack Harrison and Lakita Leonard, who stand up for kids in Baton Rouge every day, first drew my attention to this topic, and always inspire me. Many thanks to the University of Baltimore Law Review Symposium for inviting me to present an earlier iteration of this project and to the University of South Carolina School of Law Faculty Workshop, especially Seth Stoughton, Wadie Said, Claire Raj, Laura Lane-Steele, Kevin Brown, and Josephine Brown. To Brandon Garrett and Duke Law's Wilson Center, the NYU Clinical Writer's Workshop, especially Vida B. Johnson, Norrinda Brown Hayat, Vincent Southerland, Michael Pinard, and Megan Richardson; and to Cynthia Godsoe, Jonathan Witmer-Rich, Eric Miller, Dan McConkie, Gregory Parks, Jenny Carroll, and Brandon Hasbrouck for your early encouragement. Thank you to Nikesh Amin, Reilly Lerner, Lauren Hoyns, and Christel Lopez Purvis for your diligent research assistance, and to Vanessa McQuinn for administrative and submission support that goes above and beyond. My enduring gratitude and love to Tad, who believes in me every step of the way. Earlier iterations of this Article are cited as *The Racialized Violence of Police Canine Units*.

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INTRODUCTION

Two white men stand over a screaming Black teenager. A dog bites into the boy’s arm, thrashing its head back and forth, as the men egg the dog on, “Get ‘im, boy. Get ‘im.” The teenager heaves deep sobs, begging them to release him from the dog’s jaws. It is 2019, and I am sitting in my office watching discovery for a clinic case on which I am the supervising attorney. In the body camera video, the men are arresting a boy who had been the passenger in a car reported stolen. The boy had no weapons, and the police had no concrete reason to suspect he did. Yet the police demanded that he lie completely still with his hands behind his back before they would remove the dog’s gnashing teeth from the boy’s body.¹ From 2017 to 2019, the Baton Rouge police would use dogs to bite teenagers, on average, once every three weeks.² Many of those children became my clients in delinquency proceedings.

1. This story is based on my viewing of police body camera video from a police dog apprehension by the Baton Rouge Police Department in Baton Rouge, Louisiana. I chose to share this scene because police reports often mask the brutality of police dog “apprehensions.” In court documents, the child was described as having “minor dog bites.” In addition, court opinions are complicit in their sanitized renderings of police dog attacks. *See, e.g., Jarvela v. Washtenaw County*, 40 F.4th 761, 764 (6th Cir. 2022) (“Among the various forms of force available to law enforcement, [canine force] is a comparatively measured application of force”); *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003) (describing the dog as “trained to bite and hold a suspect’s arm or leg, not to maul a suspect”); *Lowry v. City of San Diego*, 858 F.3d 1248, 1254, 1257 (9th Cir. 2017) (en banc) (categorizing canine force as “moderate” and referring to dog biting through woman’s lip as “initial contact”); *Dastinot v. Watkins*, No. 18-cv-00166, 2023 WL 121221, at *3 (D. Me. Jan. 6, 2023) (referring to dog’s continued bite as “continu[ing] to hold Plaintiff by the knee”); *Rainey v. Patton*, 534 F. App’x 391, 394 n.2 (6th Cir. 2013) (“Officer Patton explained that his dog is not trained to ‘attack’ suspects, but was instead trained to bite and hold a suspect when: (1) the dog is sent to track and apprehend the suspect or (2) the suspect moves defensively.”). Some common terms, including the term “canine force” which appears in the title of this Article, can work to sanitize “officers’ attempts to exercise control over community members through the application, or threatened application, of physical power, pain, injury, or death.” Seth W. Stoughton, *Accountability and Enhancement: The Dual Objectives of Use-of-Force Review*, in *RETHINKING AND REFORMING AMERICAN POLICING: LEADERSHIP CHALLENGES AND FUTURE OPPORTUNITIES* 227, 230 (Joseph A. Schafer & Richard W. Myers eds., 2022) (quoting Seth W. Stoughton, *The Regulation of Police Violence*, in *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 321, 322 (Roger G. Dunham et al. eds., 2021)). For a complicating view on the line between witness and spectator and reasons not to repeat scenes of Black suffering, see SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 3–4 (1997).

2. Bryn Stole & Grace Toohey, *The City Where Police Unleash Dogs on Black Teens*, MARSHALL PROJECT (Feb. 12, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/02/12/the-city-where-police-unleash-dogs-on-black-teens> [<https://perma.cc/JA6T-REY3>].

Police commonly use dogs as enslavers did: to catch people running away.³ As of 2007, “[29%] of local police departments, employing 77% of all officers, used dogs for law enforcement.”⁴ Thousands have been caught on the sharp end of this form of police violence. A 2019 study culled 32,951 “legal intervention” dog bites documented by the National Electronic Injury Surveillance System (NEISS) database from 2005 to 2013.⁵ Despite widespread use, police canine violence is absent from most conversations about police reform.⁶

Some police forces make frequent use of police dogs as weapons. For example, the Sacramento Police Department (SPD) reported 228 incidents of canine force from 2014 to 2019, second only to its use of Tasers.⁷ Though people rarely die from police dog bites, police canines used to “apprehend” people are perhaps the most dangerous use of force aside from guns.⁸ In legal terms, police dog bites and the unleashed dogs themselves should be understood as “deadly force,” meaning

3. See *infra* Sections I.A–I.B.

4. BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 231174, LOCAL POLICE DEPARTMENTS, 2007, at 20 (2011), <https://bjs.ojp.gov/content/pub/pdf/lpd07.pdf> [<https://perma.cc/UJ4Q-Z5ZF>].

5. See Randall T. Loder & Cory Meixner, *The Demographics of Dog Bites Due to K-9 (Legal Intervention) in the United States*, 65 J. FORENSIC & LEGAL MED. 9, 9–14 (2019). There are some limitations caused by the use of the NEISS database in this study, acknowledged by the authors. *Id.* at 10. For instance, the study only includes canine bites that resulted in emergency room treatment and not those where treatment was refused or occurred outside of emergency rooms. *Id.* For example, according to the authors, “[i]n Montgomery County, Maryland, only 57 of 166 (34.3%) K-9 bite victims received treatment in an [emergency department].” *Id.* (footnote omitted). They note that if that statistic were accurate for the locations of the hospitals covered by NEISS, the estimated total number of K-9 bites during the time period of the study would be 93,443, or about 10,400 per year. *Id.*

6. See, e.g., *id.* at 9 (“There is a paucity of literature on K-9 dog bites.”); Christy E. Lopez, Opinion, *Don’t Overlook One of the Most Brutal and Unnecessary Parts of Policing: Police Dogs*, WASH. POST (July 6, 2020, 2:02 PM), <https://www.washingtonpost.com/opinions/2020/07/06/police-dogs-are-problem-that-needs-fixing/> (advocating for a conversation about abolishing police apprehension dogs). Scholarly discussion of this use of force is also uncommon. Ian T. Adams, Scott M. Mourtgos, Kyle D. McLean & Geoffrey P. Alpert, *De-Fanged*, J. EXPERIMENTAL CRIMINOLOGY, Jan. 2023 (“Despite prolonged use, the scholarship on K9s is scant . . .”).

7. *Sacramento, CA 2021: Use of Force*, CTR. POLICING EQUITY: JUST. NAVIGATOR, <https://justicenavigator.org/report/sacramento-city-ca-2021/uof> [<https://perma.cc/ERB5-FQCH>] (last visited March 31, 2023).

8. See Peter C. Meade, *Police and Domestic Dog Bite Injuries: What Are the Differences? What Are the Implications About Police Dog Use?*, 37 INJ. EXTRA 395, 400 (2006); Gilbert V. Pineda, H. Range Hutson, Deirdre Anglin, Christopher J. Flynn & Marie A. Russell, *Managing Law Enforcement (K-9) Dog Bites in the Emergency Department*, 3 ACAD. EMERGENCY MED. 352, 353 (1996); see also *infra* Section III.A (discussing medical studies). Courts and police typically consider guns deadly force regardless of the specific facts or outcomes of an incident. See, e.g., *Seidner v. de Vries*, 39 F.4th 591, 596 (9th Cir. 2022) (“Some uses of force can be quantified categorically. The best example is shooting a firearm, which by definition is ‘deadly force’: force that ‘creates a substantial risk of causing death or serious bodily injury.’” (quoting *Smith v. City of Hemet*, 394 F.3d 689, 693 (9th Cir. 2005) (en banc))); *Rivero v. State*, 871 So. 2d 953, 954 (Fla. Dist. Ct. App. 2004) (“[F]iring a firearm in the vicinity of human beings constitutes the use of deadly force as a matter of law.”). The Model Penal Code explicitly contemplates that guns are deadly force whenever they are fired in the direction of a person but excludes them when wielded as a threat that will not be realized absent further escalation. MODEL PENAL CODE § 3.11(2) (AM. L. INST. 2021).

“force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.”⁹

Police dog force, like most forms of police violence nationally, is aimed disproportionately at predictable targets: those racialized as Black and other racialized groups.¹⁰ While the NEISS study reflects that police dogs most frequently bite Black boys and men, Black girls and women, though fewer in absolute numbers, are (like their male counterparts) similarly overrepresented as victims of police violence.¹¹ To continue to use Sacramento as an example, SPD officers directed 43% of canine force against Black people, who make up only 14% of the city’s population.¹²

9. MODEL PENAL CODE § 3.11(2) (AM. L. INST. 2021).

10. This Article focuses most on the experience of police dogs by people racialized as Black. This specificity is necessary because racialization, discrimination, and oppression have taken unique forms for different groups of color. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2015) (discussing theories of racial formation and dynamics of racial politics). Police violence has looked different at different times and in different places in the United States. Today, while Black people may bear the brunt of police dog bites in Baton Rouge, Latine people die and are bitten at much higher rates in Kern County, California. In Kern County, “[w]ith only one exception, every person killed [from 2006 to 2017] in an incident involving [Kern County Sheriff’s Office] canines was black or Hispanic”—out of five deaths, there were three Hispanic victims and one Black victim. ADRIENNA WONG & PETER BIBRING, ACLU OF CAL., PATTERNS & PRACTICES OF POLICE EXCESSIVE FORCE IN KERN COUNTY: FINDINGS & RECOMMENDATIONS 3 n.11, 3–4, app. III (2017), https://www.aclusocal.org/sites/default/files/patterns_practices_police_excessive_force_kern_county_aclu-ca_paper.pdf [<https://perma.cc/Q57A-UE3D>]. Similar variations can be found in localities across the country.

11. See Andrea J. Ritchie, *Introduction* to KRISTIAN WILLIAMS, *OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA* 15, 18 (3d ed. 2015) (citing Written Testimony from Andrea J. Ritchie, Soros Justice Fellow, to the President’s Task Force on 21st Century Policing 1 (Jan. 28, 2015), https://web.archive.org/web/20150327133511/http://www.cops.usdoj.gov/pdf/taskforce/01-30-2015/Invited_Testimony_January_30.pdf [<https://perma.cc/E5B3-2TXB>] (discussing comparable rates of police stops between men and women of a given race or ethnicity)). Campaigns against police violence have paid relative inattention to law enforcement violence against women, transgender, and non-binary people of color, though they suffer at the intersection of gender and state violence. See Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 138, 139–40 (INCITE! Women of Color Against Violence ed., 2016). Dog attacks also link policing to the security state, and a recent investigation by Futuro Media documents the militarization of the southern U.S. border and how dispersal policies, which employ dogs to scatter groups crossing the border, create death. *Futuro Media Probes Deadly U.S. Border Policy & NY Drug Trafficking Trial of Mexico’s Former Top Cop*, DEMOCRACY NOW! (Dec. 7, 2022), https://www.democracynow.org/2022/12/7/death_by_policy_podcast_futuro_media [<https://perma.cc/Y7ME-TYEW>].

12. *Sacramento, CA 2021: Summary of Findings*, CTR. POLICING EQUITY: JUST. NAVIGATOR, <https://justicenavigator.org/report/sacramento-city-ca-2021/summary> [<https://perma.cc/M7CT-3295>] (last visited March 31, 2023). In addition to the NEISS study, numerous other departments have been found to use canine force disproportionately against Black people or people of color. See, e.g., Brian Howey, *San Jose’s Police Dogs Under Fire*, SAN JOSE SPOTLIGHT (Dec. 22, 2022), <https://sanjosespotlight.com/san-jose-police-department-dogs-under-fire-canine-unit-k9-bites-sjpd/> [<https://perma.cc/VCE2-8KLU>] (documenting disproportionate bites of Black and Hispanic people by San Jose police dogs); Ryan Martin, Andrew Fan, Dana Brozost-Kelleher & Ellen Glover, *5 Takeaways from Our Investigation of Indianapolis Police Dogs*, MARSHALL PROJECT (Oct. 11, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/11/5-takeaways-from-our-investigation-of-indianapolis-police-dogs> [<https://perma.cc/4948-SMH2>] (finding that Indianapolis police dogs disproportionately bit Black people and that the disparity was even more extreme for Black children); Stole & Toohey, *supra* note 2 (finding that Baton Rouge police dogs disproportionately bit Black people); Evan Semoffsky, *By the Numbers: How Often Bay Area Police Agencies Deploy K-9s to Bite*, KTVU FOX 2 (May 16, 2022, 8:02 PM), <https://www.ktvu.com/news/by-the-numbers-how-often-bay-area-police-agencies-deploy-k-9s-to-bite> [<https://perma.cc/42XD-FL66>] (collecting bite data from Bay Area

Vestiges of racialized control permeate the criminal legal system. When images that evoke slavery or militarism draw public attention, they sometimes receive rebuke and condemnation. After photos emerged of border patrol agents whipping Haitian asylum-seekers with reins, the backlash was swift.¹³ Within days, the Biden Administration ordered mounted patrol to cease.¹⁴ Yet similar tableaux exist across the criminal legal system. Even recently, officers on horseback have overseen imprisoned laborers at Louisiana State Penitentiary,¹⁵ and heavily armed officers with military weapons have encircled and confronted racial justice protestors.¹⁶ These images conjure different associations depending on one's cultural background. While many white communities in the United States associate police dogs with agility courses and McGruff the Crime Dog, for many Black Americans, dogs trigger memories of enslavement and brutality.¹⁷ When police dogs are celebrity guests on local media channels, that portrayal

departments that demonstrate racial disproportionality in a number of police departments and sheriff's offices). In Richmond, California, police dogs bit 46 Black people, 9 white people, and 29 Hispanic people over a five-year period, in a city that is 18.4% Black, 18.2% white, and 43.8% Hispanic or Latine according to the U.S. Census. See *id.*; *QuickFacts: Richmond City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/richmondcitycalifornia> [https://perma.cc/P2TF-6KDR] (last visited Feb. 27, 2023). In Fairfield, California, 26 Black, 10 white, and 6 Hispanic people were bitten over a five-year period in a city that is 15.9% Black, 29% white, and 29.3% Hispanic or Latine. See Semoffsky, *supra*; *QuickFacts: Fairfield City, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fairfieldcitycalifornia> [https://perma.cc/UBK4-JZTU] (last visited Feb. 27, 2023). Indeed, some jurisdictions have had their disparities widen after canine unit reforms. See, e.g., Latisha Jensen, *Portland Police Dogs Are Biting White People Less—and Black People Just as Often*, WILLAMETTE WK. (Jan. 27, 2021, 5:31 AM), <https://www.wweek.com/news/2021/01/27/portland-police-dogs-are-biting-white-people-less-and-black-people-just-as-often/> [https://perma.cc/6XH8-9J65]. One confidential database, shared with Vice News by a police dog trainer and former handler, Bob Eden, contradicts the oft-made claim that police dogs disproportionately attack people of color and shows that “white people are proportionally bitten more frequently than Black people overall. His database draws from 1,500 police agencies across North America, representing about 4,500 dogs, but race is not always recorded.” Kevin Maimann, *Time to Cancel Police Dogs, Experts Say*, VICE NEWS (July 6, 2021, 7:00 AM), <https://www.vice.com/en/article/z3xqzy/time-to-cancel-police-dogs-experts-say> [https://perma.cc/7863-XG2S]. The lack of systematized data collection means that in departments for which data is not public, this remains an unanswerable empirical question.

13. Bill Chappell, *U.S. Border Agents Chased Migrants on Horseback. A Photographer Explains What He Saw*, NPR (Sept. 21, 2021, 10:22 PM), <https://www.npr.org/2021/09/21/1039230310/u-s-border-agents-haiti-migrants-horses-photographer-del-rio> [https://perma.cc/378A-GQBE].

14. Joe Hernandez, *The Biden Administration Will No Longer Use Horses at a Texas Border Crossing*, NPR (Sept. 23, 2021, 5:27 PM), <https://www.npr.org/2021/09/23/1040214077/the-biden-administration-will-no-longer-use-horses-at-a-texas-border-crossing> [https://perma.cc/V2WX-ES7C].

15. See CLINT SMITH, *HOW THE WORD IS PASSED: A RECKONING WITH THE HISTORY OF SLAVERY ACROSS AMERICA* 90 (2021).

16. See, e.g., Nicole Chavez, *Rioters Breached US Capitol Security on Wednesday. This Was the Police Response When It Was Black Protestors on DC Streets Last Year*, CNN (Jan. 10, 2021, 11:30 PM), <https://www.cnn.com/2021/01/07/us/police-response-black-lives-matter-protest-us-capitol/index.html> [https://perma.cc/64QC-QW76] (describing and showing response of police and D.C. National Guard to racial justice protests during the summer of 2020).

17. The 2019 controversy over D.C. residents walking their dogs on Howard University's campus illuminates the cultural memory of Black Americans with dogs and their use in oppression and hatred. See Theresa Vargas, *The Howard University Controversy Was Never Just About Dogs. It Was About Respect.*, WASH. POST (Apr. 24, 2019, 2:06 PM), https://www.washingtonpost.com/local/the-howard-university-controversy-was-never-just-about-dogs-it-was-about-respect/2019/04/24/e0286c14-66a2-11e9-a1b6-b29b90efa879_story.html.

reflects a “persistent erasure” similar to that achieved by the common trope in literature of reading dogs as “man’s best friend.”¹⁸

The current deployment of police canines against Black boys and men links present policing practices to the foundations of canine policing in Western colonialism, imperialism, and chattel slavery. Police dogs were first introduced to the Southern states as dogs to hunt enslaved Black people—slave dogs.¹⁹ Some of the first slave dogs were themselves directly descended from the dogs used to control and attack enslaved people in Haiti and then-Spanish Florida.²⁰ Northern police departments modeled their use of police dogs after departments in Europe, where dogs had first been adopted as instruments of war and colonization and then as crime-fighting tools.²¹ Across the United States, police agencies first called upon dogs for order maintenance against the “dangerous classes”: the poor, immigrants, and Black people.²²

Though police dogs’ disproportionate use against Black people could also be said of any number of other police practices, police dogs are distinct for three reasons. First, police dogs are viscerally different than other forms of police violence. Police dog attacks pit people against nature, evoke the image of hunting, and place dogs above people in a hierarchy that strips those hunted of their humanity. Second, dogs, unlike any other weapon of police violence, make their own decisions. While a police officer has control of a baton, gun, or Taser, an officer can never have complete control of a dog, which has its own will and can bite without the officer’s permission. Third, police and courts systematically and persistently underestimate or minimize the degree of force that dog bites represent. While police canine policies and court opinions consistently categorize police dog bites as intermediate force, police dog bites damage nerves, rip out muscles, tear scalps, and leave deep punctures, which sometimes lead to infection. In the most extreme cases, police dog bites even kill. Each of these incidents implicates at least three constitutional rights: the right to be free from excessive force, the right to equal protection of the law, and the right to live free of the badges and incidents of slavery.

18. JOSHUA BENNETT, BEING PROPERTY ONCE MYSELF: BLACKNESS AND THE END OF MAN 141 (2020).

19. The dogs were known as “[n-word] dogs.” NORRECE T. JONES, JR., BORN A CHILD OF FREEDOM, YET A SLAVE: MECHANISMS OF CONTROL AND STRATEGIES OF RESISTANCE IN ANTEBELLUM SOUTH CAROLINA 165 (1990); see also Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*, 53 PHYLON 42, 53 (2016) (“Bloodhounds! I would respectfully inform the citizens of Missouri that I still have my [N-word] Dogs, and that they are in prime training, and ready to attend to all calls of Hunting and Catching—runaway [N-words]” (quoting *Advertisement*, LEXINGTON DEMOCRATIC ADVOCATE, Feb. 14, 1855)).

20. See MATT D. CHILDS, THE 1812 APONTE REBELLION IN CUBA AND THE STRUGGLE AGAINST ATLANTIC SLAVERY 42 (Louis A. Pérez Jr. ed., 2006); Tyler D. Parry & Charlton W. Yingling, *Slave Hounds and Abolition in the Americas*, 246 PAST & PRESENT 69, 89–92 (2020).

21. See SAMUEL G. CHAPMAN, POLICE DOGS IN NORTH AMERICA 6–8, 10–13 (1990); William F. Handy, Marilyn Harrington & David J. Pittman, *The K-9 Corps: The Use of Dogs in Police Work*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 328, 328–33 (1961); Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 385, 386–87 (1955).

22. See *infra* Section I.B.

Apprehension dogs, also known as patrol dogs, and which I will also call “biting dogs,” are distinct from detection dogs. Apprehension dogs, the focus of this Article, are trained to stop people who are running away or resisting police, most often by biting them.²³ The disproportionate use of these police canines to apprehend Black people and the continued high incidence over time of bite injuries from canines call for a reassessment of the use of dogs as a weapon of force.²⁴

Part I of this Article lays out the history of canine policing in the United States, its manifestations today, and the ways canine policing constructs and reinforces race.

Part II describes the current constitutional law of police canine force. First, Part II demonstrates that courts have underestimated the severity of police dog bites and, in so doing, embedded fatal flaws in their analysis of police dog force. Next, the Part turns to the difficulty of mounting challenges to the racialization of police canine force due to equal protection jurisprudence.

Part III analyzes the shortcomings of constitutional regulation of police canine force, namely that it fails to recognize that dog bites are substantially likely to cause serious bodily harm and thus should be categorized as “deadly force,”²⁵ that its justification is undertheorized, and that canine force is often directed against unintended targets.

Part IV outlines possible legal claims for police canine violence under the Thirteenth and Fourteenth Amendments and argues for abolition of police canine force as a matter of policy change and as a component of reparations.

The Article concludes by noting that canine force has never been proven to accomplish the goals set for it by police. The courts, while unlikely to act, have the latitude to respond to the violence of police canine force. Given the absence of judicial action to curb canine force, the Article proposes that the best path forward is through reporting, data-gathering, and political action, whether in the form of advocacy for reformed police department policies, legislation, or reparations.

23. Police dogs are used in many ways, including to sniff out bombs, missing children, and drugs, and to apply force. Though other uses of police canines can lead to dubious results and have racially disparate impacts, this Article focuses only on police dogs as a means of apprehension rather than as a means of detection. For a discussion of police dogs’ accuracy in sniffing out drugs, see Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 *BUFF. L. REV.* 81, 155–58 (2013) and Taylor Phipps, Note, *Probable Cause on a Leash*, 23 *B.U. PUB. INT. L.J.* 57, 64–79 (2014); Ken Lammers, *Canine Sniffs: The Search That Isn’t*, 1 *N.Y.U. J.L. & LIBERTY* 845, 851–52 (2005). For more about the racially disparate impact of canine policing, see, for example, *Racial Disparity in Consent Searches and Dog Sniff Searches*, ACLU OF ILL. (Aug. 13, 2014), <https://www.aclu-il.org/en/publications/racial-disparity-consent-searches-and-dog-sniff-searches> [https://perma.cc/MN2K-V586].

24. Given the different ways dispossession and oppression have manifested across time and place for different minoritized groups—including Latine and Native communities in some U.S. regions—I limit my focus to Black Americans in this Article.

25. The Model Penal Code defines “deadly force” as “force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” MODEL PENAL CODE § 3.11(2) (AM. L. INST. 2021).

I. THE RACIAL HISTORY OF POLICE CANINE FORCE

Policing in the United States is intertwined with the country's history as a settler colonial nation that amassed wealth through slavery and maintained hegemony through war. Though canine policing has evolved and formalized over centuries, it began and continues as a racialized project that has both created and enforced race through violence and oppression.²⁶ This Part traces the history of police dogs from their origins in colonial settler militaries and slave patrols to their adoption in the United States as a form of military technology in policing that is deployed in the domestic war on crime and in the country's foreign wars. The Part concludes by demonstrating how police dog force is used as a tool of racialization.

A. SETTLEMENT AND SLAVERY

Though dogs lived among Indigenous peoples long before the arrival of Europeans in the Americas,²⁷ with Spanish conquistadors arrived "demon dogs" trained to kill and, a short time later, to crave human flesh.²⁸ Bartolomé de las Casas repeatedly described the colonizers throwing Taíno people to wild dogs to be devoured.²⁹ Accounts of Hernando de Soto's expedition described using dogs to capture fleeing Indigenous people using techniques similar to those used in canine apprehensions today.³⁰ Canine violence remained common in the Caribbean throughout the transatlantic slave trade, with Cuban dogs gaining special reputations in the hemisphere for putting down rebellions of enslaved people.³¹ Even

26. In his book *Traces of History*, Patrick Wolfe notes that the racial project in what is now the United States treated and treats Native and Black people differently. PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* 14–16 (2016). Though racialized canine force is applied across minoritized racial groups, the meaning and use of that force varies with the objectives of those wielding it.

27. See generally MARION SCHWARTZ, *A HISTORY OF DOGS IN THE EARLY AMERICAS* (1997) (explaining the origin of American dog breeds and their uses among Indigenous peoples in North and South America).

28. *Id.* at 162–63; see also Sara E. Johnson, "You Should Give Them Blacks to Eat:" *Waging Inter-American Wars of Torture and Terror*, 61 *AM. Q.* 65, 68 (2009) (describing how the French military taught dogs to eat Black people in Haiti).

29. BARTOLOMÉ DE LAS CASAS, *A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES* 17, 26, 32, 40, 60, 67, 69, 73–74, 113, 120–22, 125 (Nigel Griffin trans., Penguin Books 1992) (1542); see also Parry & Yingling, *supra* note 20, at 77.

30. See SCHWARTZ, *supra* note 27, at 163 ("[A]lthough [the hound] passed by many, not one did it seize but the one who had fled, who was among the multitude, and it held him by the fleshy part of the arm in such a manner that the Indian was thrown down and apprehended." (quoting Rodrigo Rangel, *Account of the Northern Conquest and Discovery of Hernando de Soto* (John E. Worth ed. & trans.), in 1 *THE DE SOTO CHRONICLES: THE EXPEDITION OF HERNANDO DE SOTO TO NORTH AMERICA IN 1539–1543*, at 247, 262–63 (Lawrence A. Clayton et al. eds., 1st paperback ed. 1995) (1993)).

31. See CHILDS, *supra* note 20 (describing the use of Cuban slave dogs by the British against Jamaicans in the Maroon War and by the French against Haitians during the Haitian Revolution); Parry & Yingling, *supra* note 20, at 77–79 (describing Europeans' use of dogs to attack and hunt Indigenous people and enslaved Africans in the Dominican Republic, Panama, Barbados, Brazil, Martinique, Jamaica, and then-Dutch Suriname); Johnson, *supra* note 28, at 74, 79. Parry & Yingling further explain how the dogs did their work:

The hounds would . . . form a menacing circle round their target, awaiting their handler's command to attack. If not properly trained, most of these dogs could 'kill the object they pursue: they fly at the throat, or other part of a man, and never quit their hold, till they are cut in two'. Apparently only thirty-six of the dogs shipped were actually 'well-trained.'

then, these tactics were seen as inhumane at home, so British officials insisted that their use of the dogs was restrained and that the dogs “primarily intimidated rather than attacked.”³² Colonizing powers also used dogs as weapons of war and implements of torture during the Haitian Revolution, the Second Maroon War, and the Second Seminole War.³³ The French troops’ use of dogs in Haiti went well beyond the pursuit of Black insurgents. In a spectacle of white supremacy, one of the French generals placed his Black domestic servant on a platform and fed him alive to the dogs.³⁴ As Sara Johnson writes, the innovation of war dogs in this period was the use of dogs to kill rather than to track.³⁵ Johnson notes: “European colonizers wielded dogs as lethal weapons, and it was abundantly clear to contemporary observers that the animals were likely to maim and/or kill their prey, not simply to capture them in the course of pursuit.”³⁶ These colonies established the model for slave patrols and slave dogs in what would become the United States.³⁷

Scholars have extensively documented the emergence of formal policing in the Southern United States from the structures and practices of slave patrols.³⁸ To both the enslaved and the enslavers, it was always clear that the patrols were a form of policing.³⁹ Early versions of formalized policing in the South were concerned with the “dangerous classes”—the enslaved Black people who, in some colonies, outnumbered white people and who resisted their enslavement through “running away, criminal acts and

Parry & Yingling, *supra* note 20, at 84 (quoting R.C. DALLAS, *THE HISTORY OF THE MAROONS, FROM THEIR ORIGIN TO THE ESTABLISHMENT OF THEIR CHIEF TRIBE AT SIERRA LEONE* 67 (1803)).

32. Parry & Yingling, *supra* note 20, at 85. One finds parallels in the descriptions of today’s police canines as psychological deterrents rather than weapons. See CHAPMAN, *supra* note 21, at 36 (“[T]he German shepherds will bite without fear and yet are prepared to intimidate criminals by barking if this is all that is required to freeze suspects.”); *id.* at 39 (“Salt Lake City also reported the mere presence of the dogs was of immeasurable psychological value in controlling law violators.”).

33. See CHILDS, *supra* note 20; Johnson, *supra* note 28, at 66.

34. Johnson, *supra* note 28, at 68.

35. *Id.* at 73.

36. *Id.*

37. See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 10 (1st Harv. Univ. Press paperback ed., 2003) (describing South Carolina’s reliance on Barbadian slave law, which itself was inspired by Spanish and Portuguese colonists).

38. See, e.g., *id.* at 4, 41–42, 69; H. M. HENRY, *THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA* 28–52 (Negro Univ. Press 1968) (1914); Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 *AM. J. POLICE* 51, 65–71 (1988); RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860*, at 97–106 (1964); HUBERT WILLIAMS & PATRICK V. MURPHY, *NAT’L INST. OF JUST., U.S. DOJ, NCJ 121019, THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW* 3–6 (1990); WILLIAMS, *supra* note 11, at 63–65; Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 *AM J. CRIM. L.* 117, 123–24 (2017).

39. See HADDEN, *supra* note 37, at 71 (quoting interview of W.L. Bost, a formerly enslaved man, talking about the patrollers in 1937, saying, “They jes’ like policemen, only worsen”); WILLIAMS, *supra* note 11, at 74–75 (observing that slave patrols “represented a distinct mode of policing” and “satisf[ied] [the criteria] of a police endeavor”).

conspiracies or revolts.⁴⁰ Slave patrols also policed the far more mundane activities of enslaved people, controlling where they could go and with whom they could gather.⁴¹ Slave patrols and slave hunters existed in different forms throughout the South and were more or less formalized depending on the time period.

The emergence of legislated slave patrols—a system of enforcement that went beyond slave codes—further institutionalized chattel slavery and charged patrolers of all classes with the use of discretionary violence to control enslaved people.⁴² South Carolina instituted its first slave patrol by law in 1704.⁴³ The law provided that patrollers would be exempt from militia service and would secure the cities and towns when the militia fought outside threats.⁴⁴ Formalized slave patrols were introduced in Virginia in 1727, North Carolina in 1753, and Georgia in 1757.⁴⁵

Drafted in 1787, the Fugitive Slave Clause enshrined federal enforcement of slavery into law, ensuring that slave patrols would retain relevance even in states that had formally done away with the institution.⁴⁶ Once Missouri joined the

40. Reichel, *supra* note 38, at 55–57 (describing acts of resistance by enslaved people, including escape, revolt, and criminal acts such as theft, robbery, crop destruction, arson, and poison). Other literature notes a need to control the “dangerous classes” as an impetus for the development of modern, formalized policing. See RICHARD J. LUNDMAN, POLICE AND POLICING: AN INTRODUCTION 29–30 (1980); Spruill, *supra* note 19, at 50.

41. HADDEN, *supra* note 37, at 30–31; see also *id.* at 34 (“In the 1715 slave code, the North Carolina assembly required all enslaved persons to carry tickets when leaving their master’s plantation; the pass had to name their owner and the trip’s origin and destination. This pass law mimicked the South Carolina pass laws of 1696 and 1712.” (footnote omitted)). As Erwin Chemerinsky writes, beginning in the early 1800s, the courts did not concern themselves with applying constitutional constraints to police precursors such as slave patrols. ERWIN CHEMEKINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 41–43 (2021).

42. See SOLOMON NORTHUP, TWELVE YEARS A SLAVE 180–81 (Sue Eakin & Joseph Logsdon eds., 1968) (“How it is in other dark places of slavery, I do not know, but on Bayou Boeuf there is an organization of patrollers, as they are styled, whose business it is to seize and whip any slave they may find wandering from the plantation. They ride on horseback, headed by a captain, armed, and accompanied by dogs. They have the right, either by law, or by general consent, to inflict discretionary chastisement upon a black man caught beyond the boundaries of his master’s estate without a pass, and even to shoot him, if he attempts to escape.”). The patrols were made of men from all classes, “not just poor slaveless whites.” HADDEN, *supra* note 37, at 21; see Spruill, *supra* note 19, at 50–51 (“It was believed that since every citizen was at risk to slave crime and violence, patrol service was a collective responsibility to protect their families and property from ‘criminal’ blacks seeking liberation from oppression. It was their civic duty to use without reservation appropriate violence against any slaves as part of their obligation to maintain black subordination.”). The ability of poor white Southerners to profit from hunting enslaved people further invested them in the institution of chattel slavery while helping construct racial identity. Parry & Yingling, *supra* note 20, at 92–93.

43. HADDEN, *supra* note 37, at 19.

44. HADDEN, *supra* note 37, at 19–20 (explaining that the militia was responsible for defending against the Native Americans and the Spaniards in Florida, while the slave patrols defended from the threat from within—enslaved people); Reichel, *supra* note 38, at 58 (noting that the South Carolina militia was particularly active due to threats from Native Americans, the Spanish, and pirates).

45. HADDEN, *supra* note 37, at 24 & n.123, 30, 35; Reichel, *supra* note 38, at 60.

46. U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may

Union as a slave state in 1821, it, too, passed slave codes and exerted control over enslaved people through patrols entitled to use fear and discretionary violence.⁴⁷ The slave patrols also led to an omnipresence of armed personnel, unfamiliar to foreign visitors of the era.⁴⁸ The efficacy of that constant surveillance relied on the premise, articulated by a Missouri judge, that “[c]olor raises the presumption of slavery.”⁴⁹

White Southerners conceived of an enslaved person’s attempt to obtain freedom as a type of high-value property theft, appropriately recaptured with brute force.⁵⁰ Slave hunters bred Cuban bloodhounds with the explicit purpose of raising them to enact violence against Black people.⁵¹ They believed they could train dogs to hate Black people and that dogs could “smell, hear or see racial difference.”⁵² In treating dogs’ perceptions of their handlers’ prejudices as innate,

be due.”). Congress passed the first legislation enforcing the Fugitive Slave Clause, the Fugitive Slave Act, in 1793. *ArtIV.S2.C3.1 Fugitive Slave Clause*, LIBR. CONG.: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S2-C3-1/ALDE_00013571/ [<https://perma.cc/Q5LC-HWVA>] (last visited Mar. 10, 2023).

47. Spruill, *supra* note 19, at 49.

48. *See id.* at 50 (quoting Basil Hall’s 1829 travel diary on Richmond, Virginia’s slave patrol as saying, “In walking round, my eyes were struck with the unusual sight of a sentinel marching with his musket. My companion (said), ‘It is necessary to have a small guard always under arms. It is the consequence of the nature of our colored population; but is done more as a preventive check than anything else – it keeps all thoughts of insurrection out of the heads of the slaves, and so gives confidence to those persons amongst us who may be timorous.”); HADDEN, *supra* note 37, at 41 (quoting William Kingsford, who visited Charleston, South Carolina in the 1850s, writing, “I was subsequently enlightened, and learned that there was a strong force constantly in readiness to act. Patrols pass through the city at all hours.”).

49. Spruill, *supra* note 19, at 50. In fact, all slave states except Louisiana applied a presumption of enslavement to Black people. Reichel, *supra* note 38, at 63. The presumption of enslavement reverberates through time as scholars have elucidated that Blackness now raises a presumption of criminality. *See, e.g.,* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America’s History of Racial Injustice*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* 3, 4 (Angela J. Davis ed., 2017) (“People of color in the United States, particularly young black men, are burdened with a presumption of guilt and dangerousness.”). *See generally* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (discussing the American criminal justice system’s focus on the myth of the Black male “thug”); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (describing development of the idea of Black criminality in the urban North).

50. *See* JONES, JR., *supra* note 19, at 165–66 (referring to escape as “self-theft” and describing the ferocity of enslavers’ use of dogs).

51. *See* Parry & Yingling, *supra* note 20, at 75, 81–82. Parry and Yingling note that white Southerners, including Thomas Jefferson, believed that Black people smelled, looked, felt, and tasted different such that their dogs could detect differences between races imperceptible to humans but objectively present. *Id.* at 75–76. Even during the first recorded sale of Cuban bloodhounds in the United States amidst the Second Seminole War in Florida, some local historians argue that the hounds were brought to the state to hunt enslaved people rather than suppress insurrection. *Id.* at 90.

52. *Id.* at 75. Claims of innate racial difference as a reason for death by police violence have been made more recently as well. For example, in the 1980s, Los Angeles Police Commissioner Daryl Gates attributed Black people’s deaths due to chokeholds to their veins being different than that of what he called “normal people.” Joe Domanick, *The Mind-Set Is ‘Us Against Them’: Police: Chief Gates Gets Away with Outrageous Expressions of Intolerance Because LAPD operates in a World of Its Own*, L.A. TIMES (Sept. 11, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-09-11-me-23-story.html>; *see also* Slow Burn: The L.A.

white Southerners employed their animals in the project of race-making and racialized subordination.⁵³

Their fanciful ideas about the innateness of race notwithstanding, white enslavers did manage to train their dogs to treat Black people viciously. In first-person narratives, formerly enslaved people explained that some enslavers trained dogs by forcing enslaved people to beat the dogs and then putting the dogs on their trail,⁵⁴ while others arranged planned chases⁵⁵ or commanded dogs to attack enslaved people who had been forced to secure themselves to trees.⁵⁶

Bloodhounds became so closely associated with slavery that as the Fugitive Slave Act was pending, abolitionists labeled it the “Bloodhound Bill.”⁵⁷ Though the Georgia Black Codes contained formal prohibitions on “cruelly and unnecessarily biting or tearing with dogs,”⁵⁸ enslaved people’s narratives of escape document the centrality of canine policing to Southern slave patrols. Solomon Northup describes how “savage” bloodhounds chased after enslaved people, including himself: “They will attack a negro, at their master’s bidding, and cling to him as the common bull-dog will cling to a four-footed animal.”⁵⁹ William Craft also remarked on the pervasive use of dogs, stating, “I have frequently seen the blood-hounds on the chase of slaves, and have seen the poor trembling victims . . . limping through the streets”⁶⁰ The dogs sometimes did more than

Riots, *The Chief*, SLATE, at 14:51 (Nov. 17, 2021), <https://slate.com/podcasts/slow-burn/s6/the-la-riots/e3/daryl-gates-police-chief-rodney-king> [<https://perma.cc/7FH8-DR3C>].

53. See Parry & Yingling, *supra* note 20, at 76.

54. Frederick Douglass, *The Horrors of Slavery and England’s Duty to Free the Bondsman: An Address Delivered in Taunton, England, on 1 September, 1846*, SOMERSET CNTY. GAZETTE, Sept. 5, 1846, reprinted in 1 THE FREDERICK DOUGLASS PAPERS: SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, 1841–46, at 371, 377 (John W. Blassingame ed., 1979) (“Enmity is instilled into the bloodhounds by these means:—A master causes a slave to tie up the dog and beat it unmercifully. He then sends the slave away and bids him climb a tree; after which he unties the dog, puts him upon the track of the man and encourages him to pursue it until he discovers the slave. Sometimes, in hunting the negroes, if the owners are not present to call off the dogs, the slaves are torn in pieces—(sensation); this has often occurred.”).

55. Interview of Andrew Goodman in Dallas, Texas, in VOICES FROM SLAVERY 140, 142 (Norman R. Yetman ed., 1970).

56. JAMES WILLIAMS, NARRATIVE OF JAMES WILLIAMS, AN AMERICAN SLAVE, WHO WAS FOR SEVERAL YEARS A DRIVER ON A COTTON PLANTATION IN ALABAMA, at xv (New York, Am. Anti-Slavery Soc’y 1838).

57. See, e.g., William Jay, *Judge Jay on the Bloodhound Bill*, N. STAR, Oct. 31, 1850; ISABELLE KINNARD RICHMAN, SOJOURNER TRUTH: PROPHET OF SOCIAL JUSTICE 161 (2016).

58. COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL 13 (2007) (citing handwritten copies of the Georgia Black Codes of 1851 obtained by W.E.B. Du Bois).

59. NORTHUP, *supra* note 42, at 101.

60. William Craft, *Hunting Slaves with Bloodhounds*, in FIVE HUNDRED THOUSAND STROKES FOR FREEDOM: A SERIES OF ANTI-SLAVERY TRACTS, OF WHICH HALF A MILLION ARE NOW FIRST ISSUED BY THE FRIENDS OF THE NEGRO No. 59, at 1 (London, W. & F. Cash 1900). Today, we are also familiar with slave dogs from fictionalized narratives and depictions in popular media, such as the description in *Uncle Tom’s Cabin* and the gruesome depiction of canine violence in *Django Unchained*. HARRIET BEECHER STOWE, UNCLE TOM’S CABIN (1852); DJANGO UNCHAINED (The Weinstein Company 2012). Other images, though, still seek to soften the image of brutal slave dogs, such as a 2013 children’s short story *Juby and the Slave Dog* in which a slave dog named “Coon” is “doing his job: tracking a runaway

maul their victims—they killed them.⁶¹ The scars of dog bites were so common that they became marks used to identify escapees in advertisements for rewards.⁶²

This treatment, like other aspects of U.S. chattel slavery, served to terrorize, violate, and degrade enslaved people. Bénédicte Boisseron ascribes psychological dimensions to the violence: “Mutilation, performed by either a human or canine, was performed to remind the slave that she or he was, unlike the dog, a farmed animal.”⁶³ Though the cruelty and inhumanity of these practices attracted negative public attention in the press as early as the 1790s, the dogs remained in use.⁶⁴

The enslavers’ dogs remained distinct in enslaved people’s minds from dogs in general, though “ever-replicating experiences of bondage increased the odds that slaves would become so anti-dog as to abjure possession of their own.”⁶⁵ Indeed, enslaved people’s dogs provided companionship and protection, and in so doing, threatened enslavers’ control over their human chattel.⁶⁶ In response, George Washington ordered “that all dogs belonging to slaves [on his plantation] be hanged immediately, because they ‘aid[ed] [enslaved people] in their night robberies.’”⁶⁷

In 1859, the South Carolina General Assembly passed a law taxing only the dogs owned by enslaved people to decrease the perceived threat posed by those

slave” when he chases Juby, an enslaved child, but then decides to run away with her. Linda Oatman High, *Juby and the Slave Dog*, FUN FOR KIDZ (Jan. 1, 2013).

61. WILLIAMS, *supra* note 56 (“The hound was put upon his track, and in the morning was found watching the dead body of the negro.”); *id.* at 51 (“Early the next morning we started off with our neighbors, Sturtivant and Flincher; and after searching about for some time, we found the body of Little John lying in the midst of a thicket of cane. It was nearly naked, and dreadfully mangled and gashed by the teeth of the dogs. They had evidently dragged it some yards through the thicket: blood, tatters of clothes, and even the entrails of the unfortunate man, were clinging to the stubs of the old and broken cane. Huckstep stooped over his saddle, looked at the body, and muttered an oath. Sturtivant swore it was no more than the fellow deserved. We dug a hole in the cane-brake, where he lay, buried him, and returned home. The murdered young man had a mother and two sisters on the plantation, by whom he was dearly loved. When I told the old woman of what had befallen her son, she only said that it was better for poor John than to live in slavery.”).

62. *See id.* at xiv (quoting the *New Orleans Bee* from February 8, 1837, giving a description of an enslaved man: “The other is a short stumpy fellow, of a very black or almost blue color, large cheeks, has a scar over one eye; also, *one on his leg from the bite of a dog*, and a burn on his body from a piece of *hot iron*; in the shape of a T.”).

63. Bénédicte Boisseron, *Afro-Dog*, 118 *TRANSITION* 15, 24 (2015).

64. Parry & Yingling, *supra* note 20, at 89.

65. John Campbell, “*My Constant Companion*”: *Slaves and Their Dogs in the Antebellum South*, in *WORKING TOWARD FREEDOM: SLAVE SOCIETY AND DOMESTIC ECONOMY IN THE AMERICAN SOUTH* 53, 55 (Larry E. Hudson Jr. ed., 1994).

66. *Id.* at 56–67.

67. *Id.* at 67 (first two alterations in original) (quoting GERALD W. MULLIN, *FLIGHT AND REBELLION: SLAVE RESISTANCE IN EIGHTEENTH-CENTURY VIRGINIA* 61 (1972)). The contrast between enslavers’ treatment of their own dogs and those of the enslaved parallels today’s police defensiveness of their own dogs while killing thousands of house pets per year. The Department of Justice (DOJ) estimates that police kill 10,000 pet dogs in the line of duty each year. Courtney G. Lee, *More than Just Collateral Damage: Pet Shootings by Police*, 17 *U.N.H. L. REV.* 171, 176 (2018). For more on police shootings of pet dogs, see RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 290–93 (2013).

dogs.⁶⁸ As a result, pet dogs belonging to enslaved people were mostly exterminated.⁶⁹ According to historian John Campbell, the culling of enslaved people's dogs marked "one part of slaveholders' much larger campaign during the last twenty-five or so years of the slavery era to reassert, expand, and intensify their control and domination of their slaves."⁷⁰

Though the formal end of slavery soon came, it failed to stem the practice of hunting Black people with dogs. In 1865, a group of Mississippi Freedpeople wrote to the Governor to draw his attention to the ongoing violence of dogs used to hunt them: "[W]e are to[o] well acquainted with the yelping of bloodhounds and t[e]aring of our fellow serv[a]nts [t]o pieces when we were slaves and now we are free we do not want to be hunted by negro-runners and th[e]ir hounds unless we are guilty of a . . . crime."⁷¹

B. FROM SLAVE DOGS TO K-9S

Until the late 1800s, dogs of force were used either by enslavers, colonizers, or militaries. That began to change when Ghent, Belgium, founded the first police dog training school in 1899.⁷² Though police dogs found their way into departments across Europe and North America soon after, their use was not widespread.⁷³ South Orange, New Jersey and New York City founded the first two canine units in the United States in 1907.⁷⁴ Yet between 1907 and 1952, what Samuel Chapman calls the "Early Era" of police dog use in the United States, only thirteen departments started canine units, and some of those were short-lived.⁷⁵ Almost all were in the Northeast.⁷⁶

The first of these canine units came into existence during the height of the Progressive Era (1897–1920), at the same time that white, upper-class panic about crime and disorder resulting from immigration, urbanization, and

68. Campbell, *supra* note 65, at 68.

69. *Id.*

70. *Id.* at 68–69.

71. David H. Gans, "We Do Not Want to Be Hunted": *The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 274 (2021) (alterations in original) (quoting Letter from Miss. Freedpeople to the Governor of Miss. (Dec. 3, 1865), reprinted in FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, SER. 3, VOL. 1: LAND AND LABOR, 1865, at 857 (Steven Hahn et al. eds., 2017)).

72. CHAPMAN, *supra* note 21, at 10. Chapman identifies one earlier instance of dogs being used for policing in Germany in 1886 to "clean up" the hamlet of Hildesheim. *Id.*

73. *Id.* at 10–13, 15 (noting police dog programs in Belgium, Germany, the United Kingdom, Canada, and the United States beginning in the late 1800s and early 1900s).

74. *Id.* at 15. Philadelphia implemented a police dog program even earlier—in 1904—but Chapman uncovered limited evidence of the program and therefore considers South Orange to be the first in the United States. *Id.* at 25–26.

75. *Id.* at 15. Those thirteen departments are South Orange, New Jersey (1907–1911); New York City (1907–1951); New Haven, Connecticut (1910–1920); Glen Ridge, New Jersey (1910–1914); Englewood, New Jersey (1913–1915); Ridgewood, New Jersey (1914–1916); Baltimore, Maryland (1915–1917); Detroit, Michigan (1917–1919 & 1928–1941); Muncie, Indiana (1920–1921); Berkeley, California (1930–1940); Pennsylvania State Police (1931–1937); Connecticut State Police (1944–1947); and Babylon Town, New York (1951–1952). *Id.*

76. *See id.*

industrialization dominated social policy.⁷⁷ Likewise, though the lineage is more circuitous than that of the slave dogs of the South, Northern policing's adoption of the techniques of European militaries and police implicitly meant the incorporation of techniques honed while enforcing colonial power and subjugating enslaved and conquered peoples in the Americas and across the Global South.⁷⁸ The technology of military and slave dogs that evolved into canine policing is inseparable from the transatlantic racial-colonial project. As such, Northern canine policing grew from the Euro-American, racialized imperial-colonial project and implemented that project as white fears of racialized immigrants and Black "others" grew across the urbanizing North.

In the cities with canine units, the dogs were often credited with decreasing crime, but those benefits accrued mostly to wealthier neighborhoods.⁷⁹ In New York City, the police primarily deployed the dogs overnight in the "affluent residential district of Parkville, consisting of many well spaced one-family homes."⁸⁰ The class dimensions of canine policing were also evident in New Haven, Connecticut, where in 1910 the police chief reported, "The dogs have also been used in other localities for the purpose of breaking up gangs of rowdies and hoodlums who congregated in the outlying districts and by their conduct annoyed the

77. See WILLIAMS, *supra* note 11, at 103–13, 115–17 (describing the increased need for social control mechanisms in the wake of urbanization and industrialization in Northern cities); see also Madalyn K. Wasilczuk, *For Their Own Good: Girls, Sexuality, and State Violence in the Name of Safety*, 59 CAL. W. L. REV. 1, 4, 14–15 (2023) (describing these dynamics in the context of the formation of the juvenile legal system).

78. See Johnson, *supra* note 28, at 89 n.3 ("In the twentieth century, the use of dogs as weapons of repression and torture was common in many colonial contexts, from South Africa and the Belgian Congo to the United States."); Josh Doble, *Empire, Race, and Canine Training: Dogs as Racial Weapons in the Twentieth Century*, SNIFFING THE PAST (Sept. 2, 2021), <https://sniffingthepast.wordpress.com/2021/09/02/empire-race-and-canine-training-dogs-as-racial-weapons-in-the-twentieth-century/> [<https://perma.cc/MR67-MEBJ>] (describing the use of dogs in the colonization of Libya and South Africa); Josh Doble, *Can Dogs Be Racist? The Colonial Legacies of Racialized Dogs in Kenya and Zambia*, 89 HIST. WORKSHOP J. 68, 75–76 (noting the use of dogs in the security services of colonial Rhodesia and South Africa and other dogs trained to bite Africans by settlers of Kenya and Zambia). The proliferation of law enforcement models and techniques across borders is not unique to canine policing. See WILLIAMS, *supra* note 11, at 113–14, 119.

79. See CHAPMAN, *supra* note 21, at 16 (quoting a 1907 annual police report from South Orange, New Jersey, concluding that "during the year the entire absence of a certain class of criminals who have heretofore been a trouble and nuisance within our boundaries has been quite significant"); see also *id.* at 17 (quoting a 1911 newspaper article praising New York City because "[b]urglaries are now of such rare occurrence that it may almost be said they never occur" and "[h]oldups by thugs, rowdies and professional strong-arm men are practically unknown"); *id.* at 18 (quoting New Haven, Connecticut, police chief as concluding in 1910 that "no burglaries have occurred in the infested districts"); *id.* at 19 (quoting a Glen Ridge, New Jersey, newspaper article from around 1911 that "a report issued after six months noted that crimes of robbery and housebreaking had decreased by 75 percent since the arrival of [three police] dogs"); *id.* ("These communities [in Englewood, New Jersey] which have adopted the police dog are enjoying a security which they have never before known."). It is also worth acknowledging that the sources Chapman relies upon are typically police departments' public statements, not data-driven assessments of the dogs' utility. See *id.* at 16, 17, 19–20.

80. *Id.* at 17. Similarly, when Englewood, New Jersey, reconstituted its canine unit in 1962, the police chief noted the dogs would "be used mainly in areas where prowlers are likely to lurk, swank residential streets and industrial districts." *Id.* at 20.

neighborhoods and insulted passersby.⁸¹ In some cities, however, the police deemed the dogs ineffective and too expensive to maintain, and those programs were soon terminated.⁸² Problems with controlling the dogs also quickly surfaced.⁸³

Elsewhere in the country, though formal canine units may not yet have existed, police and prisons nevertheless used dogs. James K. Vardaman, a “penal reform[er]” and the governor of Mississippi starting in 1904, oversaw the construction of a prison at Parchman Farm.⁸⁴ There, Vardaman enjoyed taking groups of people on horseback to engage in mock hunts of prisoners for sport using the prison’s bloodhounds, after which he hosted picnics.⁸⁵ Parchman was not the only carceral facility to use dogs to menace its wards. At the Dozier School for Boys in Florida, founded in 1900 as the Florida State Reform School, the administrators used imprisoned men with bloodhounds to hunt for runaway boys.⁸⁶ The boys would sometimes be taken back to the school in a dog cage.⁸⁷

Across the South, this era also exhibited permeability between legal and extra-legal authority.⁸⁸ The police and white supremacist groups sometimes worked at cross-purposes but often reinforced one another,⁸⁹ and racial violence surged.⁹⁰ Even as official police dogs had not yet appeared in the South, posses with dogs tracked and menaced Black people fleeing lynchings.⁹¹

Chapman characterizes the “Modern Era” of police dogs as beginning in 1954, with a canine unit founded in Burlington, Massachusetts, followed closely by a program led by an ex-Marine dog trainer in Dearborn, Michigan, and a program

81. *Id.* at 18.

82. *Id.* at 20–23 (describing abandoned experiments with canines in the 1910s and ‘20s in Baltimore, Maryland; Detroit, Michigan; and Muncie, Indiana).

83. *Id.* at 16 (describing account from South Orange, New Jersey, that “[o]n July 27, 1908, canine Bob was unfit for patrol because he was bitten by police dog Rover ‘. . . in a fight in the jail yard today’”); *id.* at 19 (describing a police dog attack on a police officer in Glen Ridge, New Jersey, in which the officer “was fortunate to have escaped with his life”); *id.* at 22 (noting that Berkeley’s police dogs tended to be “nervous and excitable, . . . constantly difficult to control,” and sometimes “vicious”).

84. DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 109 (1996).

85. *Id.* at 110 n.*.

86. ERIN KIMMERLE, WE CARRY THEIR BONES: THE SEARCH FOR JUSTICE AT THE DOZIER SCHOOL FOR BOYS, at xi, 54 (2022).

87. *Id.* at 54.

88. WILLIAMS, *supra* note 11, at 126.

89. *Id.* at 126–27.

90. See EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 39–44 (3d ed. 2017), <https://eji.org/wp-content/uploads/2005/11/lynching-in-america-3d-ed-110121.pdf> [<https://perma.cc/RYT5-WB6H>].

91. See, e.g., SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 12 (2007) (describing men using bloodhounds to track George Fountain, who fled custody to avoid a lynch mob); Andrew S. Buckser, *Lynching as Ritual in the American South*, 37 BERKELEY J. SOCIO. 11, 16 (1992) (“As soon as a crime was discovered, residents of the area would begin discussing whether to form a posse to apprehend the perpetrator. . . . They usually operated independently of the sheriff; knowing that such groups were forming, law enforcement officers tried to find the culprit first, to save him from being lynched on the spot. Posses used various methods to find the criminal, from interviewing witnesses to tracking with bloodhounds.”).

in Portland, Oregon.⁹² These first three programs foundered, and Dearborn and Portland's programs shuttered within a year.⁹³ Chapman considers the Baltimore, Maryland canine unit, founded in 1956, the first successful program.⁹⁴ Another nineteen units, including the "preeminent" St. Louis program, were founded in 1958, and nineteen more in 1959.⁹⁵ In 1958, the St. Louis Police Department sent five officers to London to train with German shepherds, a breed selected for the "supreme psychological effect on the people police seek to impress."⁹⁶

Canine units conformed with institutionalized violence in policing. In 1955, Marguerite Johnson, Dearborn's director of public safety, remarked that juvenile delinquency and burglary were down in areas with canine units because "[n]obody wants to lose the seat of his pants, you understand."⁹⁷ In Portland, Oregon, the dogs were used to control crowds but not "the boisterously happy crowds attending athletic contests, New Year's Eve celebrations and the like."⁹⁸ Chapman's history also reveals that police dogs, in the 1950s as now, were not predominantly used to interrupt violent crime. A Richmond, Virginia police dog "apprehended a man who was observed breaking into a parked, unattended car."⁹⁹ In Salt Lake City, Utah, the canine unit made 638 misdemeanor arrests in 1959—far outpacing the 48 felony arrests for which it was directly responsible¹⁰⁰—giving lie to the myth that dog bites are reserved for violent criminals.

An "upsurge of police dog teams" coincided with the nation's racial upheaval in the 1960s.¹⁰¹ Three hundred-fifty programs were implemented during the 1960s, followed by a surge of discontinuances in 1965 on the heels of the brutal use of dogs against civil rights and anti-war protestors.¹⁰² Iconic images of German shepherds attacking students appeared in newspapers across the country.¹⁰³ The

92. CHAPMAN, *supra* note 21, at 28 (noting that all three programs were "inauspicious"); Handy et al., *supra* note 21, at 333.

93. CHAPMAN, *supra* note 21, at 28.

94. *Id.* This 1956 program came after Baltimore's first attempt was terminated in 1917. *Id.* at 20. Chapman describes Baltimore's 1956 program as "large, still operative and world renown." *Id.* at 28.

95. *Id.* at 28–29, 34–35.

96. *Id.* at 36.

97. *Id.* at 29.

98. *Id.* at 30.

99. *Id.* at 37.

100. *Id.* at 39. While misdemeanor arrests far outpace felony arrests no matter the type or level of force used, these data reflect that canine force is not reserved for the most serious offenses. For an overview of the scale of misdemeanor prosecutions in the United States, see Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735–37 (2018).

101. Jonathan K. Dorriety, *Police Service Dogs in the Use-of-Force Continuum*, 16 CRIM. JUST. POL'Y REV. 88, 89 (2005).

102. CHAPMAN, *supra* note 21, at 41, 43 tbl.3; see also *id.* at 87 (noting that Wilmington, Delaware; Carbondale, Illinois; Atlanta, Georgia; and Danville, Virginia, all discontinued their canine programs as a result of civil rights protests and the aftermath of protests in Birmingham, Alabama).

103. See, e.g., Greg Garrison, *Young Man Who Confronted Police Dogs in 1963 Was Little-Known Civil Rights Icon (Life Stories: Walter Lee Fowlkes)*, AL.COM (Feb. 22, 2014, 11:40 AM), https://www.al.com/living/2014/02/young_man_attacked_by_german_s.html [<https://perma.cc/8TTA-NF95>].

photographs, like the protests themselves, evoked disparate meaning depending on the racial positionality of the viewer.¹⁰⁴

Depictions of the police response to protests in the white mainstream press often failed to capture the full brutality of police dogs. A story in the *New York Times* on May 4, 1963, acknowledged that three students had to go to the hospital after being bitten by a squad of six dogs that police brought to peaceful demonstrations in Birmingham, Alabama, the day before.¹⁰⁵ The article failed to describe the extent of the injuries or the terror inflicted by the use of the living, barking weapons.¹⁰⁶ Even in Birmingham, the newspaper refused to put the dog attacks on the front page, relegating coverage of the violence against protestors to inside the paper.¹⁰⁷

The infamous events in Birmingham did not occur in isolation. In June 1961, in Wichita, Kansas, police set dogs upon a crowd that congregated in the streets during a youth dance at the YWCA and then sent the dogs inside.¹⁰⁸ Young people were bitten, and others jumped through the windows of the building to escape.¹⁰⁹ In April 1963, James Farmer, the national director of the Congress of Racial Equality, described Greenwood, Mississippi police siccing a German shepherd on a minister leading a voter registration drive.¹¹⁰ The minister's ankle was "chewed to the bone," said Farmer, and "[w]hen that dog's fangs sank into the ankle of the young minister, . . . they also sank into the hearts of the Negroes of Greenwood."¹¹¹ Police deployed dogs against civil rights protesters in Petersburg and Danville, Virginia; Jackson, Mississippi; and Chicago, Illinois.¹¹² In Chicago, police sicced dogs on Puerto Ricans protesting a police shooting.¹¹³

The '50s and '60s saw dogs wielded against Black people far afield of Southern civil rights marches. Police invoked the "logic of masculinist

104. See, e.g., Ramenda Cyrus, *How the George Floyd Uprising Was Framed for White Eyes*, MOTHER JONES (June 10, 2021), <https://www.motherjones.com/politics/2021/06/george-floyd-protest-photography-white-liberals/> [<https://perma.cc/2X6Y-ZQ5C>] ("The white gaze skipped right over the signs of Gadsden's resistance—the hand on the cop's arm, the left knee thrust into the dog's chest. These details did not fit with the prevailing picture of the struggle for civil rights. What white people saw instead was Black passivity.")

105. Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, N.Y. TIMES, May 4, 1963, at 1, 8, <https://timesmachine.nytimes.com/timesmachine/1963/05/04/81808290.html?pageNumber=1>.

106. See *id.* The same article quotes the Mayor of Birmingham, Albert Boutwell, praising police for their restraint and condemning the "use" of students in demonstrations. *Id.*

107. Audie Cornish, *How the Civil Rights Movement Was Covered in Birmingham*, NPR: CODE SW!TCH (June 18, 2013, 8:04 PM), <https://www.npr.org/sections/codeswitch/2013/06/18/193128475/how-the-civil-rights-movement-was-covered-in-birmingham> [<https://perma.cc/DYF3-X3C6>].

108. CHAPMAN, *supra* note 21, at 83.

109. *Id.*

110. Murray Illson, *Cruelty in South Is Laid to Police: CORE Chief Says Greenwood Used Dogs on Negroes*, N.Y. TIMES, Apr. 7, 1963, at 57, <https://timesmachine.nytimes.com/timesmachine/1963/04/07/317736932.html?pageNumber=57>.

111. *Id.*

112. CHAPMAN, *supra* note 21, at 86.

113. Tyler Wall, "For the Very Existence of Civilization": The Police Dog and Racial Terror, 68 AM. Q. 861, 873 (2016).

protection”¹¹⁴ to justify police dog units. In St. Louis in 1958, a Board of Police Commissioners member claimed, “[I]f we can get these dogs on the street, our women will be safer.”¹¹⁵ After a woman was attacked by a knife-wielding man (reported as Black) in a park in San Francisco in 1962, San Francisco Police Department (SFPD) Chief Cahill stoked fears of Black male violence against white women to establish a K-9 unit.¹¹⁶

While Black civil rights activists drew the connection between slavery and the new K-9 unit, the police characterized the dogs as a professionalizing measure.¹¹⁷ The press took up this characterization, writing that the dogs were “‘meticulously trained’ to attack only on command.”¹¹⁸ Further underscoring the racial dynamics, the media depicted the dogs “interacting docilely with white children.”¹¹⁹ At the same time that the *San Francisco Chronicle* assured readers that the dogs would only target criminals and not racial minorities, it also reported that the SFPD dog trainer had worked for the Nazi army.¹²⁰

Even outside the zenith of the Civil Rights Movement, dogs—particularly German shepherds—remained symbolic and practical tools of racial control,¹²¹

114. Iris Marion Young’s explanation of the “logic of masculinist protection” describes how a gendered logic positions the masculine role of protector as an authoritative component of the security state in relation to citizens in a democracy and demonstrates how appeals to protection of domestic tranquility (and sometimes, more explicitly, women and children) “legitimizes authoritarian power over citizens internally . . . [and] aggressive war outside.” Iris Marion Young, *The Logic of Masculinist Protection: Reflections on the Current Security State*, 29 SIGNS: J. WOMEN CULTURE & SOC’Y 1, 2 (2003).

115. Wall, *supra* note 113, at 870.

116. CHRISTOPHER LOWEN AGEE, *THE STREETS OF SAN FRANCISCO: POLICING AND THE CREATION OF A COSMOPOLITAN LIBERAL POLITICS, 1950 – 1972*, at 193 (2014). This “logic of masculinist protection,” see Young, *supra* note 114, was commonly invoked to justify the need for police dogs. Indeed, this logic, particularly as applied to white women and womanhood, has been used to construct the “Black brute” and justify racial violence, including lynchings, and oppression. Calvin John Smiley & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 353 (2016). The 1915 movie *The Birth of a Nation* depicts hypersexualized Black men who cannot control their lust for a white woman, who throws herself from a cliff to save herself from them. *THE BIRTH OF A NATION* (David W. Griffith Corp. 1915); see also Erin Blakemore, “*Birth of a Nation*: 100 Years Later,” JSTOR DAILY (Feb. 4, 2015), <https://daily.jstor.org/the-birth-of-a-nation/> [<https://perma.cc/5ULC-3VYW>]. Forty years later, Roy Bryant and J.W. Milam abducted, beat, mutilated, and killed Emmett Till, a fourteen-year-old Black boy, based on Carolyn Bryant’s accusation that he had interacted with her in a way that violated Jim Crow Southern norms. See generally TIMOTHY B. TYSON, *THE BLOOD OF EMMETT TILL* (2017) (detailing the story of Emmett Till).

117. AGEE, *supra* note 116, at 194.

118. *Id.*

119. *Id.*

120. See *id.*

121. Tyler Wall writes that German shepherds became the breed most desired for and associated with police work due to the reputation they gained during World War II as violent and vicious. Wall, *supra* note 113, at 865–66. It was not until TV shows such as *Rin Tin Tin* rehabilitated the German shepherd’s image that it was set in contrast to other “dangerous” dog breeds such as bloodhounds. *Id.* at 866 (citing KAREN DELISE, *THE PIT BULL PLACEBO: THE MEDIA, MYTHS AND POLITICS OF CANINE AGGRESSION* (2007)). In addition, myths about German shepherds’ superiority were “imbricated in imperial categories such as race, civilization, and loyalty, and hence intertwined with notions of blood, purity, and nation.” *Id.* Police also seemed convinced that the German shepherd inspired the most terror of any

and their use was prevalent in Northern cities. In *America on Fire*, Elizabeth Hinton recounts how civilian white supremacist groups worked in coordination with police in Cairo, Illinois, to set dogs on Black schoolchildren and terrorize them on their daily commutes.¹²² In York, Pennsylvania, in the late '60s, the mayor, “who openly referred to Black people as ‘darkies,’ . . . would walk a German shepherd through the streets” to reinforce racial terror.¹²³ The *New York Times* reported of the York K-9 Corps, “Police dogs are used only against Negroes.”¹²⁴

Despite the backlash against police dogs in the mid-'60s, a resurgence of implementation began in 1975.¹²⁵ Several notable units restarted in the '80s. Muncie, Indiana, initiated a successful program in 1981, New York City implemented a new program in 1982 after its forty-four-year program ended in 1951, and Portland reconstituted its defunct program in 1983. As the carceral state ballooned, new programs also found their footing. Los Angeles implemented a canine unit for the first time in 1981 after rejecting proposals to start a unit in 1955 and 1959.¹²⁶ The white cultural memory of police dog terror faded quickly, giving way to dogs' role as furry police mascots.¹²⁷

breed. *Id.* (citing police officials in Long Island, St. Louis, and Birmingham, all extolling the “psychological effect” of German shepherds). One police official went so far as to say, “Humans have an innate fear of them—and that is their greatest value.” *Id.* On a 1974 *Time* magazine cover trumpeting “Middle-Class Blacks: Making It in America,” a Black family of four, mother and daughter in dresses, father in a suit, and son in a University of Alabama t-shirt, pose with a German shepherd dog, a symbol of whiteness. *TIME*, June 17, 1974, <https://content.time.com/time/covers/0,16641,19740617,00.html> [<https://perma.cc/UK5X-WGEEK>]. The accompanying article inside reflects a vision of Black success as assimilation to white cultural norms and affluence. *RACES: America's Rising Black Middle Class*, *TIME*, June 17, 1974, <https://content.time.com/time/subscriber/article/0,33009,879319,00.html> [<https://perma.cc/EP5F-QEMF>].

122. ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960s*, at 51 (2021) (“The supremacists terrorized Black Cairoites on an everyday basis, driving around Pyramid Courts, pointing their rifles at passersby, and when Black children were on their way to school, they threatened them with German shepherds.”); *id.* at 74 (describing how the sheriff and coroner deputized a civilian group called the “White Hats,” which conducted paramilitary drills including police dogs in preparation for battle with Black community members). Outside the United States, Chapman notes that police dogs were used to quell unrest in Pretoria, South Africa, and Karlskoga, Sweden. CHAPMAN, *supra* note 21, at 90. Police dogs were also used in the Teddy Boy riots in which white young men attacked Black people in West London in 1958. *Id.*; see also Thomas Kingsley, *Black History in West London: The Ruthless Teddy Boys Gang Who Went Hunting for Black People in Notting Hill*, MYLONDON (July 11, 2020, 3:14 PM), <https://www.mylondon.news/news/west-london-news/black-history-west-london-ruthless-18575183> [<https://perma.cc/X8CU-AHB5>] (detailing the history of the Teddy Boy riots).

123. HINTON, *supra* note 122, at 79.

124. *Id.*

125. See CHAPMAN, *supra* note 21, at 42.

126. *Id.* at 31–34. Chapman also notes that Muncie, Indiana, had more success implementing a canine unit in 1981 and that New York City implemented a new program in 1982 after its forty-four-year program ended in 1951. *Id.* at 18, 21.

127. Chapman notes that some departments consider the use of a police dog unit in public relations to be one of the unit's most valuable assets. *Id.* at 114. Indeed, police dogs often attract significant public admiration and attention. See Maimann, *supra* note 12 (describing an outpouring of public support on social media for a Royal Canadian Mounted Police dog killed during a firefight); “Name the Puppy” 2022, ROYAL CANADIAN

Black writers' prose and poetry reveal a different cultural memory of police dogs. Their works shed light on the significance of dogs as tools of oppression in the Black community. As Joshua Bennett explains:

White dogs—which is also to say, dogs that, as a result of those who claim ownership over their flesh and employ it, exploit it toward white-supremacist ends that are more or less inextricable from hegemonic whiteness as a set of sociopolitical protocols and practices—are ubiquitous within the African American literary tradition and beyond.¹²⁸

Margaret Walker's poem "Jackson, Mississippi" depicts a city:

Hauling my people in garbage trucks,
Fenced in by new white police billies,
Fist cuffs and red-necked brothers of Hate Legions
Straining their leashed and fiercely hungry dogs.¹²⁹

Earlier work by Claude McKay also conveys Black resistance through the imagery of facing down snarling dogs:

If we must die, let it not be like hogs
Hunted and penned in an inglorious spot,
While round us bark the mad and hungry dogs,
Making their mock at our accursèd lot.¹³⁰

One film, *When We Were Kings*, depicts George Foreman bringing a German shepherd with him to his bout with Muhammad Ali in Kinshasa.¹³¹ To onlookers, the dog confirmed what Ali said about Foreman: "He is a

MOUNTED POLICE (Feb. 16, 2022), <https://www.rcmp-grc.gc.ca/en/news/2022/name-the-puppy> [<https://perma.cc/UH5G-3JGL>] (announcing a naming contest for new police dogs); Kiki Kane, *This Police Dog's Hilarious Side Gig Just Made Him Internet Famous*, DOG PEOPLE, <https://www.rover.com/blog/police-dogs-hilarious-side-gig-just-made-internet-famous/> [<https://perma.cc/A2BF-GW99>] (last visited Mar. 13, 2023) (profiling an Instagram-famous police dog); Charlie McKenna & Tonya Alanez, *Police Dog Killed in Shootout Honored with Open Casket Funeral at Gillette Stadium*, BOS. GLOBE (June 22, 2021, 6:07 PM), <https://www.bostonglobe.com/2021/06/22/metro/braintree-police-have-somber-procession-funeral-k-9-kitt-killed-ambush-that-wounded-two-officers/> (describing an elaborate funeral held for a police dog); Reba Hull Campbell, *A (Police) Dog's Life: Local K-9 Units Protect the Community*, COLUMBIA METRO. MAG. (Apr. 2019), <https://columbiametro.com/article/a-police-dogs-life/> [<https://perma.cc/P5LX-W5YG>] (profiling a local K-9 unit, including the dogs' home lives and describing them tracking both "good [and] bad people"); Rio Lacanlale, *A Day in the Life of a K-9 Officer and Dogs Who Are 'Family,'* CHI. TRIB. (Nov. 12, 2019, 10:22 AM), <https://www.chicagotribune.com/pets/sns-day-in-the-life-of-canine-officer-20191112-ctr37flqtfhlaqf23fnawix4y-story.html> (emphasizing the bond between K-9 officers and police dogs).

128. BENNETT, *supra* note 18, at 140–41.

129. MARGARET WALKER, *Jackson, Mississippi*, in *THIS IS MY CENTURY: NEW AND COLLECTED POEMS* 62, 62 (1989).

130. CLAUDE MCKAY, *If We Must Die*, in *HARLEM SHADOWS: THE POEMS OF CLAUDE MCKAY* 47, 47 (Angelico Press 2021) (1922).

131. *WHEN WE WERE KINGS* (PolyGram Filmed Ent. 1996).

Belgian.”¹³² A more contemporary voice, Lauryn Hill, makes Black communal memories of dog bites central to her song “Black Rage” by raising them in the chorus.¹³³

The racial salience of the police dogs at Birmingham is not confined to Black cultural memory, though it may be more prominent there. In the early 2000s, when defending the Cincinnati Police Department’s canine unit against allegations of excessive force and discriminatory policing, Fraternal Order of Police President Keith Fangman stated, “This isn’t Birmingham, Alabama, 1963. We don’t unleash our dogs and say: ‘Go get ’em.’ But if a suspect refuses to follow verbal commands, of course the dog may be deployed.”¹³⁴

C. DOGS OF WAR, AT HOME AND ABROAD

Just as Tyler D. Parry and Charlton W. Yingling have woven together the histories of canine violence across the antebellum Americas to demonstrate more fully the “systemic prevalence of racialized hunting of humans with hounds,”¹³⁵ a contemporary account of U.S. canine policing must move across borders and link racialized policing with U.S. imperialism and the War on Terror.¹³⁶ Long before there were police K-9s, there were dogs of war. Once understood as a military technology, the connections between U.S. war-making and law-enforcing through canine training and deployment serve as an additional example of the embeddedness of militarism in U.S. policing.¹³⁷

As at home, U.S. dogs abroad are set upon groups that are minoritized, racialized, and despised. In fall 2002, “FBI agents saw a dog used ‘in an aggressive manner to intimidate a detainee’” at Camp X-Ray, Guantanamo Bay.¹³⁸ Importing tactics from Guantanamo, dogs were also used at Abu Ghraib to torture men the United States declared terror suspects.¹³⁹ When the scandal broke,

132. PBS, *Ali v. Foreman: The Rumble in the Jungle*, YOUTUBE, at 00:17 (Sept. 29, 2021), <https://youtu.be/V3Ov2yXSqaU>.

133. Lauryn Hill (@MsLaurynHill), TWITTER (Aug. 20, 2014, 10:34 PM), https://twitter.com/MsLaurynHill/status/502282676934426626?s=20&t=Z_pmQtH6HSXX7ksQy8JPFQ [<https://perma.cc/SSA6-9KX5>]; Lauryn Hill, *Black Rage (Sketch)*, MS. LAURYN HILL, at 00:41 (Aug. 20, 2014, 6:28 PM), <https://mslaurynhill.com/post/95329923112/black-rage-sketch> [<https://perma.cc/V9LR-QCBQ>] (“When the dogs bite, when the beatings, when I’m feeling sad . . .”). For more on the song, see Deborah N. Archer, “*Black Rage*” and the Architecture of Racial Oppression, in *FIGHT THE POWER: LAW AND POLICY THROUGH HIP-HOP SONGS* 231, 232–33 (Gregory S. Parks & Frank Rudy Cooper eds., 2022).

134. HINTON, *supra* note 122, at 279.

135. Parry & Yingling, *supra* note 20, at 73.

136. Canine violence remained part of the colonial project until and past its formal end. For example, the British imported police dogs from South Africa to quell the Mau Mau Uprising in Kenya in the 1950s. See Tyler D. Parry, *Police Still Use Attack Dogs Against Black Americans*, WASH. POST (Sept. 2, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/09/02/police-still-use-attack-dogs-against-black-americans/>.

137. Some would go so far as to say that “any use of dogs specifically bred to track and destroy human beings is evidence of a state of war.” Johnson, *supra* note 28, at 82.

138. LILA RAJIVA, *THE LANGUAGE OF EMPIRE: ABU GHRAIB AND THE AMERICAN MEDIA* 150 (2005).

139. See Josh White, *Abu Ghraib Dog Tactics Came from Guantanamo*, WASH. POST (July 27, 2005), <https://www.washingtonpost.com/archive/politics/2005/07/27/abu-ghraib-dog-tactics-came-from-guantanamo/f60e00e9-5d47-490e-9efb-e5a8256bbad9/>; Johnson, *supra* note 28, at 86 (describing

pictures emerged of dogs baring their teeth at Muslim men during interrogations. Though images of the torture horrified many in the U.S. public, a former U.S. canine handler, Ken Licklider, refused to say the way the dogs were being used was inappropriate based on the photographs.¹⁴⁰ In fact, he invoked the “common knowledge that people in that area are very, very afraid of dogs” to justify the dogs’ use.¹⁴¹ The U.S. media acquiesced in the minimization of detainees’ torture and the government’s role in it. As Lila Rajiva writes:

Charging a few “bad apples” with individual crimes is one thing because they do not represent the state; charging the government with procedural error, wrong judgment, carelessness, or cultural insensitivity is also permissible, because the underlying “intention” and morality of the state is not called into question. But charging the government with the abuse of children and medical complicity in torture ruptures the facade of the liberal state and the ideology that journalists themselves share too deeply to undermine. So we find a *Post* article, for example, trying to minimize the use of dogs in terrorizing prisoners. It suggests in frankly racist terms that the animals simply disliked the Iraqis because of their smell and appearance.¹⁴²

Rajiva also points out the connection between U.S. war-making and torture abroad and the use of the same techniques at home:

photographs of prisoners at Abu Ghraib being tortured with dogs, including one man, naked and “lying on the ground surrounded by a pool of his own blood after being bitten by the dog(s) on both legs”). Two soldiers were ultimately “charged with maltreatment of detainees, largely for allegedly encouraging and permitting unmuzzled working dogs to threaten and attack” prisoners at Abu Ghraib. Johnson, *supra* note 28, at 86 (quoting White, *supra*).

140. All Things Considered, *Use of Dogs as Tools for Interrogation*, NPR, at 01:03 (June 11, 2004, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=1955345> [<https://perma.cc/AJH7-N7VJ>] (interviewing Licklider, saying “I saw the same pictures that everybody else saw and I saw nothing wrong bringing the dogs in. That situation could have been read many different ways from policemen and prison officials around the world. I saw two dog handlers with dogs there and a man in between them. That’s all I saw. I don’t know how they’re using them; I don’t know how they were told to use them. But a dog is a great deterrent and if there was something going wrong at that moment to bring dogs in to quell it or to not let it escalate is common, and I feel, a good practice. But to bring a dog in, to bring anything in to intimidate is part of an interrogation. You’ve got to use what you can use to get the people to talk to you, and it’s common knowledge that the people in that area are very, very afraid of dogs.”).

141. *Id.* at 01:46. The U.S. military during this period relied on pseudo-scientific information combined in books such as *The Arab Mind* by Raphael Patai to derive their torture techniques. RAPHAEL PATAI, *THE ARAB MIND* (1973); see also Dag Tuastad, *Neo-Orientalism and the New Barbarism Thesis: Aspects of Symbolic Violence in the Middle East Conflict(s)*, 24 *THIRD WORLD Q.* 591, 592 (2003). The use of dogs relied on a belief among some Muslims that dogs are unclean, and thus that individuals would have to perform ablution after contact with a dog. See *Dogs*, *OXFORD DICTIONARY OF ISLAM* (John L. Esposito ed., 2003). By no means are these beliefs about dogs universally held among adherents to Islam. See, e.g., *Are Dogs Acceptable Pets, Muslim Scholars Ask?*, *ECONOMIST* (Aug. 27, 2020), <https://www.economist.com/middle-east-and-africa/2020/08/27/are-dogs-acceptable-pets-muslim-scholars-ask>. Whether the particular individuals tortured with dogs held those beliefs or not, the weaponization of religious practices against prisoners exacerbated the cruelty and indignity of U.S. torture techniques.

142. RAJIVA, *supra* note 138, at 162.

The meaning of Abu Ghraib is ultimately not to be found in isolation but in acts elsewhere and at other times, which unfold from opaque depths that are at first strange but then completely familiar. The water tortures that American forces used in the Spanish-American War come home to American police stations. The electric torture used in Vietnam reappears in Arkansas prisons in the 1960s and in Chicago squad rooms in the 1970s and 1980s.¹⁴³

It should be noted that the American public's disgust at the use of dogs in Abu Ghraib against a reviled enemy did not provoke introspection about how U.S. policing used dogs in its War on Crime.¹⁴⁴ Licklider, the expert quoted by NPR in its coverage of the infamous prison complex, owns Vohne Liche Kennels, and he himself trained dogs sent to work with the military in Iraq.¹⁴⁵ Vohne Liche's website boasts that it trains dogs for more than five-thousand civilian and police agencies, including the Memphis Police Department, Michigan State Police, Ohio Highway Patrol, National Security Agency, Bureau of Indian Affairs, and Kansas City Police Department.¹⁴⁶

Though domestic canine policing rarely attracts a national spotlight, pattern-or-practice investigations often reveal serious problems in police canine units, both with the uses to which dogs are put and the oversight of canine apprehensions.¹⁴⁷ Settlements have required changes to canine unit policies in Prince

143. *Id.* at 163 (footnote omitted); *cf.* PAUL GOWDER, *THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION* 16–17 (2021) (describing U.S. “failures of legality” that were affirmed in international contexts before being applied to the U.S. War on Terror).

144. *See generally* Wadie E. Said, *Law Enforcement in the American Security State*, 2019 *Wis. L. REV.* 821 (2019) (describing how the relationship between national security, immigration, and law enforcement organizations creates geographies within the United States that function like foreign countries).

145. All Things Considered, *supra* note 140, at 00:12, 04:09. A much earlier proponent of police dogs, Charles Sloane, was a military advisor in Vietnam, where the military used sentry dogs. Wall, *supra* note 113, at 868.

146. VOHNE LICHE KENNELS, <http://vohneliche.com/> [<https://perma.cc/G937-B9DG>] (last visited Mar. 22, 2023).

147. *See, e.g.*, Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, U.S. Dep’t of Just., C.R. Div., to Virginia Gennaro, Esq., City Attorney, City of Bakersfield, California 9–10 (Apr. 12, 2004) [hereinafter Bakersfield Investigation], https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/bakersfield_ta_letter.pdf [<https://perma.cc/T2BL-Z376>] (noting that Bakersfield Police Department policy “states that canine units will be ‘primarily utilized’ in domestic disturbance calls, and to apprehend persons under the influence of drugs and/or alcohol or persons with mental illness” and that canine program supervisors were not trained in canine handling procedures). The DOJ conducts pattern-or-practice investigations under 34 U.S.C. § 12601 (formerly 42 U.S.C. § 14141), which gives the DOJ the power to investigate whether state or local law enforcement agencies are “committing a ‘pattern or practice’ of police misconduct that violates the federal rights of individuals, and to seek injunctive relief to eliminate any patterns of misconduct the DOJ investigation reveals.” Christy E. Lopez, *DOJ Police Pattern-or-Practice Investigations*, 37 *CRIM. JUST.* 34, 34–35 (2022); *see* 34 U.S.C. § 12601(a) (“It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”).

George's County, Maryland;¹⁴⁸ Washington, D.C.;¹⁴⁹ Cincinnati, Ohio;¹⁵⁰ Bakersfield, California;¹⁵¹ New Orleans, Louisiana;¹⁵² Albuquerque, New Mexico;¹⁵³ and Ferguson, Missouri.¹⁵⁴ Soon after the Cincinnati uprisings in response to the police killing of Timothy Thomas in 2001, the DOJ initiated a pattern-or-practice investigation that underscored the racial dynamics of police canine force and concluded that the Cincinnati Police Department improperly used dogs against Black residents.¹⁵⁵

When the DOJ investigated the New Orleans Police Department (NOPD) in 2010–2011, it found that some of the department's dogs "were almost completely uncontrollable and the rest were not consistently controllable."¹⁵⁶ The DOJ report stated that while one would expect that three or fewer apprehensions out of ten would result in a dog biting a person, NOPD's bite ratio was approximately six out of ten.¹⁵⁷ The NOPD dogs were not certified by any nationally recognized organization, the department maintained no training records, and the dogs could not be recalled upon command.¹⁵⁸

The DOJ also determined that the documentation of canine apprehensions was so deficient that "appropriate oversight [was] not possible."¹⁵⁹ Though canine

148. Press Release, U.S. DOJ, Justice Department Signs Agreements Governing Use of Canines and Force with Prince George's County (Jan. 22, 2004), https://www.justice.gov/archive/opa/pr/2004/January/04_crt_037.htm [<https://perma.cc/Q92B-QRZ3>].

149. Memorandum of Agreement Between the U.S. DOJ and the Dist. of Columbia and the Dist. of Columbia Metro. Police Dep't, U.S. DOJ ¶¶ 44–46 (June 13, 2001) (available at https://www.justice.gov/crt/memorandum-agreement-united-states-department-justice-and-district-columbia-and-dc-metropolitan#_1_8) [<https://perma.cc/B23Y-QKQX>].

150. Memorandum of Agreement Between the U.S. DOJ and the City of Cincinnati, Ohio and the Cincinnati Police Dep't, U.S. DOJ ¶ 20(a) (Apr. 12, 2002) [hereinafter Cincinnati Memorandum of Agreement] (available at <https://www.cincinnati-oh.gov/police/linkservid/EA1A2C00-DCB5-4212-8628197B6C923141/showMeta/0/>) [<https://perma.cc/75G6-HNGE>] ("The CPD will revise and augment, subject to DOJ review and approval, its canine policies.").

151. Bakersfield Investigation, *supra* note 147, at 9–11.

152. C.R. Div., U.S. DOJ, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 6 (2011) [hereinafter NEW ORLEANS INVESTIGATION], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<https://perma.cc/8TL5-N8EG>]; Consent Decree Regarding the New Orleans Police Department at 17–19, *United States v. City of New Orleans*, No. 12-cv-01924 (E.D. La. July 24, 2012).

153. Settlement Agreement at 41, *United States v. City of Albuquerque*, No. 14-CV-1025 (D.N.M. Nov. 14, 2014).

154. C.R. Div., U.S. DOJ, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 92–93 (2015) [hereinafter FERGUSON INVESTIGATION], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/K3YB-GS39>].

155. HINTON, *supra* note 122, at 277–79; Cincinnati Memorandum of Agreement, *supra* note 150.

156. NEW ORLEANS INVESTIGATION, *supra* note 152.

157. *Id.* at 7. Moreover, the report notes that the NOPD had initially provided bite ratio data that revealed an inaccurate understanding of how to calculate bite ratios. *Id.* at 7 n.8. The NOPD had used bites-to-deployments to define its bite ratio, while the correct method is bites-to-apprehensions. *Id.* The NOPD's method makes the bite ratio seem lower than it is, because deployments cover a wider range of activities than apprehensions, *id.*, which allows the police to use unnecessary deployments to pad their statistics.

158. *Id.* at 7.

159. *Id.*

apprehensions were documented in “Resisting Arrest Reports,” the reports relied on vague, boilerplate language, including “that the canine ‘apprehended the subject,’ that the subject ‘received minor dog bites,’ and that the canine ‘made physical contact’ with the subject.”¹⁶⁰ The NOPD failed to take any photographs of the victims’ injuries and did not document the “nature or severity of the wounds.”¹⁶¹ Upon the DOJ’s urging, NOPD’s superintendent immediately suspended the canine unit pending remediation.¹⁶² Though the DOJ report did not break down use of canine force by race, the report did find that 84% of NOPD’s documented uses of force between January 2009 and May 2010 were against a Black person,¹⁶³ while 60% of the city’s population was Black at that time.¹⁶⁴

Perhaps the most well-known example of discriminatory and brutal canine policing became public through the DOJ investigation in Ferguson, Missouri, after the killing of Michael Brown. In the protests that followed Brown’s death, community members called out K-9s as a technology of racist state violence.¹⁶⁵

During its investigation, the DOJ uncovered a pattern of abusive behavior by the Ferguson canine officers. Though Ferguson Police Department (FPD) policy indicated that dogs were to be used to locate and apprehend “dangerous offenders,” the policy also allowed dogs to be used to apprehend someone for any alleged crime.¹⁶⁶ As a result, FPD used dogs permissively, siccing the animals on unarmed people suspected of nonviolent crimes, including children.¹⁶⁷ The DOJ noted that FPD officers “act as if every offender has a gun, justifying their decisions based on what might be possible rather than what the facts indicate is likely.”¹⁶⁸ The DOJ also found that the dogs were apparently used to “inflict punishment” on those who engaged them in chases.¹⁶⁹ Further, DOJ noted that all bite victims for whom racial data were available were Black.¹⁷⁰

Though the DOJ investigation of Ferguson occurred because of mass mobilization against racialized police violence, it should not take extraordinary moments to examine policing practices. Studies of police canine force, though limited, suggest that racial disparities and abuse of canine force are not exceptional. For the period of 2005 to 2013, Randall Loder and Cory Meixner found that Black individuals comprised 42% of the victims of recorded “legal intervention” canine

160. *Id.* at 7–8.

161. *Id.* at 8.

162. *Id.*

163. *Id.* at 39.

164. Michelle Krupa, *New Orleans’ Official 2010 Census Population is 343,829, Agency Reports*, TIMES-PICAYUNE (Feb. 3, 2011, 11:36 PM), https://www.nola.com/news/politics/article_a2e0101d-5845-5ce0-9523-d674b177939d.html [<https://perma.cc/BG2R-AXZS>].

165. See Wall, *supra* note 113, at 861–62.

166. FERGUSON INVESTIGATION, *supra* note 154, at 31.

167. *Id.* at 31–33 (describing FPD canine deployments).

168. *Id.* at 33.

169. *Id.*

170. *Id.* at 31.

bites that resulted in emergency medical treatment¹⁷¹—far out of step with the demographics of the country¹⁷² and with the number of domestic dog bites suffered by Black Americans.¹⁷³ In some cities, the disparities are even starker. In Baton Rouge, 146 people were bitten from 2017 to 2019, and more than 90% of the 93 adult victims were Black.¹⁷⁴ For children, the disparities were starker still: 51 of the 53 children bitten in Baton Rouge were Black.¹⁷⁵ The city’s population is just over 50% Black.¹⁷⁶

The commonness of police dog bites varies widely between agencies. In a series by the Marshall Project, records requests revealed that while Chicago police had only one bite incident from 2017 to 2019, Seattle had 23, New York City had 25, and other departments had far more.¹⁷⁷ In the same period, “Indianapolis had more than 220 bites, and Los Angeles reported more than 200 bites or dog-related injuries, while Phoenix had 169. The Sheriff’s Department in Jacksonville, Florida, had 160 bites in this period.”¹⁷⁸

Though police departments insist they do not use canines for “just for any little reason,”¹⁷⁹ innumerable cases suggest that canine force is not adequately constrained. The Marshall Project verified incidents in which people were maimed after driving a golf cart drunk at fifteen miles per hour, stealing a nail file and lipsticks, or even after no crime at all.¹⁸⁰ While the police in these situations often

171. See Loder & Meixner, *supra* note 5, at 11 tbl.1, 12. The data that Loder and Meixner studied do not reflect all police canine bites in the United States. See *id.*

172. The 2010 Census—taken in the middle of Loder and Meixner’s research period—revealed that 13.6% of Americans were Black. KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 7 tbl.3 (2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-02.pdf> [<https://perma.cc/VS49-RFHC>].

173. The study found that 13% of the victims of unintentional dog bites were Black. Loder & Meixner, *supra* note 5, at 11 tbl.1, 12.

174. Stole & Toohey, *supra* note 2.

175. *Id.*

176. *Id.*

177. Abbie VanSickle, Challen Stephens, Ryan Martin, Dana Brozost-Kelleher & Andrew Fan, *When Police Violence Is a Dog Bite*, MARSHALL PROJECT (Oct. 2, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/02/when-police-violence-is-a-dog-bite> [<https://perma.cc/L5UW-9V5L>]. The absolute disparities in bite numbers cannot explain why these disparities exist. On the one hand, one might expect a city such as New York, with a much larger police force, to have more bites, though some departmental policies, such as those in New York, limit dog use to felonies, circumscribing the animals’ use. *Id.* It may also be that policies like the New York Police Department’s reflect the practicalities of more densely populated cities, where the risk of collateral damage may be higher than in smaller cities that are more sparsely populated, such as Indianapolis. At the same time, police agencies could have a similar number of deployments but fewer off-lead deployments, which may also lead to a lower bite ratio.

178. *Id.*

179. *Id.* (quoting Patrick McKean, trainer for the Mobile, Alabama Police Department).

180. See *id.*; see also Dorian Hargrove, *Mother Bitten by a San Diego Police K9 That Got Loose to Get \$600,000 from City*, CBS8 (Sept. 16, 2022, 12:25 PM), <https://www.cbs8.com/article/news/investigations/san-diego-to-pay-600000-to-mother-attacked-by-loose-k9-police-dog/509-2697ece1-acdf-4f5c-b98d-11f896dd5284> [<https://perma.cc/W3N3-4YBS>] (describing a dog attack that occurred when a San Diego police dog got out of its yard, jumped over a fence, and attacked a five-year-old girl jumping on a trampoline then turned on the girl’s mother).

had imperfect information—as in the golf cart incident, where police believed they were responding to a carjacking¹⁸¹—the treatment of dogs as an intermediate form of force has had serious consequences. An Alabama man, Joseph Lee Pettaway, was killed by a police dog after someone reported him for burglarizing an unoccupied house—one that he was repairing for his mother and for which he had a key.¹⁸² After the dog lunged and bit Pettaway, the handler struggled to remove the dog for nearly two minutes and testified that “he had to choke the dog until it could not breathe and was nearly unconscious” before it would let go of Pettaway’s groin.¹⁸³

When used to stop a person from running away, the pain of a police dog’s bite may be incidental to the dog’s use as a mechanical disruption. In other instances, the pain of a dog bite is the officer’s express objective. Police sometimes use dogs as a method of “pain compliance,” a term used to describe “the intentional infliction of pain . . . as a way of encouraging the subject to comply with an officer’s commands.”¹⁸⁴ For instance, in Yakima, Washington, police guided a dog’s mouth to the leg of a man who was lying on the ground with three officers on top of him.¹⁸⁵ The Yakima incident occurred as part of a traffic stop, and the officers’ goal was to use pain to make the man submit to police authority.¹⁸⁶

Using dogs for pain compliance is dangerous for four reasons. First, dog bites are imprecise compared to other pain compliance techniques. As one police consultant said, “The dog is more unpredictable. . . . The dog chomps into somebody’s leg—you don’t know whether it’s going to be a muscle, a tendon or, God forbid, an artery.”¹⁸⁷ Second, police officers have imperfect control over the mechanism of force when that mechanism is a dog’s jaws. If an officer presses their thumb into a pressure point or deploys a Taser, they can control the exact moment the force will end by releasing their grip or flipping the safety to end the Taser cycle. A dog, trained that a bite will be rewarded and that a bite is itself a reward,¹⁸⁸ may not “out”—the term used by dog handlers to describe a

181. VanSickle et al., *supra* note 177.

182. *Id.*

183. Ashley Remkus, *Judge Won’t Release Bodycam of Deadly Police Dog Attack in Alabama*, AL.COM (May 19, 2022, 2:57 PM), <https://www.al.com/news/2022/05/judge-wont-release-bodycam-of-deadly-police-dog-attack-in-alabama.html> [<https://perma.cc/HL9Q-6JU2>].

184. SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, *EVALUATING POLICE USES OF FORCE* 55 (2020); *see also* Abbie VanSickle & Challen Stephens, *Police Use Painful Dog Bites to Make People Obey*, MARSHALL PROJECT (Dec. 14, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/12/14/police-use-painful-dog-bites-to-make-people-obey> [<https://perma.cc/8LRH-DGG2>] (“The idea [of pain compliance] is to apply quick, targeted amounts of pain . . . to force a person to follow orders.”).

185. VanSickle & Stephens, *supra* note 185. A police dog could also be used not to actually engage in force but simply to threaten it.

186. *See* VanSickle & Stephens, *supra* note 185.

187. *Id.*

188. *See* *Mitchum v. City of Indianapolis*, No. 19-cv-02277, 2021 WL 2915025, at *14 (S.D. Ind. July 12, 2021) (“Mr. Hartssock testified that the basic principle in dog training called operant conditioning means that you will increase the likelihood of a behavior if you reinforce that behavior; as such, when [the Indianapolis Metropolitan Police Department] immediately plays tug of war or throws a ball after the dog bites in training, the dog begins to be conditioned that it will get a reward if it bites.”).

release¹⁸⁹—upon command. When that happens, injuries become more severe and are beyond an officer’s control.¹⁹⁰ Third, a dog bite causes such severe pain that it becomes difficult for people to submit. When a dog bites, adrenaline floods the body, and people are likely to instinctually struggle to free themselves—the opposite of the goal of pain compliance.¹⁹¹ Fourth, unlike the more limited residual pain occasioned by use of a pressure point or Taser, the pain of a dog bite lasts long after the dog stops biting and can be a source of long-term medical complications.¹⁹²

Some incidents also suggest that officers use police dogs as punishment. For example, bodycam footage from Spokane, Washington showed an officer “shoving a dog through a truck window and watching it chew on a man inside as he screamed.”¹⁹³ In Sonoma County, California, officers sicced a dog on a thirty-five-year-old Black man whom they had already tased and who was on the ground.¹⁹⁴ These instances suggest that police are using dogs as a form of punishment, because there was, under the circumstances, seemingly nothing the officers were trying to achieve aside from the infliction of pain.

Recently, some cities have taken steps that indicate their police canine units have been used inappropriately. In Salt Lake City, the mayor suspended the canine unit after a video showed police releasing a dog on a Black man, even though he was on his knees, hands in the air.¹⁹⁵ In a rare move, prosecutors filed criminal charges of second-degree aggravated assault against the dog handler.¹⁹⁶ Subsequently, the department filed additional charges against the officer for a different incident in which he lifted up his dog to “bite a woman who was in a

189. See Josh Kirby, *Police K9: The Case for a Verbal Out*, K-9IRBY (July 9, 2022), <https://www.k9irby.com/post/police-k9-the-case-for-a-verbal-out> [<https://perma.cc/5R9U-Y563>].

190. See, e.g., Brendan Keefe & Lindsey Basye, *Teen Following Police Commands Is Brutally Attacked by Roswell K-9*, 11ALIVE (Dec. 4, 2018, 3:21 PM), <https://www.11alive.com/article/news/local/investigations/teen-following-police-commands-is-brutally-attacked-by-roswell-k-9/85-575177266> [<https://perma.cc/824K-F66E>].

191. STOUGHTON ET AL., *supra* note 184, at 221 (“The . . . ‘bite and hold’ [approach] . . . relies in large part on the dubious assumption that the canine’s bite will, through pain compliance, induce a subject to stop moving or to follow officers’ verbal commands. Experience and common sense call this assumption into question; individuals bitten by dogs, including police canines, may reasonably be expected to react to a bite by physically struggling to escape the bite, rather than becoming quietly compliant. This observation has led many police agencies to instruct handlers to keep in mind that struggling is the natural result of a dog bite and should therefore not be used as a reason to maintain the bite.”).

192. See *infra* Part III.

193. VanSickle et al., *supra* note 177. Regarding the incident, the president of the Spokane City Council said, “It seemed like the officers essentially used the dog to punish [the man].” *Id.*

194. *Id.*

195. Jessica Miller, *Salt Lake City Suspends Use of Police Dogs After a Black Man Was Bit While Complying*, SALT LAKE TRIB. (Aug. 12, 2020, 8:35 PM), <https://www.sltrib.com/news/2020/08/12/salt-lake-city-police/>.

196. Jessica Miller, *Salt Lake City Officer Charged with a Felony for Ordering His Police Dog to Attack a Black Man*, SALT LAKE TRIB. (Sept. 16, 2020, 9:41 PM), <https://www.sltrib.com/news/2020/09/16/salt-lake-city-officer/>.

suspected stolen vehicle.”¹⁹⁷ The additional charges came on the heels of a review of all Salt Lake City Police Department dog bites, which uncovered a “pattern of abuse of power” and resulted in the forwarding of 66% of bite incidents to the district attorney’s office for possible criminal charges.¹⁹⁸ Likewise, in Walnut Creek, California, police assured the public they would no longer use police dogs at demonstrations after a dog was used to arrest a demonstrator at a Black Lives Matter protest, who described the incident as feeling like he “was being eaten.”¹⁹⁹ The protestor, twenty-two-year-old Joseph Malott, had “picked up one [tear gas] canister and tossed it away—in the direction of the cops.”²⁰⁰

Racial disparities are not only a fact of canine policing; the performance of canine policing constitutes a substructure of the scaffolding of racial subordination in the United States. Dorothy Roberts writes, “[R]acialized policing entails more than a race-based statistical difference in how police treat people. Rather, police enforce a carceral grip on entire communities that impinges on residents’ everyday lives, imposing a perpetual threat of physical assault and degradation, jeopardizing their opportunities to participate in the political economy, and suffocating their freedom.”²⁰¹ The next subsection describes how canine policing functions to construct and reinforce race.

D. CANINE BIOPOWER AS RACIAL INFRASTRUCTURE

Race lacks a biological underpinning, yet as the weight of the history recounted above demonstrates, the ideology and political reality of race exerts a powerful influence on society. As an ideology, race naturalizes hierarchy by relying on phenotypic characteristics to denote “cognitive, cultural, and moral ones.”²⁰² Race in practice, or racialization, occurs when a society applies hierarchy to its colonized members on a coordinated basis to support its ends.²⁰³

Understanding canine policing as a form of racialization clarifies the place of history in the analysis of current policing practices. Rather than equating slavery to mass incarceration or the tortures inflicted on enslaved people to the violence enacted by police dogs, we can understand “racist ideological and material practices [as] infrastructure that needs to be updated, upgraded, and modernized periodically.”²⁰⁴ Therefore, canine policing is not simply a reenactment of slave

197. Jessica Miller, *Salt Lake City Officer Charged with Another Felony as Review of K-9 Attacks Continues*, SALT LAKE TRIB. (May 11, 2021, 8:51 PM), <https://www.sltrib.com/news/2021/05/11/salt-lake-city-officer/>.

198. *Id.*

199. VanSickle et al., *supra* note 177.

200. *Id.*

201. Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 80 (2019).

202. WOLFE, *supra* note 26, at 7.

203. *See id.* at 10, 18–19.

204. Ruth Wilson Gilmore with Craig Gilmore, *Restating the Obvious*, in ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION 259, 264–65 (Brenna Bhandar & Alberto Toscano eds., 2022).

patrols; rather, it is part of what Ruth Wilson Gilmore calls racism's "changing same"²⁰⁵ and Reva Siegel calls "preservation-through-transformation."²⁰⁶

An examination of the social construction of race through canine policing asks how relations of power and difference manifest in canine policing to create and reinforce hierarchy.²⁰⁷ This inquiry asks how the institution of canine policing naturalizes the deservedness of harm inflicted on Black people and the production of premature death.²⁰⁸ A serious inquiry into the social construction of race through canine policing also goes beyond seeing the disparate effects on Black, Muslim, Indigenous, and Latine people as simply disproportionate or distributive, to seeing them as constitutive of our racial order.²⁰⁹

The fact of a dog attack marks a person as a threat and, when coupled with a racialized identity, reinforces the background assumption that police dogs are an appropriate weapon against a person who threatens innocent—coded white, propertied—Americans. In this scenario, whether a person is threatened or not, they are trained to believe they need protection from a racialized "other." As a result, the police dog is constitutive of the "yawning moral chasm in politics and everyday morality—between the innocent victims of state-sanctioned segregation and the more blameworthy, violent victims of racialized mass incarceration."²¹⁰

The power of the association between race, class, and canine policing remains visible through the disparate effects of racialized policing, the subordination of human dignity to canine dignity, and the threats to deploy attack dogs against racial justice advocates. Furthermore, the police dog stands as just one reminder of the relationship of U.S. policing to American hegemony and empire, which extends from the early American genocide of Native Americans to today's continued War on Terror, and the layered, overlapping racial hierarchies of carceral control.

205. Ruth Wilson Gilmore, *Race and Globalization*, in *ABOLITION GEOGRAPHY*, *supra* note 204, at 107, 114. Gilmore defines racism as "the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death." RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (2007).

206. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178 (1996).

207. It may seem odd to some to speak about canine policing as constructing race. After all, racialization is already happening to those racialized through canine violence's enactment through other ideological and material practices, and the abolition of canine policing would leave plenty of that infrastructure intact. But scenes of subjection played out through dog bites and the wounds they inflict are a particularly gruesome site of the type of "naturalization ceremony" Devon Carbado describes when Black people are forced to interact with the prevailing racial scripts of policing and rightlessness. Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 957 (2002).

208. *Cf.* GILMORE, *supra* note 205.

209. This Article uses the term "Latine" to describe people of Latin American descent. See Samantha Chery, *A Guide to How Words Like Hispanic and Latinx Came About*, *WASH. POST* (Oct. 1, 2022, 6:00 AM) <https://www.washingtonpost.com/lifestyle/2022/10/01/hispanic-latino-latinx-latine-words-history/>. The Article maintains usage of the term "Hispanic" when describing people descended from Spanish-speaking countries or when used by the cited source.

210. JODY ARMOUR, *N*GGA THEORY: RACE, LANGUAGE, UNEQUAL JUSTICE, AND THE LAW* 18 (2020).

The disparate effects of canine policing on Black and brown communities in the United States are created in part through the literal geographic boundaries of canine deployment. Canine policing helps reinforce racial boundaries by policing primarily within the geographic boundaries inhabited by Black, Indigenous, and Latine people. The practices of the Los Angeles Police Department in the 1990s demonstrate this marking of boundary. There, police concentrated canine deployments in Black and Latine neighborhoods without regard to crime rates or type of offense.²¹¹ This distribution of canine policing and its use to gain compliance also reinforces an institutional structure that demands a show of submission to the law's legitimacy by those for whom the law is least legitimate.²¹²

Another way to understand canine policing as constitutive of race is the further entrenchment of boundaries around communities in the United States. One articulation of this is the understanding among many, especially Black, Americans that if police dogs regularly attacked people racialized as white, the practice would quickly end. Scholars have articulated this claim as one of equal citizenship and argued that to equally protect Black people, Fourth Amendment doctrine must embody an equal citizenship principle that applies to Black people regardless of whether they are suspected of a crime.²¹³ The contingent nature of Black Americans' full citizenship is evident when canine violence is used to vindicate the state power to prosecute people for non-violent property offenses rather than to protect either property or people.²¹⁴

Canine policing also configures "a hierarchy of human and inhuman persons that in sum form the category 'human being.'"²¹⁵ The insistence on the dignity of

211. See, e.g., Third Amended Complaint for Damages and Declaratory and Injunctive Relief at 4–5, *Lawson v. Gates*, No. 031232 (Cal. Super. Ct. Aug. 17, 1993).

212. See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1190–91 (2017).

213. See, e.g., I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 9 (2011) (describing the extension of Fourth Amendment protections through Warren Court era jurisprudence as reflecting "a concern for the dual goals of citizenship and equality"). See generally Carbadó, *supra* note 207 (illustrating the rightlessness of being a Black American in contrast to a white American and therefore outside the reach of the Fourth Amendment). Paul Butler has also explicitly stated that if the extraordinary power given police "had been understood as applying mainly to white people, these cases would have been decided differently." Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 107 (2019).

214. See Stole & Toohey, *supra* note 2 (referring to a review of Baton Rouge Police Department records showing most people bitten by police dogs between 2017 and 2019 were Black and "were unarmed and suspected by police of nonviolent crimes like driving a stolen vehicle or burglary"); see also GOWDER, *supra* note 143, at 4 (explaining that "harsh policing policies are often motivated by the desire to protect property, but such policies have also driven America's racial disparities in criminal justice and the segregation at its foundation").

215. Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, in ABOLITION GEOGRAPHY, *supra* note 204, at 132, 137. For example, in San Jose, California, a police dog bit and held Anthony Paredes by the throat for one minute, during which time the officer commanded Paredes, "Don't fight the dog! Let go of the dog!" Lisa Fernandez & Evan Sernoffsky, *Video: San Jose K-9 Bites Man's Throat for 1 Minute Re-Igniting Police Dog Concerns*, KTVU Fox2 (July 25, 2022, 11:06 PM), <https://www.ktvu.com/news/video-san-jose-k-9-bites-mans-throat-for-1-minute-re-igniting-police-dog-concerns> [<https://perma.cc/H94U-4ZM6>].

police dogs and subordination of human dignity is one instance of this hierarchy. When police demand that people not touch or interfere with the very dogs that are attacking them, it marks a hierarchy of concern.²¹⁶

Police make tactical decisions that privilege the dog over the person it is biting. For example, while a police dog ripped parts of a woman's scalp off, the officer backing the canine handler assured him, gun drawn, "Don't worry, I won't shoot your dog."²¹⁷ The video does not show officers assuring the woman she would not be shot.²¹⁸ Reporters' emphasis on injuries dogs sustain when people try to fight them off reflects the same pattern,²¹⁹ as do ceremonies honoring dogs injured in the line of duty.²²⁰

Likewise, when laws, civil and criminal, protect police dogs' lives while ignoring the harms caused by police dogs and their handlers, those laws express a preference for the pain, physical and psychic injury, disfigurement, disability, and sometimes death of Black and brown people over that of dogs.²²¹ Stylized police funerals held when a police dog is killed epitomize their elevation and humanization, honoring them because of and in spite of their training to attack human beings.²²²

216. See *infra* text accompanying notes 462–465.

217. Complaint for Damages at 5, *Bates v. Rezentos*, No. 22-cv-01097 (N.D. Cal. Feb. 22, 2022); *Warning: Brentwood Police Dog Rips Off Woman's Scalp*, KTVU Fox2, at 00:29 (Feb. 23, 2022), <https://www.ktvu.com/video/1038381>; see also Lisa Fernandez, *Video: Brentwood Police Dog Rips Off Young Woman's Scalp*, KTVU Fox2 (Feb. 23, 2022, 7:39 PM), <https://www.ktvu.com/news/video-brentwood-police-dog-rips-off-young-womans-scalp> [<https://perma.cc/67FK-W4X7>] (describing police dog's biting of Talmika Bates).

218. See Fernandez, *supra* note 217.

219. See, e.g., Shannon Handy, *San Diego Police Dog Recovering After Vicious Attack*, CBS8 (July 26, 2022, 6:13 PM), <https://www.cbs8.com/article/news/crime/san-diego-police-dog-recovering-vicious-attack/509-c05f33e7-2131-4f66-a657-902f44c125ef> [<https://perma.cc/NF5W-MP45>] (centering police dog's injuries by beginning the article with the sentence, "A police dog stabbed by a wanted felon is recovering from his injuries," and continuing by describing that it was the dog's "first time getting injured on the job"—while only in the seventh paragraph stating that the person stabbed the dog in response to the dog biting him).

220. See, e.g., Kirstan Conley, *K-9 Cop Gets Standing Ovation After Leaving Hospital*, N.Y. POST (June 26, 2013, 6:53 PM), <https://nypost.com/2013/06/26/k-9-cop-gets-standing-ovation-after-leaving-hospital/> [<https://perma.cc/TYH3-DZA9>] (describing a walkout ceremony held for NYPD police dog injured on the job); WKMG News 6 ClickOrlando, *Injured Police Dog Honored at Ceremony*, YOUTUBE (Apr. 5, 2018), https://youtu.be/1-kJ2DPBG_A (depicting a medal ceremony for a police dog injured after a chase); Houston Police, *K-9 Rony End of Watch Ceremony*, YOUTUBE (Mar. 12, 2018), <https://youtu.be/xGd5sIRYovM> (showing a ceremony honoring a police dog that had to be euthanized due to an injury).

221. Cf., e.g., Brian Palmer, *So Help You, Dog*, SLATE (July 18, 2008, 1:53 PM), <https://slate.com/news-and-politics/2008/07/how-does-a-canine-cop-become-a-sworn-officer.html> [<https://perma.cc/7FGF-N2SN>] ("Anyone who kills a federal law enforcement animal will face fines and up to 10 years in prison . . . Similar statutes exist to protect police animals from malicious injury in every state but South Dakota . . ."); Olga Khazan, *Protecting Police Dogs from Fentanyl*, ATLANTIC (May 11, 2018), <https://www.theatlantic.com/health/archive/2018/05/protecting-police-dogs-from-fentanyl/560132/> ("Fully trained police dogs are worth around \$30,000 each, and police departments are looking for ways to protect these four-legged officers on the job."); Handy, *supra* note 219 (noting that the man that was arrested was being charged with "attacking a police dog, which is a felony"). This preference is, in Gilmore's terms, a preference for the production of "premature death." See Gilmore, *supra* note 205, at 107.

222. See Ann L. Schiavone, *K-9 Catch-22: The Impossible Dilemma of Using Police Dogs on Apprehension of Suspects*, 80 U. PITT. L. REV. 613, 615–17 (2019) (describing that Rocco, a police dog

Patrick Wolfe also describes racialization as “a response to the crisis occasioned when colonisers are threatened with the requirement to share social space with the colonised.”²²³ It is not surprising, then, that police canine violence, and attention thereto, has heightened in moments when people have pushed against caste boundaries—the rebellions of the 1960s and ’70s, Black Lives Matter protests in Ferguson in 2014, and uprisings across the country after Derek Chauvin murdered George Floyd in 2020.

As Boisseron notes, police dogs were conspicuously present after Michael Brown’s killing in Ferguson in 2014 but were absent in Baltimore after Freddie Gray’s killing in 2015.²²⁴ That difference led Hyland “Buddy” Fowler, Jr., a Virginia state delegate, to suggest that attack dogs should have been used against the Baltimore protesters.²²⁵ Likewise, when protests erupted after Floyd’s murder, then-President Donald Trump proclaimed that if protestors came near the White House fence, “they would have been greeted with the most vicious dogs, and most ominous weapons, I have ever seen.”²²⁶ By contrast, neither the rhetoric of police dog violence nor the actual animals seem to have been deployed against COVID-19 lockdown protestors or those who descended on the U.S. Capitol on January 6, 2021.²²⁷ These practices and rhetoric present police dogs as a marker of both race and racism in the U.S. collective consciousness.²²⁸ In the context of racial justice protests, race-making through canine policing serves to “retriev[e] . . . the inequities that the extension of citizenship has theoretically abolished.”²²⁹ Bennett Capers has theorized this differential citizenship through race-making as one of the failures of contemporary Fourth Amendment jurisprudence—a jurisprudence that

killed, “was given a funeral service with full law enforcement honors”); *see also id.* at 617 (“The death of Aren, like the death of Rocco, caused an outpouring of grief over the life of the [police] dog. However, unlike the death of Rocco, this incident also involved the death of a person, Bruce Kelley, Jr. In the aftermath, the City of Pittsburgh exhibited significantly more conflict in its response than it did in the death of Rocco. While the police also honored Aren with a law enforcement funeral, community groups expressed anger over the callous disregard for the grieving Kelley family.” (footnotes omitted)).

223. WOLFE, *supra* note 26, at 14.

224. Boisseron, *supra* note 63, at 15.

225. *Id.*; *Virginia House of Delegates Member Listings: Delegate Hyland F. (Buddy) Fowler Jr., VA. HOUSE OF DELEGATES*, <https://viriniageneralassembly.gov/house/members/members.php?id=H0259> [<https://perma.cc/U6LV-PGSW>] (last visited Mar. 31, 2023).

226. Maggie Haberman, *Trump Threatens White House Protestors With ‘Vicious Dogs’ and ‘Ominous Weapons’*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/05/30/us/politics/trump-threatens-protesters-dogs-weapons.html>.

227. *See* Chavez, *supra* note 16; Anna Presnall, *The Right to Protest: Black Lives Matter and the Anti-Lockdown Protests*, UAB INST. HUM. RTS. BLOG (Nov. 20, 2020), <https://sites.uab.edu/humanrights/2020/11/20/the-right-to-protest-black-lives-matter-and-the-anti-lockdown-protests/> [<https://perma.cc/M82N-NTHK>]; Abigail Censky, *Heavily Armed Protesters Gather Again at Michigan Capitol to Decry Stay-at-Home Order*, NPR (May 14, 2020, 12:09 PM) <https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order> [<https://perma.cc/79CZ-UZ8X>].

228. *See* Boisseron, *supra* note 63, at 29–30 (“[O]ne no longer needs to see the black man next to the dog’s fangs or the white man holding the leash in order to know that the attack dog *means* not only racism but also race.”).

229. WOLFE, *supra* note 26, at 14.

has not course-corrected in the decade since Capers proffered his vision for a more equal Fourth Amendment regime.²³⁰

The generational trauma and memory of police dogs as dangerous also racializes minoritized communities by marking those who are inside of the polity and protected by police and those who are outside the polity and remain unprotected. As an example, we might call on Joshua Bennett's description of the "white dog":

White dogs . . . are not only pets but often extensions of the police state, indeed, the very flesh-and-bone entities through which the murderous whims of the police state are made manifest in the everyday lives of those who are property themselves or else the descendants of property, those who own nothing and as such exist as a threat to the logic of private property altogether.²³¹

These white dogs are recalled across generations and geographies through family history and collective racial consciousness. One such legacy is retold in David J. Dennis Jr.'s book *The Movement Made Us*, which explains his own family history, including the police dogs that menaced his father and other civil rights activists.²³² Another is that of Daniel Smith, believed to be the last child born to enslaved parents, who died in October 2022. He told the *Economist* in 2021, "I remember hearing [from my enslaved father] about two slaves who were chained together at the wrist and tried to run away. . . . They were found by some vicious dogs hiding under a tree, and hanged from it."²³³

The chasm between the racial memory of white and Black communities in the United States when it comes to police dogs is true across other forms of racial violence as well.²³⁴ While these legacies remain "present" in the families of Black Americans, white Americans, mostly, choose to forget or even bury those histories.²³⁵ Therefore, while for many white Americans police dogs can serve as

230. Capers, *supra* note 213, at 22–23, 37–47.

231. BENNETT, *supra* note 18.

232. DAVID J. DENNIS JR., *THE MOVEMENT MADE US: A FATHER, A SON, AND THE LEGACY OF A FREEDOM RIDE* 148 (2022) (describing civil rights activists' "march[] to City Hall, where police unleashed their dogs"); *id.* at 171 ("There, over the horizon, hidden from plain sight, I saw the horsemen of the Black apocalypse. Not just four, but dozens. Some were police officers, but the rest were the deputized Klansmen. They were dressed for a massacre. Riot gear. Automatic rifles. Grenades. Some were on horseback. Others holding back dogs foaming at the mouth. They were waiting for the march to come their way. Violent or not, it wouldn't matter. Those Klansmen were going to have the green light to kill as many Black people as possible."); *id.* at 209 ("Police joined in, swinging billy clubs and letting attack dogs brutalize as many Black people as they could. They even stuck one man in a cage with a police dog.").

233. Clay Risen, *Daniel Smith, 90, Dies; Thought to Be the Last Child of an Enslaved Person*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/01/us/daniel-smith-dead.html>.

234. See, e.g., IFILL, *supra* note 91, at xvi–xvii (recalling the history of lynchings on Maryland's Eastern Shore).

235. See *id.* at xiii (describing the "silence by whites and their detachment from the lynchings . . . when contrasted with the rich and detailed 'memory' of blacks").

“copaganda” that softens the image of the police,²³⁶ for many Black Americans, they evoke a different set of emotions.

These disparate memories affect how Black and white communities relate to dogs, particularly police dogs. While a snarling police dog would likely scare people of any background, the mere presence of a German shepherd communicates a message to some Black Americans about their belonging. Perhaps more importantly, as Sherrilyn Ifill argues, these divergent memories of violent control constrain political, economic, and social possibility.²³⁷

The dogs’ disparate use, now and in the past, also affects the present well-being of communities. As Ta-Nehisi Coates writes, “[R]acism is a visceral experience . . . [that] dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, breaks teeth.”²³⁸ The visceral experience of racism also creates trauma that is passed down through generations.²³⁹ For people bitten by police dogs, the trauma is direct, damaging their sense of safety and severing meaningful connections to family pets,²⁴⁰ but their families and communities experience trauma as well.²⁴¹ Police canine units trigger trauma through the continued employment of instruments of terror and in doing so perpetuate racial hierarchy and constitute race. This constitutive force reasserts itself in shared histories and presents of trauma, from slave dog to police dog, that perpetuate, in Saidiya Hartman’s words, the “‘givenness’ of ‘blackness’” that derives from subjection.²⁴²

236. See, e.g., Ryan Martin, *The Rise and Fall of a Celebrity Police Dog*, MARSHALL PROJECT (Dec. 16, 2020), <https://www.themarshallproject.org/2020/12/16/the-rise-and-fall-of-a-celebrity-police-dog> [<https://perma.cc/A9L8-SFYJ>]; ABC Action News, *K9 Nitro Does Push-Ups with Alabama Police Officers to Promote 9PM Routine*, YOUTUBE (Nov. 22, 2017), <https://youtu.be/gvUiBewUmSE>. But see Samantha Cole, *Furries Are Arguing About Whether They Should Support Police Dog Charities*, VICE: MOTHERBOARD (Sept. 12, 2019, 8:00 AM), <https://www.vice.com/en/article/3kxkgj/anthro-new-england-furries-and-vest-a-dog> [<https://perma.cc/6Y8C-MYBQ>] (describing a controversy between furry organization Anthro New England members, an organization that includes people who are queer, trans, gender-nonconforming, and people of color, about whether to continue to support a charity that buys bulletproof vests for police dogs).

237. See IFILL, *supra* note 91, at xv–xvii, xix–xx.

238. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 10 (2015).

239. See, e.g., RESMAA MENAKEM, *MY GRANDMOTHER’S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES* 9–10 (2017).

240. See, e.g., Stole & Toohey, *supra* note 2 (reporting that a teenage police dog victim “said he became afraid of dogs after the incident, despite previously loving the family pet”).

241. Cf., e.g., Michael Cahoon, *Addressing Police Violence Against Children in EBR 9-3-20*, VIMEO (Sept. 3, 2020, 8:52 PM), <https://vimeo.com/454582653>; Joscha Legewie & Jeffrey Fagan, *Aggressive Policing and the Educational Performance of Minority Youth*, 84 AM. SOCIO. REV. 220, 224 (2019) (“Police contact can also hinder children’s educational performance through negative health consequences related to stress, fear, trauma, and anxiety.”); Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176, 181 (2019) (describing how non-consensual police encounters “left the residents angry, afraid, and distrustful of the police”); DENNIS JR., *supra* note 232, at 265–66 (describing the effects of anti-Blackness and chattel slavery on Black families).

242. HARTMAN, *supra* note 1, at 96–97 (“[T]he sheer weight of a history of terror . . . is palpable in the very utterance ‘black’ and inseparable from the tortured body of the enslaved. It acts as a reminder of the material effects of power on bodies and as an injunction to remember that the performance of blackness is inseparable from the brute force that brands, rapes, and tears open the flesh in the racial

Having established the racialized and racializing effects of canine policing, I now turn to how constitutional law regulates this form of violence.

II. THE CONSTITUTIONAL LAW OF POLICE CANINE FORCE

Police use dogs for a variety of purposes. Most familiar to students of Fourth Amendment law are probably dogs trained to sniff out drugs and explosives.²⁴³ Many people are also familiar with the idea of tracking dogs, with the most famous contemporary example being the rescue dog that finds people buried after disasters.²⁴⁴ These dogs can find missing people or detect an absconding suspect but are not trained for apprehension.²⁴⁵ Dogs that sniff and track are tools police use to engage in searches. What are less familiar, except perhaps as historical relics, are police dogs trained to apprehend people. These dogs, which I will call “biting dogs” or “apprehension dogs,” are the focus of this Article. They are not tools for searching, though they may also search. Instead, they are used as weapons of force.

Police dogs trained for apprehension may also be trained for other purposes,²⁴⁶ but to be apprehension dogs, they must be trained in one of two methods of apprehension: (1) “bite and hold” or (2) “bark and hold” (also called “find and bark” or

inscription of the body. The seeming obstinacy or the ‘givenness’ of ‘blackness’ registers the ‘fixing’ of the body by terror and domination and the way that fixing or arrest has been constitutive.”).

243. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 3, 9–12 (2013) (holding a drug sniff by a dog within the curtilage of a home is a Fourth Amendment search); *Illinois v. Caballes*, 543 U.S. 405, 407–09 (2005) (holding that reasonable suspicion and probable cause are not required for a dog sniff that does not prolong a traffic stop, which is not a Fourth Amendment search because it could only reveal contraband in which a person has no reasonable expectation of privacy); *United States v. Place*, 462 U.S. 696, 702, 707 (1983) (holding that a drug sniff by a dog is not a Fourth Amendment search because it only reveals contraband, not items in which a person has a legitimate expectation of privacy). In the drug-sniffing context, the most important question is typically the accuracy of a police dog, including whether its training demonstrates that an officer would reasonably rely on the dog’s alert to the presence of drugs. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013) (holding that a dog’s satisfactory performance in a certification or training program can provide a sufficient basis for an officer to rely on the dog’s alert to establish probable cause). By contrast, with apprehension dogs, the dog itself is not a mechanism for establishing probable cause. Instead, the dog is the method of effectuating a seizure of a person.

244. *See, e.g.*, Kelly Taylor Hayes, *Dogs of 9/11: Search and Rescue Canines Worked Tirelessly in Days Following Terror Attacks*, FOX13 SEATTLE (Sept. 8, 2020), <https://www.q13fox.com/news/dogs-of-9-11-search-and-rescue-canines-worked-tirelessly-in-days-following-terror-attacks.amp> [<https://perma.cc/73FH-FTFM>]. Some distinguish search-and-rescue dogs from police dogs because they are not trained as patrol dogs and won’t bite, but police dogs can be trained for search and rescue. *See* Aubrey Woods, *Fairgrounds Serves as K-9 Training Ground*, TRIB. (Oct. 28, 2022), <https://tribtown.com/2022/10/28/fairgrounds-serves-as-k-9-training-ground/>.

245. *See, e.g.*, *United States v. Gates*, 680 F.2d 1117, 1118 (6th Cir. 1982) (per curiam) (tracking dog identified defendant in a lineup after smelling a shoe he lost while fleeing crime scene); *United States v. Lavado*, 750 F.2d 1527, 1529 (11th Cir. 1985) (bloodhound identified defendants after smelling the trail by which they fled); *United States v. Graham*, 504 F. App’x 63, 65 (2d Cir. 2012) (German shepherd and Belgian Malinois tracked fleeing suspect’s path to scene of arrest).

246. For example, a dog may be both trained for narcotics detection and as an apprehension dog. *See* NIGEL ALLSOPP, *K9 COPS: POLICE DOGS OF THE WORLD* 29 (2012) (“[F]or budget constraint reasons some police departments use their limited dog resources by multi-skilling them. For example, training their general purpose police dogs in firearms detection or locating cannabis.”).

“circle and bark”).²⁴⁷ The distinction can be a bit misleading, as it implies the find-and-bark dogs are not trained to bite, even though they are. A bite-and-hold dog bites the person it has chased and does not release the person until its handler arrives and either manually removes the dog or commands it to release.²⁴⁸ Alternatively, some police dogs are trained to find and bark or to circle and bark. A find-and-bark dog is not trained to bite as its primary method of apprehension, but it will bite if the person continues to move.²⁴⁹ This apprehension method can have the effect of moving the final bite decision from the handler to the dog.²⁵⁰ Having bitten, if either type of dog loses its grip on the person it is biting, it will attempt to bite the person again.²⁵¹ Dogs trained to bite are trained to use their whole mouths to bite so that they maintain a better grip on the flesh of the person they are biting.²⁵²

As of 2007, 29% of local police departments—which employed 77% of all officers—used dogs for law enforcement.²⁵³ Every department serving 250,000 or more residents, and a majority of those serving 10,000 to 249,999 residents, had dogs.²⁵⁴ In 2007, approximately 8,000 dogs were involved in policing.²⁵⁵ This data does not distinguish between dogs used as weapons of force and those used for drug and explosive detection or tracking, though not all departments that use dogs have biting (apprehension) dogs,²⁵⁶ and different breeds of dog are

247. See Charlie Mesloh, *Barks or Bites? The Impact of Training on Police Canine Force Outcomes*, 7 POLICE PRAC. & RSCH. 323, 324–25 (2006); STOUGHTON ET AL., *supra* note 184, at 220–21 (“When used for apprehension, canines are generally trained to engage in either a ‘bark and hold’ (also called ‘circle and bark’) approach, where the dog circles its target and barks until officers arrive to apprehend the subject, or a ‘bite and hold’ approach, where the dog bites its intended target and maintains the bite until ordered to release by its handler.”). In this Article, I refer to the second technique primarily as “find and bark.”

248. See Mesloh, *supra* note 247; STOUGHTON ET AL., *supra* note 184, at 220–21.

249. See Mesloh, *supra* note 247, at 325. The utility of bark-and-hold training methods is questionable, because the dogs are trained not to tolerate even slight movements and training methods often teach dogs to see bites as a reward for making apprehensions. *Id.* As a result, “the dog will precipitate the movement of the suspect by bumping them, thus fulfilling the requirements necessary for a ‘proper’ bite.” *Id.*

250. POLICE EXEC. RSCH. F., GUIDANCE ON POLICIES AND PRACTICES FOR PATROL CANINES 22 (2020), <https://www.policeforum.org/assets/Canines.pdf> [<https://perma.cc/4JNN-K5Y5>]; Mesloh, *supra* note 248, at 325.

251. See Meade, *supra* note 8, at 399; see also *United States v. Jereb*, 882 F.3d 1325, 1332 (10th Cir. 2018) (quoting a canine officer describing a “full mouth bite” as follows: “[T]he rear of the teeth are engaging the forearm all the way. . . . Full mouth bite is deep. The individual that’s being bit is going to have more pain response because the muscles are more powerful towards the rear of the jaw.”).

252. See Meade, *supra* note 8, at 399.

253. REAVES, *supra* note 4.

254. *Id.*

255. *Id.*

256. See, e.g., *SCHP K-9 Teams*, S.C. DEP’T PUB. SAFETY, <https://scdps.sc.gov/schp/K9> [<https://perma.cc/8LEN-YQYZ>] (last visited Apr. 2, 2023) (describing South Carolina Highway Patrol’s dogs as “trained in narcotics, tracking or article detection, but not in other police dog functions such as apprehension”).

preferred for different purposes.²⁵⁷ Unfortunately, more recent reports by the Bureau of Justice Statistics have not tracked police canine use or policies.²⁵⁸

Police canine force most often occurs in the context of an arrest in a criminal case, but criminal courts offer no remedy for the tissue damage, scars, or trauma inflicted during those arrests.²⁵⁹ Instead, people must seek monetary damages in civil court.²⁶⁰ Through these cases, courts delineate the bounds of lawful police canine force.²⁶¹ Lawsuits brought in federal court against police departments for their use of dogs typically allege that the officers used excessive force in violation of 42 U.S.C. § 1983.²⁶² Enacted as part of the Civil Rights Act of 1871 in response to Ku Klux Klan activity in the South, § 1983 provides a federal forum for local and state officials' violations of constitutional rights.²⁶³ In *Monroe v. Pape*, the Supreme Court noted that one reason for enacting the Civil Rights Act was “to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”²⁶⁴ As a result of § 1983, victims of police violence can access federal courts

257. See ALLSOPP, *supra* note 246, at 14–17 (describing canine breeds and their uses in law enforcement).

258. See, e.g., BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 248677, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES (2015), <https://bjs.ojp.gov/content/pub/pdf/lpd13ppp.pdf> [<https://perma.cc/HM3U-3K6F>]; BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 248767, LOCAL POLICE DEPARTMENTS, 2013: EQUIPMENT AND TECHNOLOGY (2015), <https://bjs.ojp.gov/content/pub/pdf/lpd13et.pdf> [<https://perma.cc/5ZZE-9NQK>]; CONNOR BROOKS, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 254826, LOCAL POLICE DEPARTMENTS: POLICIES AND PROCEDURES, 2016 (2020), <https://bjs.ojp.gov/content/pub/pdf/lpdpp16.pdf> [<https://perma.cc/3RVY-PNFP>]; SEAN E. GOODISON, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 305187, LOCAL POLICE DEPARTMENTS PERSONNEL, 2020 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/lpdpp20.pdf> [<https://perma.cc/A3Y9-GJEE>].

259. Defense lawyers may use the amount of force to call the police officers' stories into question or may invoke the pain and trauma of the bite to argue that a later confession was not voluntary, but excessive force is not, by itself, a defense. Cf. RONALD JAY ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, COMPREHENSIVE CRIMINAL PROCEDURE 317–18, 331–40 (5th ed. 2020) (describing remedies for a Fourth Amendment violation).

260. For reasons discussed *infra* Part III, prospective and collective remedies are often out of reach. See generally Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465 (2018) (describing the racial dynamics of excessive force claims under the Fourth Amendment).

261. See Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 445 (2012) (“In contrast to the criminal grounding of investigatory stop doctrine [under the Fourth Amendment], the doctrine of excessive force has evolved almost exclusively in the civil context in actions pursuant to § 1983.”).

262. See, e.g., *Robinette v. Barnes*, 854 F.2d 909, 911 (6th Cir. 1988); *Thomson v. Salt Lake County*, 584 F.3d 1304, 1311 (10th Cir. 2009); *Lowry v. City of San Diego*, 858 F.3d 1248, 1253 (9th Cir. 2017) (en banc). Lawsuits can also be brought in state courts under § 1983, state § 1983-analogs, or for various state tort claims, but because the general contours of the cases remain the same, I will draw my analysis from federal court cases.

263. CHEMERINSKY, *supra* note 41, at 132.

264. 365 U.S. 167, 180 (1961).

regardless of the amount of damages they sustained, as long as victims can establish that the officials in question violated their constitutional rights.²⁶⁵

Some class action lawsuits have also attempted to prove violations of the Equal Protection Clause of the Fourteenth Amendment.²⁶⁶ Regardless of the approach, lawsuits against police canine force, like all suits against the police, often fail.²⁶⁷ This Part will explain how courts analyze police canine force suits under the Fourth and Fourteenth Amendments.

A. FOURTH AMENDMENT SEIZURES BY POLICE CANINES

In *Robinette v. Barnes*, a police officer commanded a dog to find a person suspected of a commercial burglary.²⁶⁸ The dog did as it was told, running ahead of the officer off leash. When the officer next saw the dog, it had an unmoving man's neck in its mouth, surrounded by a pool of blood that continued to "ooz[e]" from the wound.²⁶⁹ The officer called an ambulance, but the man was dead by the time he arrived at the hospital.²⁷⁰ The Sixth Circuit Court of Appeals, in a case of first impression, held that police canine force was not deadly force for purposes of the Fourth Amendment, found the use of force that killed Daniel Briggs reasonable, and awarded summary judgment to the officers.²⁷¹ To understand the Sixth Circuit's analysis in this foundational canine force case, we must turn to the development of the regulation of police violence through the Fourth Amendment. In this Section, I will first trace the development of Fourth Amendment jurisprudence on use of force. Second, I will describe the flaws in the Sixth Circuit's factual and legal analysis in the *Robinette* case. Third, I will describe courts' persistent underestimation of the degree of force inflicted by police dog bites.

The Fourth Amendment right of the people "to be secure in their persons . . . against unreasonable . . . seizures" governs police use of force against "free citizens" in the United States.²⁷² Today the Fourth Amendment regulates police violence by requiring that uses of force be "objectively reasonable."²⁷³ To determine whether the use of force is reasonable, the Court requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."²⁷⁴ To guide lower courts' decisionmaking, the Court has directed that reasonableness determinations "require[] careful attention to the facts and circumstances of each

265. *See id.*

266. *See infra* Section II.B.

267. *See* VanSickle et al., *supra* note 177 ("In many parts of the country, criminal suspects can't bring federal claims if they plead guilty or are convicted of a crime related to the biting incident. And even when victims can bring cases, lawyers say they struggle because jurors tend to love police dogs—something they call the Lassie effect.").

268. 854 F.2d 909, 911 (6th Cir. 1988).

269. *Id.*

270. *Id.*

271. *Id.* at 912–14.

272. *Graham v. Connor*, 490 U.S. 386, 394 (1989).

273. *Id.* at 397.

274. *Id.* at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

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.”²⁷⁵ These three considerations are referred to as the *Graham* factors.

Even once a court identifies relevant government interests under *Graham*, those interests must be balanced against the level of intrusion, with higher levels of force constituting a greater intrusion. In other words, the court is supposed to apply a proportionality test.²⁷⁶ When deadly force is at stake, officers must have “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”²⁷⁷ That someone is alleged to have committed a felony, is running away, and may not be caught without the use of deadly force is not enough on its own to justify the use of deadly force.²⁷⁸

This framework emerged from a trilogy of cases that began with *Tennessee v. Garner*, was followed by *Graham v. Connor*, and concluded with *Scott v. Harris*, the least influential of the three.²⁷⁹ The *Robinette* court’s focus on whether police canine force constituted lethal force and whether it was otherwise reasonable stems from the Supreme Court’s regulation of police uses of force in *Garner*, the only case of the trilogy that had been decided at the time of *Robinette*.

The facts of *Garner* mirror many of the cases in which, today, a dog might be deployed. It was 10:45 PM on October 3, 1974, when Edward Garner, a Black teenage boy, ran from behind a house that was the subject of a “proowler inside call” and began to climb a chain link fence to flee from Memphis police officers Elton Hymon and Leslie Wright.²⁸⁰ Though Hymon believed Garner was unarmed, he also believed that if the boy made it over the fence, he would evade arrest.²⁸¹ Rather than let a fleeing suspect escape, Hymon shot Garner in the back of the head, and Garner died at the hospital.²⁸²

Hymon’s actions, though authorized by Tennessee statute and Memphis Police Department policy,²⁸³ were held unconstitutional by the Supreme

275. *Id.* (quoting *Garner*, 471 U.S. at 8).

276. See STOUGHTON ET AL., *supra* note 184, at 42–44.

277. *Garner*, 471 U.S. at 3. While the Supreme Court opened the door to other standards for the use of deadly force in *Scott v. Harris*, the Court still justified proportionality in that case by reference to the *Garner* criteria. 550 U.S. 372, 381–83 (2007). Police-use-of-force experts such as Rachel Harmon have observed that courts still functionally apply the *Garner* test when deadly force is at issue. RACHEL HARMON, *THE LAW OF THE POLICE* 400–01 (2021).

278. *Garner*, 471 U.S. at 11 (“The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape.”).

279. 471 U.S. 1 (1985); 490 U.S. 386 (1989); 550 U.S. 371 (2007).

280. *Garner*, 471 U.S. at 3.

281. *Id.* at 3–4.

282. *Id.* at 4.

283. *Id.* at 4–5 (“The statute provides that ‘[i]f, after notice of the intention to arrest [a criminal suspect], he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.’ The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary.” (footnote omitted) (quoting TENN. CODE ANN. § 40-7-108 (1982))).

Court.²⁸⁴ Balancing 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,” the Court recognized that, although being able to effect an arrest was an important government interest, seizure through deadly force is maximally intrusive and frustrates society’s interest in criminal adjudication.²⁸⁵ Therefore, an officer could only prevent an escape through deadly force “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”²⁸⁶

Writing in 1988, in the wake of *Garner*, the *Robinette* court treated the distinction between lethal and non-lethal force as an important threshold question for determining reasonableness.²⁸⁷ The application of *Garner* to dog bite cases meant that if a dog were deadly force, the police would have to have probable cause that the target of the bite “pose[d] a significant threat of death or serious physical injury to the officer or others” before the police could send a dog to bite.²⁸⁸ In this case of first impression, the Sixth Circuit Court of Appeals held that police canine force is not “deadly force” for purposes of Fourth Amendment analysis.²⁸⁹ It did so relying upon the Model Penal Code’s (MPC) definition of deadly force: “[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.”²⁹⁰

The court then conducted an analysis that only partially addressed the definition upon which it relied. The court called the death of Daniel Briggs in the case “an extreme aberration from the outcome intended or expected,” and asserted that Briggs’s death was the first death ever caused by a trained police dog.²⁹¹

284. *Id.* at 22 (holding that “the statute is invalid insofar as it purported to give Hyman the authority to act as he did”).

285. *Id.* at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)); see *id.* at 9–10.

286. *Id.* at 11.

287. *Robinette v. Barnes*, 854 F.2d 909, 911–12 (6th Cir. 1988).

288. *Garner*, 471 U.S. at 3.

289. *Robinette*, 854 F.2d at 913.

290. *Id.* at 912 (emphasis added) (quoting MODEL PENAL CODE § 3.11(2) (AM. L. INST., Proposed Official Draft 1962)). The MPC definition now uses slightly different language, defining deadly force as “force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” MODEL PENAL CODE § 3.11(2) (AM. L. INST. 2021).

291. *Robinette*, 854 F.2d at 912–13 (“Lieutenant Spain stated that to his knowledge, no trained police dog has ever killed an individual before these events occurred. Corroborating this statement is Barnes’s deposition testimony that the records of the USECA, which have been maintained for over 20 years, also indicate that this is the first time a person has died as a result of being apprehended by a police dog. These statements, along with the fact that our own research has failed to reveal any reported case involving similar circumstances, lead us to conclude that when a properly trained police dog is used in an appropriate manner to apprehend a felony suspect, the use of the dog does not constitute deadly force. While an officer’s intent in using a police dog, or the use of an improperly trained dog, could transform the use of the dog into deadly force, we find no such intent or improper training present in this case.”). Since 1988, several additional instances of police dog killings have been recorded. In Kern County, California, alone, there were five deaths as a result of police dogs in a decade, including three between 2011 and 2013. See WONG & BIBRING, *supra* note 10 (providing data showing five fatalities resulting from police canine force). All but one of the police dog victims, Christopher McDaniel (2014), were Black or Latine. *Id.* at 4 & app. 3. Their names are Ronnie Ledesma (2013), David Sal Silva (2013), Rory McKenzie (2009), and Ray Robles (2006). *Id.* Jose Mendez, who died as a result of police-inflicted

Despite the death in the case before it, the Sixth Circuit decided that a police dog does not pose a “substantial risk of causing death or serious bodily harm.”²⁹² Its decision relied only on its conclusion that a police dog was unlikely to cause death, while failing to address whether a police dog was likely to cause “serious bodily harm.”²⁹³ Instead, the court expressed hesitation “to declare a police practice of long standing ‘unreasonable’ if doing so would severely hamper effective law enforcement”²⁹⁴ and cited an unsupported belief that “these dogs often can help prevent officers from having to resort to, or be subjected to, [deadly] force.”²⁹⁵ In describing the necessity of police dogs for effective law enforcement, the court also conflated dogs trained for different purposes, mistakenly assuming that if dogs could not bite, they could not be used to track missing people or detect drugs.²⁹⁶ The Sixth Circuit went on to determine that the officer would have been justified in using deadly force against Briggs because Briggs was hiding rather than fleeing, making him a danger to officers.²⁹⁷

One year later, in 1989, Chief Justice Rehnquist’s opinion in *Graham v. Connor* cemented the Supreme Court’s reliance on the Fourth Amendment prohibition on unreasonable seizures to regulate non-lethal uses of force.²⁹⁸ As applied, the reasonableness standard broadened the scope of judicial deference to police officer actions.²⁹⁹ *Graham* held that courts were to analyze whether the force used to effect a seizure is “reasonable” by applying the same balancing test applied in *Garner*.³⁰⁰ To guide that analysis, the Court proposed a set of non-exhaustive factors now known as the *Graham* factors: (1) “the severity of the crime at issue”; (2) “whether the suspect poses an immediate threat to the safety of the officers or others”; and (3) “whether [the suspect] is actively resisting arrest or

gunshot wounds in 2011, also had a police dog released to bite him, but Mendez struck the dog with a metal rod, disabling the dog. KERN CNTY. SHERIFF/CORONER, FINAL REPORT, C00859-11 (2011).

292. *Robinette*, 854 F.2d at 912.

293. *See id.* at 912–13.

294. *Id.* at 914 (quoting *Tennessee v. Garner*, 471 U.S. 1, 19 (1985)). The court did so without evidence that law enforcement would be “severely hampered” if police dogs were not allowed to bite. *See id.* One may also take issue with the practice being of “long standing.” The police department involved in *Robinette* first created a K-9 division in 1972. *Id.* at 910.

295. *Id.* at 914.

296. *See id.* at 914 n.6 (“For example, besides being used to track and apprehend criminals, police dogs are well-known for their ability to detect drugs and, thus, have been instrumental in achieving a number of drug-trafficking convictions. We also note that [the police department here] uses the dogs to locate missing persons and lost or abandoned articles.” (citations omitted)).

297. *Id.* at 913–14.

298. 490 U.S. 386, 394–96 (1989) (“Today, we make explicit what was implicit in *Garner*’s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”).

299. *See id.* at 395. Up until *Garner* and *Graham*, courts regulated police violence as a matter of substantive due process under the majority test set out by the Second Circuit in *Johnson v. Glick*. 481 F.2d 1028, 1032 (2d Cir. 1973). Substantive due process is “the practice of interpreting the word ‘liberty’ in the Due Process Clauses to protect basic liberties that are not ‘enumerated’ specifically in the text of the Constitution.” JAMES E. FLEMING, *CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS* 21 (2022).

300. *Graham*, 490 U.S. at 396.

attempting to evade arrest by flight.”³⁰¹ The Court also put its thumb on the scale in favor of officers by insisting that the reasonableness of an officer’s actions “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”³⁰² So while the analysis is not fully subjective because the Court requires the perspective of a “reasonable” officer, neither is the inquiry fully objective—courts are, after all, to consider how a reasonable *officer*, not a reasonable person with any other set of experiences, understandings, or worldviews, would have assessed the situation.³⁰³ The deference to an officer must also take into account the environment in which the officer works: one, the Court admonished, in which “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”³⁰⁴

The Court muddled the bright line between the application of deadly and non-deadly force in 2007 when, in *Scott v. Harris*, the Court purported to discard the distinction.³⁰⁵ Stating that the *Garner* rule was merely an application of the *Graham* test, *Scott* held that regardless of the type or degree of force, reasonableness is the lodestar.³⁰⁶ Yet in coming to its conclusion that the force used—a sheriff’s deputy’s car ramming Harris’s fleeing car—was reasonable, the Court still relied upon the criteria in *Garner*, saying that Harris “plac[ed] officers and innocent bystanders alike at great risk of serious injury.”³⁰⁷ Therefore, while formally rejecting the bright line rule, it nonetheless applied the same standard to officers’ use of deadly force as did the *Garner* Court. As a result, many courts continue to apply *Garner* to deadly force cases, making clear that flight alone is insufficient to justify deadly force and requiring a

301. *Id.*

302. *Id.*

303. See, e.g., Kenneth J. Novak, *Reasonable Officers, Public Perceptions, and Policy Challenges*, 8 CRIMINOLOGY & PUB. POL’Y 153, 153, 155 (2009); Geoffrey P. Alpert & William C. Smith, *How Reasonable Is the Reasonable Man?: Police and Excessive Force*, 85 J. CRIM. L. & CRIMINOLOGY 481, 484–85, 487 (1994); David A. Klinger & Rod K. Brunson, *Police Officers’ Perceptual Distortions During Lethal Force Situations: Informing the Reasonableness Standard*, 8 CRIMINOLOGY & PUB. POL’Y 117, 119 (2009). Other factors, such as race, may also influence officers’ decision to use force. See Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 974–75 (2020). Police officers’ lived experiences also include training and socialization that teach them to be wary of the communities they police and be on guard at all times. See Seth W. Stoughton, *How Police Training Contributes to Avoidable Deaths*, ATLANTIC (Dec. 12, 2014), <https://www.theatlantic.com/national/archive/2014/12/police-gun-shooting-training-ferguson/383681/>; Madalyn K. Wasilczuk, *Developing Police*, 70 BUFF. L. REV. 271, 319–21 (2022).

304. *Graham*, 490 U.S. at 396–97.

305. 550 U.S. 372, 383 (2007).

306. See *id.* (“Whether or not Scott’s actions constituted application of ‘deadly force,’ all that matters is whether Scott’s actions were reasonable.”). As Seth Stoughton notes, “The [*Scott*] Court appears to have encountered a Star Trek-esque hole in the space-time continuum, given that it was, in 2007, interpreting *Garner*, written in 1985, to be an example of *Graham*, decided in 1989.” Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 533 n.58 (2020).

307. *Scott*, 550 U.S. at 380.

showing of probable cause that the person poses a threat of death or serious bodily injury to the officers or others.³⁰⁸

The upshot is that to use force that is substantially likely to cause death or serious bodily injury—deadly force—an officer must have probable cause that the subject of that force poses an imminent threat of death or serious bodily injury to the officer or others. In other contexts, courts have construed force that creates a substantial risk of death or serious bodily injury quite broadly. For instance, in reviewing a sentencing enhancement, the Fourth Circuit affirmed the trial court’s finding that when an officer tried to handcuff a person based on a gun in his waistband, the person had created a substantial risk of serious bodily injury by trying to punch the officer but missing and struggling with the officer on the ground, after which the officer pepper sprayed and subdued him.³⁰⁹ Courts have also found a person created a substantial risk of bodily injury to an officer when they drove a car toward a military police officer who suffered a glancing blow to the knee³¹⁰ and when an unarmed person “kicked and swung and fought with such ferocity that it took five officers several minutes to subdue him,” though no officer suffered a serious injury.³¹¹

When applied to officers’ use of force, however, the scope of serious bodily injury appears to narrow. Instead of applying a broad definition as they do under the sentencing guidelines, in those contexts, courts distinguish force “capable of causing serious injury” and force that poses a “substantial risk” of causing death or serious bodily injury, focusing not only on the risk of harm, as the definition of deadly force implies, but also on the “actual harm experienced.”³¹² As a result, depending on the circumstances, courts have found that tactical roadblocks³¹³ and Sage Launchers,³¹⁴ neither of which is specifically intended to kill, can be deadly force.³¹⁵

Courts and law enforcement also sometimes categorize force differently. For example, the Ninth Circuit in *Young v. County of Los Angeles* refers to baton swings toward the head and prolonged pepper spraying as “intermediate force,”

308. See, e.g., *Becker v. Elfreich*, 821 F.3d 920, 926 (7th Cir. 2016) (noting that “bite and hold” is not deadly force per se, but depends on how dog is trained); *Thomson v. Salt Lake County*, 584 F.3d 1304, 1313 (10th Cir. 2009); *Lowry v. City of San Diego*, 858 F.3d 1248, 1259–60 (9th Cir. 2017) (en banc); see also HARMON, *supra* note 277 (observing that courts, including the Supreme Court, tend to ignore *Scott* and continue to distinguish between deadly and non-deadly force).

309. *United States v. Richburg*, 109 F. App’x 558, 558–59 (4th Cir. 2004).

310. *United States v. Zaragoza-Fernandez*, 217 F.3d 31, 32–33 (1st Cir. 2000).

311. *United States v. Ashley*, 141 F.3d 63, 69 (2d Cir. 1998). The Second Circuit also noted in *Ashley* that “the violence that caused a sprained wrist could easily have resulted in a broken wrist requiring surgery and/or rehabilitation.” *Id.*

312. *Nelson v. City of Davis*, 685 F.3d 867, 879, 885 (9th Cir. 2012).

313. See *Buckner v. Kilgore*, 36 F.3d 536, 539–40 (6th Cir. 1994) (explaining roadblock is deadly force). *But see Seidner v. de Vries*, 39 F.4th 591, 602–03 (9th Cir. 2022) (holding that a roadblock used against a cyclist was not deadly force).

314. *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005).

315. It should also be noted that this area of law is underdeveloped because often when cases make it past the hurdles of qualified immunity and summary judgment, they settle, leaving the contours of deadly force unexplored.

whereas the Los Angeles County Sheriff's Department policy advises officers that "[h]ead strikes with an impact weapon are prohibited unless circumstances justify the use of deadly force."³¹⁶

The outcomes in police canine cases are like those in other areas governed by *Graham*—"ad hoc, often inconsistent, and sometimes ill-considered."³¹⁷ Though use-of-force experts have acknowledged that canine bites can rise to the level of deadly force when used for prolonged periods or against vulnerable people,³¹⁸ all circuit courts have followed the *Robinette* court in evaluating police dog bites on a case-by-case basis rather than considering police dogs per se deadly force, even where their use results in death or serious bodily injury.³¹⁹ Courts' analyses ignore that deadly force includes force that is unlikely to kill but is substantially likely to result in serious bodily injury. Police dog bites are not only likely to result in serious bodily injury when bites are prolonged or used against vulnerable people but in every circumstance in which a police biting dog is used because of how police dogs are trained to bite, the lack of precision and control of their bites, and how people react to being bitten.³²⁰

The Eighth and Ninth Circuits' early opinions on dog bites also focused on the risk of death rather than that of serious bodily injury, rejecting the MPC's applicability to police force.³²¹ In making this distinction, the Eighth and Ninth Circuits

316. 655 F.3d 1156, 1162 (9th Cir. 2011).

317. Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1123 (2008).

318. STOUGHTON ET AL., *supra* note 184, at 219–20; *see also* Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994) ("Chief Gates" deposition disclosed that he was 'very much' aware that such bites could be fatal, and Officer Bunch echoed this awareness.").

319. *See* Jarrett v. Town of Yarmouth, 331 F.3d 140, 149–50 (1st Cir. 2003) (per curiam); McKinney v. City of Middletown, 49 F.4th 730, 743–44 (2d Cir. 2022); Moore v. Vangelo, 222 F. App'x 167, 170–71, 170 n.2 (3d Cir. 2007); Melgar *ex rel.* Melgar v. Greene, 593 F.3d 348, 355, 361 (4th Cir. 2010); Cooper v. Brown, 844 F.3d 517, 524 (5th Cir. 2016); Jarvela v. Washtenaw County, 40 F.4th 761, 764–65 (6th Cir. 2022); Becker v. Elfreich, 821 F.3d 920, 925–26 (7th Cir. 2016) (holding that the dog's training and performance would be determinative of whether the dog constituted deadly force where the dog "tore [a person's] calf out, causing permanent muscle and nerve damage"); Szabla v. City of Brooklyn Park, 486 F.3d 385, 391–92 (8th Cir. 2007); Lowry v. City of San Diego, 858 F.3d 1248, 1256 (9th Cir. 2017) (en banc); Thomson v. Salt Lake County, 584 F.3d 1304, 1315 (10th Cir. 2009); Edwards v. Shanley, 666 F.3d 1289, 1295 (11th Cir. 2012) (applying *Graham* factors); *accord* Arrington v. U.S. Park Police Serv., 591 F. Supp. 2d 57, 64–66 (D.D.C. 2008); McKay v. City of Hayward, 949 F. Supp. 2d 971, 983 (N.D. Cal. 2013); Koistra v. County of San Diego, 310 F. Supp. 3d 1066, 1077 (S.D. Cal. 2018) (holding canine force was "severe" but not deadly, when "the canine bit into [Plaintiff's] left finger, left hand, left arm, face, mouth and skull for about thirty seconds even though she surrendered by showing herself, putting her hands up and saying 'What's going on? I'm unarmed.' She suffered a broken jaw and bites to her arms, hands and face. In addition, the canine with his teeth, dragged [Plaintiff] by her mouth from the bedroom into the living room for about twelve feet. She was hospitalized for about three or four days, underwent three surgeries for her broken jaw, and suffered facial lacerations and stitches on her face, lacerations and stitches or staples on her left forearm and finger, right finger injury and injury to her skull.".) *But see* Marley v. City of Allentown, 774 F. Supp. 343, 345–46 (E.D. Pa. 1991), *aff'd*, 961 F.2d 1567 (3d Cir. 1992) (denying motion for judgment notwithstanding the verdict for officer where the jury found that canine force was deadly, and finding that use of canine was unconstitutional with respect to an unarmed, fleeing misdemeanant).

320. *See supra* note 191 and accompanying text.

321. *See* Kuha v. City of Minnetonka, 365 F.3d 590, 598 n.3 (8th Cir. 2003), *abrogated in part on other grounds by* Szabla, 486 F.3d 385 (8th Cir. 2007); Vera Cruz v. City of Escondido, 139 F.3d 659,

decided a different definition of deadly force applied to police in the course of their duties than that which applied to people charged with criminal offenses. More recently, however, courts have retreated from that position and applied the MPC definition in police force cases.³²² Despite that, the courts have continued to reject that police dogs create a substantial risk of serious bodily injury, justifying themselves by saying a trained police dog creates no such risk or, at least, does not categorically create such a risk.³²³ Courts also tend to focus on the outcomes in individual cases as indicative of the level of force used.³²⁴ Contrast this with courts' treatment of guns, which are deadly force because of the likelihood that they will cause death or serious bodily injury, regardless of the outcome in a given case.³²⁵ The reliance on the "specific factual circumstances"³²⁶ in dog bite cases ignores the differences between dogs and other uses of force to which courts apply fact-specific analyses, such as "hitting and shoving."³²⁷ Unlike with hits, shoves, or baton jabs, the officer does not control the precise application of force when a dog bites.³²⁸ As a result, once a dog is trained to bite upon contact, it is more appropriate to treat the dog like a gun than a fist, baton, or Taser.

663 (9th Cir. 1997), *overruled by* *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005). *But see* *Vera Cruz*, 139 F.3d at 662 (noting that the Eighth, Tenth, and Eleventh Circuits seemed to have adopted the MPC definition in the context of police uses of force but had done so in situations where what constitutes "deadly force" was not at issue).

322. *See, e.g., Smith v. City of Hemet*, 394 F.3d 689, 705–06 (9th Cir. 2005) (overruling *Vera Cruz* and adopting the MPC definition of deadly force, which is "used by the other circuit courts throughout the nation"); *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n.10 (11th Cir. 1985) (adopting MPC definition of deadly force); *Ryder v. City of Topeka*, 814 F.2d 1412, 1416 n.11 (10th Cir. 1987) (same); *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) (same); *In re City of Phila. Litig.*, 49 F.3d 945, 966 (3d Cir. 1995) (adopting MPC definition of deadly force as in *Robinette*); *Matthews v. Jones*, 35 F.3d 1046, 1050–51 (6th Cir. 1994) (same); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 594 (7th Cir. 1997) (same); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (adopting the state equivalent of the MPC definition of deadly force as in *Robinette*).

323. *See, e.g., Jarvela*, 40 F.4th at 764 ("Among the various forms of force available to law enforcement, [a police dog bite] is a comparatively measured application of force, which 'does not carry with it a substantial risk of causing death or serious bodily harm.'" (quoting *Robinette*, 854 F.2d at 912)).

324. *See Quintanilla v. City of Downey*, 84 F.3d 353, 358 (9th Cir. 1996) (rejecting the need for a deadly force instruction because "Quintanilla suffered only non-life threatening injuries that did not require serious medical attention" and the dog released on command); *Johnson v. Scott*, 576 F.3d 658, 661 (7th Cir. 2009) ("[W]e do not mean to minimize the unpleasantness of having a German Shepherd clamp onto one's arm or leg. This does not mean, however, that the practice of deploying trained dogs to bite and hold suspects is unconstitutional *per se*; the situation might warrant the use of a dog that has been trained and that is under the control of the officer . . ."); *Lowry*, 858 F.3d at 1254, 1257 (holding a dog biting a sleeping woman in the lip, requiring three stitches, was a "moderate" use of force because the dog was quickly called off after the officer realized the woman was not burglarizing the office building).

325. *See supra* note 8 and accompanying text. In the context of sentencing enhancement, courts apply the "substantial risk of serious bodily injury" standard liberally. *See supra* notes 309–11 and accompanying text.

326. *Seidner v. de Vries*, 39 F.4th 591, 597 (9th Cir. 2022) (quoting *Lowry*, 858 F.3d at 1256).

327. *Id.*

328. *See supra* text accompanying notes 188–90.

When applying the *Graham* factors, courts also focus on canine-specific issues. Courts consider the duration of the bite when determining its reasonableness³²⁹ but split on whether bites must be preceded by adequate warnings and under what circumstances.³³⁰ Appellate courts also divide on whether dogs can be sicced on fleeing misdemeanants.³³¹ The courts seem to agree, on the other hand, that police dogs cannot be used against people that are not resisting,³³² though they differ in their analysis of what constitutes surrender or compliance.³³³ While courts typically do not second-guess dogs' training,³³⁴ courts have found in favor of plaintiffs when the dog's training has lapsed.³³⁵ Courts have also considered the length of a dog's lead³³⁶ and whether the dog was deployed on- or off-leash as considerations relevant to the reasonableness of a dog deployment,³³⁷ because those factors determine the level of the officer's control over the dog. Though on some occasions the courts discuss departments' policies, courts do not rely on the policies

329. See *Edwards v. Shanley*, 666 F.3d 1289, 1296 (11th Cir. 2012) (holding that a five- to seven-minute bite constituted excessive force); *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (agreeing that it is "clearly established that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force"); *Johnson*, 576 F.3d at 660–61 (affirming summary judgment when a police officer allowed a five- to ten-second bite after a last-second surrender and the dog immediately disengaged upon command).

330. Compare *Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998) (holding the failure to give warning before police dog deployment was objectively unreasonable and violated Fourth Amendment), *Kuha v. City of Minnetonka*, 365 F.3d 590, 599 (8th Cir. 2003) ("[T]he presence or absence of a warning is a critical fact in virtually every excessive force case involving a police dog."), *abrogated in part on other grounds by Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007), and *Rogers v. City of Kennewick*, 205 F. App'x 491, 493 (9th Cir. 2006) (affirming district court's ruling that "failing to give a warning before releasing a police dog to bite and hold is unreasonable"), with *Trammell v. Thomason*, 335 F. App'x 835, 842 (11th Cir. 2009) (holding right to a warning before a canine seizure not clearly established), *Johnson*, 576 F.3d at 661 (finding that failure to give warning before release irrelevant because no time to give warning), *Thomson v. Salt Lake County*, 584 F.3d 1304, 1321 (10th Cir. 2009) (determining warning not required when "release of the dog was nondeadly force used in the face of an imminent threat"), and *Moore v. Vangelo*, 222 F. App'x 167, 170 n.2 (3d Cir. 2007) (declining to hold that deployment of a dog without a verbal warning is per se unreasonable).

331. Compare *Cooper v. Brown*, 844 F.3d 517, 521, 524–25 (5th Cir. 2016) (affirming district court's holding that use of police canine force against a fleeing misdemeanor DUI suspect was objectively unreasonable), with *Hernandez v. Town of Gilbert*, 989 F.3d 739, 745, 747 (9th Cir. 2021) (granting qualified immunity on the grounds that it was not clearly established that using a dog as escalating force against a non-surrendering misdemeanant was unconstitutional).

332. See, e.g., *Edwards*, 666 F.3d at 1298; *Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000); *Cooper*, 844 F.3d at 524–25; *Monticciolo v. Robertson*, No. 15-8134, 2017 WL 4536119, at *10 (D.N.J. Oct. 11, 2017).

333. See, e.g., *Johnson*, 576 F.3d at 659–61 (stating that allowing a dog to bite while the officer applied handcuffs and allowing the bite even though the suspect's hands were up was not unreasonable because "[n]ot all surrenders . . . are genuine").

334. See *Thomson*, 584 F.3d at 1316 (finding that evidence of a dog's non-responsiveness to a command does not mean it is improperly trained).

335. See *Campbell v. City of Springboro*, 700 F.3d 779, 783, 787 (6th Cir. 2012) (affirming denial of summary judgment when officer admitted he had not kept up with dog's trainings and dog's certification had lapsed); *Mitchum v. City of Indianapolis*, No. 19-cv-02277, 2021 WL 2915025, at *8 (S.D. Ind. July 12, 2021) (reviewing dog's training records and indicating for purposes of summary judgment that lack of evidence of training could show officer or dog inadequately trained).

336. See *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 356–57 (4th Cir. 2010).

337. See *Lowry v. City of San Diego*, 858 F.3d 1248, 1259–60 (9th Cir. 2017) (en banc).

in making their reasonableness determinations.³³⁸ Some circuits also consider factors that have developed across different types of force. The Ninth Circuit, for instance, considers “the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed.”³³⁹

For the many police canine bite cases that have been litigated in federal courts,³⁴⁰ it can still be difficult to define the bounds of reasonableness. One reason, common to other Fourth Amendment case law, is that courts often grant qualified immunity without reaching the merits of a claim³⁴¹ or do not publish decisions on the grounds that the analysis is so fact-bound that it cannot be precedential.³⁴² A great deal of legal scholarship is devoted to critiquing *Graham*, both as a legal analytical tool and as a feature of police regulation and policymaking.³⁴³ The next part of this Section describes the less-trodden Fourteenth Amendment path to police dog regulation.

B. FOURTEENTH AMENDMENT REGULATION OF CANINE VIOLENCE

While the Fourth Amendment remains the primary vehicle for challenging police canine violence, it provides no tools for reckoning with the historical provenance of policing practices nor does it give us remedies that ameliorate—or even consider—racialized harm.³⁴⁴ Race-based policing claims have been relegated instead to the Fourteenth Amendment. Before *Robinette* set the federal judiciary on its path for regulating police dogs, the class action plaintiffs in *Cintron v. Vaughn* alleged that the city of Hartford, Connecticut, used police dogs indiscriminately against people based on

338. See, e.g., *Watkins v. City of Oakland*, 145 F.3d 1087, 1092–93 (9th Cir. 1998) (finding that the “bite and hold” policy was not categorically unconstitutional but discussing the excessive force claim on its own merits). Policies can be relevant, however, to *Monell* claims regarding municipal liability, which I do not discuss in detail here. See, e.g., *Shumpert v. City of Tupelo*, 905 F.3d 310, 316–18 (5th Cir. 2018).

339. *Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011).

340. Lawsuits are only filed when there is a bite, so this paper examines police canine violence in those terms. I leave open whether dogs that are trained never to bite could constitute force and whether they should likewise be prohibited.

341. See, e.g., *Hernandez v. Town of Gilbert*, 989 F.3d 739, 741, 744–45 (9th Cir. 2021) (affirming grant of qualified immunity where not clearly established that using dog as form of escalating force against non-surrendering DUI misdemeanor was unconstitutional); *James v. City of Boise*, 376 P.3d 33, 40, 42 (Idaho 2016) (affirming grant of qualified immunity where officer mistook person for burglar); *Matthews v. Huntsville City Police Dep’t*, No. 17-cv-02195, 2020 WL 4593782, at *7–8 (N.D. Ala. Aug. 11, 2020) (granting qualified immunity where allegedly illegal use of canine not clearly established).

342. See, e.g., *Maney v. Garrison*, 681 F. App’x 210, 213–15 (4th Cir. 2017) (noting that fact-bound findings surrounding a dog biting an unhoused man, where the dog was sent into an area near a known unhoused persons’ camp and would not be called off until the man showed his hands, were unlikely to be useful in future cases).

343. See, e.g., *Stoughton*, *supra* note 306, at 523–24; *Harmon*, *supra* note 317, at 1127, 1129–33; *Ristroph*, *supra* note 212, at 1203–15; *Obasogie & Newman*, *supra* note 260, at 1469.

344. See *Gans*, *supra* note 71, at 296.

their race and/or ancestry.³⁴⁵ Though the case was never litigated, the city entered a settlement agreement in 1973—one that remained in effect until April 2023.³⁴⁶

Despite wide racial disparities in canine force,³⁴⁷ few lawsuits seek to curb police dog bites as discriminatory policing. The Supreme Court has erected high bars to vindicating race discrimination claims under the Fourteenth Amendment. In *Washington v. Davis*, the Supreme Court made clear that a litigant seeking to invalidate a facially race-neutral policy would have to show that the policy had a discriminatory purpose.³⁴⁸ Thus, the *Davis* Court held that it was insufficient for the plaintiffs to demonstrate that an entrance exam excluded four times as many Black applicants as white applicants for the Washington, D.C. police force—disparate impact alone could not be the basis for an equal protection challenge.³⁴⁹ Moreover, the type of discriminatory purpose necessary to prove those claims does not require only indifference to known harms against minoritized groups but actual animus: “‘Discriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³⁵⁰

345. No. 69-cv-13578, 2009 WL 10714967 (D. Conn. July 6, 2009); see CHAPMAN, *supra* note 21, at 130.

346. *Cintron v. Vaughn*, No. 69-cv-13578 (D. Conn. Apr. 14, 2023); see also CHAPMAN, *supra* note 21, at 130.

347. See Loder & Meixner, *supra* note 5 (finding 42% of individuals that sought emergency treatment for police dog bites from 2005 to 2013 were Black); Meade, *supra* note 8, at 398 & tbl.4 (finding that LAPD police dog victims between 1989 and 1996 were 60% Black, 32% Hispanic, 7% white, and 2% other, as compared to the population of Los Angeles County in 1990, which was 10% Black, 37% Hispanic, 41% white, and 11% other); Evan Sernoffsky & Lisa Fernandez, *K-9s in Question: Bay Area Police Dogs Bite with Little Consequence*, KTVU Fox2 (May 16, 2022, 10:55 PM), <https://www.ktvu.com/news/k-9s-in-question-bay-area-police-dogs-bite-with-little-consequence> [https://perma.cc/Z5NY-NTDW] (noting that police dogs “are disproportionately deployed on Black and Hispanic people”); Julie Sze, *The White Dog and Dark Water: Police Violence in the Central Valley*, in *VIOLENT ORDER: ESSAYS ON THE NATURE OF POLICE* 55, 64 (David Correia & Tyler Wall eds., 2021) (noting that all but one of the people killed by Kern County police dogs were Black or Hispanic in a city that is “38 percent white, 46 percent Hispanic, and 8 percent Black”). The Center for Policing Equity has completed five public assessments as part of their Justice Navigator. In each report that identified the use of police dogs, canine force was disproportionately targeted against communities of color. See *San Diego County, CA 2021: Use of Force*, CTR. POLICING EQUITY: JUST. NAVIGATOR, <https://justicenavigator.org/report/sandiego-county-ca-2021/uof> [https://perma.cc/MR8X-JLP7] (last visited March 31, 2023) (finding that nearly 50% of canine force incidents targeted Black or Hispanic individuals, who represented approximately 40% of the county’s population); *Sacramento City, CA 2021*, *supra* note 7 (finding that 43% of canine force incidents in the city targeted Black individuals, who accounted for only 14% of the city’s population); *Norman, OK 2021: Use of Force*, CTR. POLICING EQUITY: JUST. NAVIGATOR, <https://justicenavigator.org/report/norman-city-ok-2021/uof> [https://perma.cc/QL8T-MJCK] (last visited March 31, 2023) (finding that the city’s sole canine force incident targeted a Black individual); *Elgin, IL 2021: Use of Force*, CTR. POLICING EQUITY: JUST. NAVIGATOR, <https://justicenavigator.org/report/elgin-city-il-2021/uof> [https://perma.cc/K84Z-NT5L] (last visited March 31, 2023) (finding that 41% of the city’s seventeen canine force incidents were against Black people though only 5.5% of the city’s population was Black).

348. 426 U.S. 229, 245–48 (1976).

349. *Id.* at 237–39.

350. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted).

Nevertheless, discriminatory impact can be used as evidence of discriminatory purpose, because “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”³⁵¹ A little more than a decade after it decided *Davis*, the Court reiterated its argument in a case with life-and-death stakes—*McCleskey v. Kemp*.³⁵² In that case, though a complex study demonstrated racial disparities in the imposition of the death penalty, the Court held that without a racially discriminatory purpose, there was no recourse for the cumulative racially discriminatory consequences that Georgia’s legal system imposed.³⁵³

A cognizable equal protection claim in a police canine case must demonstrate not just racial disparities in bite victims but also discriminatory intent on the part of the department or officer using the police dog. One canine equal protection case that survived summary judgment and provoked a settlement was *Lawson v. Gates*, a 1992 lawsuit brought by the ACLU and the NAACP.³⁵⁴ In *Lawson*, the plaintiffs requested damages and injunctive relief for the use of Los Angeles Police Department (LAPD) canines as a violation of the prohibition on unlawful seizures under the Fourth Amendment and as a violation of the Equal Protection Clause of the Fourteenth Amendment.³⁵⁵ The litigants relied on an extensive study of the LAPD canine unit’s deployment records, demonstrating a pattern that suggested discriminatory deployment against Black and Latine Americans.³⁵⁶ Indeed, the percentage of bites against Black Angelenos was staggering.³⁵⁷

The root of the claim in *Lawson* was that the LAPD deployed dogs to Black and brown communities based on intentional decisions to concentrate dogs in minoritized communities rather than based on crime rates or other legitimate rationales.³⁵⁸ To make this claim, the plaintiffs worked with social scientists to collect and analyze data on the dogs’ deployments. The sheer volume of data-gathering necessary to bring such a suit puts it beyond the reach of most litigants, especially when that data-gathering must take place within tight statutes of limitations. Moreover, *McCleskey* makes clear that even the most sophisticated statistical studies that demonstrate disparities will not by themselves be enough to prove

351. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

352. 481 U.S. 279, 292 (1987).

353. *Id.* at 292–98.

354. Settlement and Injunctive Relief Agreement, *Lawson v. Gates*, No. 031232 (Cal. Super. Ct. Mar. 27, 1995); Third Amended Complaint, *supra* note 211, at 1.

355. Third Amended Complaint, *supra* note 211, at 3, 5.

356. *See id.* at 31–32.

357. *See id.* (“Of the persons bitten by LAPD police dogs from June 30, 1990 through June 30, 1992, 55% were African-American, 31% were Latino, 6% were Caucasian, 1% were Asian, and 7% were unknown. Thus, over 90% of the racially identified dog bite victims were African-American or Latino, and nearly 60% were African-American. . . . [T]here are nearly 3 times more deployments of LAPD dogs, after adjusting for crime and population, in predominately African-American areas of the City of Los Angeles, as in predominately Caucasian areas of the City of Los Angeles.” (citation omitted)).

358. *Id.* at 33.

discriminatory purpose.³⁵⁹ These obstacles mean that even though stark racial disparities persist in canine policing, there are a dearth of cases seeking to root out this form of inequality. Now that I have distilled the current state of the constitutional law of canine force, I will proceed to the factual, doctrinal, and procedural errors that enable the dangerous and inhumane use of police dogs.

III. THE DEFICIENCIES OF POLICE CANINE FORCE LAW

Law often fails “as a reliable demarcation device for proper and improper police violence.”³⁶⁰ Indeed, the law has unleashed brutal, gruesome violence on victims by requiring little justification for police canine force.³⁶¹ This lack of justification grows out of the failure of courts to take seriously the type and degree of force that dogs entail, the “deeply impoverished” framework provided by the Supreme Court’s use-of-force jurisprudence,³⁶² and the distributive choices that result therefrom.³⁶³ There remains a sharp disjunction between the bloodless application of a reasonableness standard and the lived experience of those who have suffered this violence. Consider a common list of police-use-of-force options: a baton, pepper spray, a Taser, pressure points, takedowns, firearms, strikes, and canines. With the assumption that each would be used on you, which would you rank as most severe? For most, I would venture to guess that a dog bite would follow close behind a firearm as the least-preferred option.

While *Graham* governs whether it is “objectively reasonable” for an officer to use force, it provides no guidance on what type or how much force is reasonable under any given circumstance.³⁶⁴ Substantive barriers combine with the doctrine of qualified immunity to stand in the way of recovery,³⁶⁵ even for police dog

359. 481 U.S. 279, 297 (1987).

360. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786 (2020).

361. The focus of this Article is important but narrow. I focus on the law that governs police dog violence rather than on police policies and accreditation, which are important topics for future research.

362. Harmon, *supra* note 317, at 1119.

363. Ristroph, *supra* note 212, at 1189.

364. *Graham v. Connor*, 490 U.S. 386, 397 (1989); see Harmon, *supra* note 317, at 1128–46 (exploring “the Supreme Court’s problematic use of force doctrine” after *Garner*, *Graham*, and *Scott*). Police departments also tend to resist issuing more specific guidance to their officers, contending that *Graham* lays out the only legitimate standards for regulation of police violence. See Stoughton, *supra* note 306, at 524. Some police departments even reject the classification of biting dogs as uses of force. See, e.g., MICHEL R. MOORE, LOS ANGELES POLICE DEPARTMENT: USE OF FORCE YEAR-END REVIEW 2021, at 292 (2021), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/04/2_2021-UOF-YER-compressed.pdf [<https://perma.cc/SK5B-X98T>] (noting that LAPD does not consider a police dog a use of force but that it reports canine “contact incidents” in its annual use-of-force report as a condition of its consent decree).

365. See, e.g., *Kuha v. Minnetonka*, 365 F.3d 590, 601–03 (8th Cir. 2003), *abrogated in part on other grounds* by *Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007). For more about how qualified immunity affects constitutional litigation, see Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

attacks of bystanders.³⁶⁶ In this Part, I argue that constitutional law must recognize that police dog violence is deadly force that police agencies have failed to adequately justify in light of its unique unpredictability. By conceiving of police dog bites as intermediate uses of force, rather than deadly force, courts fail to accurately apply the definition of deadly force and lower the justification needed to resort to dogs as weapons.

A. DOGS AS DEADLY FORCE

The *Robinette* court held that police dogs trained to bite and hold were not instruments of deadly force.³⁶⁷ Subsequently, all other federal circuits to consider the issue have followed its lead.³⁶⁸ Today's courts continue to rely on the same faulty legal and factual analysis as they analyze whether the force of a dog bite is reasonable under the Fourth Amendment. In this Section, I will first discuss in more detail the errors in the *Robinette* court's analysis of the law and facts of police dog bites. I will then turn to law enforcement and courts' universal failure to understand the severity of police dog bite injuries.

As previously noted, in order to hold that canine bites were not deadly force, the *Robinette* court relied on the MPC definition of deadly force: “[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.”³⁶⁹ The Sixth Circuit's discussion of the definition of deadly force relied on a shaky factual foundation and a failure to develop what would constitute a substantial risk of serious bodily harm.³⁷⁰

The court's discussion of police dog training reflects its fundamental lack of understanding of how police dog bites occur. The court opined that the officer could not have anticipated that a dog, trained to bite the nearest part of a person available to them, would grab the suspect's exposed neck with its teeth.³⁷¹ The court's opinion also took a crabbed view of the officer's ability to foresee the logical risks associated with its training: “[W]e cannot conclude that [Officer] Barnes released the dog with the knowledge that by doing so, he was creating ‘a substantial risk’ that the dog might kill Briggs.”³⁷² The court then relied on the

366. See, e.g., *Mancini v. City of Indianapolis*, No. 16-cv-02048, 2018 WL 4680188, at *1–3 (S.D. Ind. Sept. 28, 2018) (granting summary judgment to city in a lawsuit brought by a pregnant woman standing on her porch who was bitten by a police dog).

367. *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) (quoting MODEL PENAL CODE § 3.11(2) (AM. L. INST., Proposed Official Draft 1962)). Bite and hold remains the predominant method by which police departments train dogs to apprehend people, see *Mesloh*, *supra* note 247, at 324, so most discussion will focus on bite-and-hold dogs. A minority of departments with apprehension dogs train their dogs to find and bark, but as explained above, these dogs are also trained to bite. See *supra* text accompanying notes 247–50.

368. See *supra* note 319 and accompanying text.

369. *Robinette*, 854 F.2d at 912 (quoting MODEL PENAL CODE § 3.11(2) (AM. L. INST., Proposed Official Draft 1962)).

370. See *id.* at 912–13; *supra* note 291 and accompanying text.

371. *Robinette*, 854 F.2d at 912.

372. *Id.*

assertion that this was the first known killing of a person by a trained police dog.³⁷³ But the definition of deadly force does not require a substantial risk of death. Instead, it also applies when there is a substantial risk of serious bodily injury.³⁷⁴

The *Robinette* court did not discuss whether a dog posed a substantial likelihood of serious bodily injury. To the extent that the court grappled with serious bodily injury at all, the court only wrote there was “no indication from the evidence that Barnes *intended* Briggs to . . . suffer serious bodily harm.”³⁷⁵ Yet Barnes’s intention was not before the court. His knowledge was. The MPC required the court to decide whether Barnes’s dog posed a substantial risk of serious bodily injury, and it said nothing about that risk. Nor did the Sixth Circuit discuss what level of injury less than death amounted to “serious bodily harm.”

The MPC definition of serious bodily injury, which the court did not discuss, is “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”³⁷⁶ The Sixth Circuit has found that lacerations to a hand causing lingering numbness and an inability to work constituted “serious bodily injury,” relying on a definition analogous to that of the MPC.³⁷⁷ This

373. *Id.* at 913.

374. *Id.* at 912 (“force which the actor . . . knows to create a substantial risk of causing death or serious bodily harm” (quoting MODEL PENAL CODE § 3.11(2) (AM. L. INST., Proposed Official Draft 1962))).

375. *Id.* (emphasis added).

376. MODEL PENAL CODE § 210.0(3) (AM. L. INST., Proposed Official Draft 1962). The current MPC retains this definition. MODEL PENAL CODE § 210.0(3) (AM. L. INST. 2021). Though it would seem helpful to look to Sixth Circuit criminal cases to understand the types of injuries that fall into the category “serious bodily injury,” federal law does not define the term consistently, and other definitions arguably sweep more broadly. The federal sentencing guidelines, for example, allow serious bodily injury to include injuries “requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” U.S. SENT’G GUIDELINES MANUAL §1B1.1 cmt. n.1(M) (U.S. SENT’G COMM’N 2021) (“‘*Serious bodily injury*’ means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”). Additionally, under 18 U.S.C. § 1365, which proscribes tampering with consumer products, serious bodily injury also includes “extreme physical pain.” 18 U.S.C. § 1365(h)(3) (“[T]he term ‘serious bodily injury’ means bodily injury which involves —(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”).

377. *United States v. Campbell*, 18 F. App’x 355, 357–58 (6th Cir. 2001) (finding that lacerations to a hand and lingering numbness, rendering victim unable to work, constitute “protracted loss or impairment of the function of a bodily member” under 18 U.S.C. § 1365(g)(3)(D)). In other criminal cases, the Sixth Circuit has found that medical treatment involving stitches and sutures rose to the level of serious bodily injury. *See, e.g., United States v. Clay*, 90 F. App’x 931, 933 (6th Cir. 2004) (finding that brief unconsciousness and lacerations that required sutures constituted serious bodily injury under the Sentencing Guidelines); *United States v. Frazier*, 769 F. App’x 268, 271 (6th Cir. 2019) (ruling that broken bones, lacerations that required sutures, and an eye being swollen shut for a week involved the “extreme physical pain” necessary for serious bodily injury under 18 U.S.C. § 1365(h)(3)); *United States v. Woosley*, No. 94-6137, 1995 WL 358268, at *2–3 (6th Cir. June 14, 1995) (per curiam) (describing a cut that required fourteen stitches, a sprained wrist, headaches, and cuts and abrasions to the back for which the doctor prescribed five days’ worth of painkillers serious bodily injury because it caused “extreme physical pain” under 18 U.S.C. § 1365(h)(3)).

suggests that serious lacerations that require stitches and result in scarring—the type that one might expect from a dog bite that inflicts more than 450 pounds per square inch of force³⁷⁸—fall within the Sixth Circuit’s understanding of serious bodily injury.

It should have been foreseeable to an experienced police dog handler that a dog trained to bite the nearest part of a person’s body while out of the officer’s sight bore a substantial risk of causing “serious, permanent disfigurement” in the form of scars, or “protracted loss or impairment of the function of any bodily member or organ” in the form of torn or excised muscles, nerve damage, and other long-lasting injuries. By emphasizing the improbability of death and ignoring the substantial likelihood of serious bodily harm, the Sixth Circuit set the stage for subsequent insufficient analyses that fail to categorize police canine force as deadly force.³⁷⁹ The court’s failure to grapple with the risk of common injuries from dog bites, let alone lifelong injuries such as nerve damage that are more infrequent but not uncommon, represents an inadequate consideration of the true costs of canine policing.

Of course, in *Robinette*, the court did not have to imagine the possibility of serious bodily injury—a police dog had killed a man.³⁸⁰ And while the court discounted the risk of death as too insignificant to be “substantial,” its dropping of the “substantial risk of serious bodily injury” prong dogs subsequent canine cases. Courts often misapply the law and base their determination of the level of force on the actual outcomes of that force rather than the substantial risks created by that force.³⁸¹ In so doing, they resist legally meaningful categorization in favor of terms that do not limit the utilization of canine force.³⁸²

For instance, in *Lowry v. City of San Diego*, the Ninth Circuit, sitting en banc, reaffirmed its precedent that “characterizing the quantum of force with regard to the use of a police dog depends on the specific factual circumstances.”³⁸³ The court reviewed its cases, finding the uses of force severe (but not deadly) “where

378. See Meade, *supra* note 8, at 399.

379. I am not the first to argue that a proper understanding of the harms of police dogs necessarily leads to the conclusion that they are deadly force. See, e.g., Mark Weintraub, *A Pack of Wild Dogs? Chew v. Gates and Police Canine Excessive Force*, 34 LOY. L.A. L. REV. 937, 939 (2001) (“By using an incomplete definition of deadly force, courts have labeled police dogs as nondeadly and denied the more rigorous standard of review that deadly force requires and victims of police dogs deserve. Further, courts rely on unsubstantiated policy arguments to protect police dogs from any honest or critical review.” (footnote omitted)).

380. *Robinette*, 854 F.2d at 910.

381. See STOUGHTON ET AL., *supra* note 184, at 21, 23 (noting that the “subjective objectivity” standard means the reasonableness of a use of force “depends on the risk inherent in the type and manner of the force being used, not the ultimate effect of that force”).

382. This interpretive move facilitates police violence in the guise of regulating it. For a discussion of how Fourth Amendment law serves as a permission structure for police violence, see Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1720 (2019) (“Constitutional doctrine purports to regulate this power [of police to use force] but that ‘regulation’ functions as little more than a restatement of the police’s power to decide the exception.”) and Ristroph, *supra* note 212, at 1189 (“The constitutional law of police force is not indeterminate, but determinately permissive.”).

383. 858 F.3d 1248, 1256 (9th Cir. 2017) (en banc).

the officers sicced the dog on the plaintiff three times, including once after he had already been pinned down, and then pepper sprayed his open wounds”; where “the dog bit the plaintiff three times, dragged him between four and ten feet, and ‘nearly severed’ his arm”; and where “the dog apprehended a fleeing suspect with a bite that lasted between forty-five and sixty seconds, ‘shredded’ the plaintiff’s muscles, and reached the bone.”³⁸⁴ After reviewing those cases, the *Lowry* court found the force was “moderate” when the plaintiff had fallen asleep in her office, tripped the security alarm, and been bitten through the lip because, though the dog was off-lead, the officer closely followed the dog and called it off quickly.³⁸⁵

Neither of the Ninth’s Circuit’s force categorizations—severe or moderate—triggers a clear and specific requirement to justify force, unlike “a substantial risk of serious bodily injury,” which invokes the *Garner* standard. In jettisoning a deadly force analysis in these cases, the court implicitly finds that “severe” force is less than that which involves “a substantial risk of serious bodily injury” without giving clear guidance to police or the public about how close to the line the officers’ actions came. One can surmise that less was needed to justify the “moderate” force in *Lowry* than the “severe” force in *Chew*, but how much more is anyone’s guess.³⁸⁶ Case-by-case analysis leaves each new case essentially indeterminate, existing on a spectrum without meaningful bounds.

Courts’ focus on actual harm to determine whether police dogs are deadly force contradicts their treatment of similar issues in other contexts. When courts consider the potential dangerousness of other weapons in the context of criminal cases, they emphasize that, for a weapon to be a “dangerous weapon,” it is “the *capacity* for harm in the weapon and its use that is significant, not the *actual* harm inflicted.”³⁸⁷ For example, courts have found that chairs, shoes, wine bottles, rakes, clubs, bricks, and chair legs can all be dangerous weapons because “as used or attempted to be used [they] may endanger life or inflict great bodily harm.”³⁸⁸ When applied to police biting dogs, however, the courts confuse the backward-looking details of the dog’s deployment with the capacity the dogs have for harm. In every police biting dog case, the dog is being put to the use of biting a person—a scenario that, even based on proper training, puts a person at substantial risk of serious

384. *Id.* at 1256–57 (first citing *Smith v. City of Hemet*, 394 F.3d 689, 701–02 (9th Cir. 2005) (en banc); then citing *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994); and then citing *Miller v. Clark County*, 340 F.3d 959, 961–66 (9th Cir. 2003)).

385. *Id.* at 1254, 1257. Ms. Lowry’s lip had been bitten by the dog, and the officer “remarked that the dog could have ‘ripped [Lowry’s] face off’ and that she was ‘very lucky’ to have gotten only a relatively small bite.” *Id.* at 1261 (Thomas, C.J., dissenting).

386. Similar inexactitude and inconsistency permeate courts’ use-of-force analysis. See Stoughton, *supra* note 306, at 559–61.

387. *United States v. Moore*, 846 F.2d 1163, 1167 (8th Cir. 1988).

388. *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963) (quoting *United States v. Anderson*, 190 F. Supp. 589, 591 (D. Md. 1960)); see *id.* (collecting cases).

bodily harm. That is so because even a short bite that is called off by the handler involves a great deal of force.³⁸⁹

The absurdity of this analysis is clear in the Seventh Circuit’s discussion of whether a dog bite is deadly force in *Becker v. Elfreich*.³⁹⁰ In that case, the dog “tore [the plaintiff’s] calf out, causing permanent muscle and nerve damage” from which the plaintiff continued to suffer at the time of the appeal.³⁹¹ The officer that handled the dog acknowledged in his deposition that the dog was “capable of inflicting ‘lethal force’ and that ‘there [was] a probability of him doing so.’”³⁹² The officer also testified that the dog would bite “the first thing he comes in contact with.”³⁹³ In the face of that information, the court found the existence of a “substantial risk” of serious bodily injury was “unclear . . . because we do not know the amount of force [the dog] was trained to use and whether, in the field, [the dog] performed as trained.”³⁹⁴

The Ninth Circuit’s list of “severe” (but not deadly) uses of canine force and the Seventh Circuit’s analysis in *Becker* illustrate courts’ stubborn resistance to understanding the realities of police canine bites. While the *Robinette* court could perhaps be excused for lacking sufficient data to make its assessment of the risks of canine force, news stories, cases, and medical studies now demonstrate that the use of dogs to apprehend people comes with a substantial risk of serious and life-altering injury and even death for its victims.³⁹⁵

Police dog bites often result in serious injuries—far more serious than those seen in domestic dog bites.³⁹⁶ A study comparing LAPD dog bites to domestic dog bites paints a troubling picture. People bitten by police dogs were more likely to have multiple bites (73% versus 16%), defined as bites on multiple areas of the body (not as multiple teeth marks).³⁹⁷ Police dog victims were also “twice as likely to be bitten in the area of the head, neck, chest and upper arms (32% versus 15%).”³⁹⁸ Once at the hospital, police dog bites resulted in higher hospital admission rates (42% versus 7%), higher operative rates (4.0% versus 2.3%), and more invasive diagnostic procedures (8.9% versus 0.1% requiring angiograms).³⁹⁹ The

389. There is also always a risk that the dog will not obey. In the context of police drug-sniffing dogs, Justice Souter noted, “The infallible dog . . . is a creature of legal fiction.” *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting).

390. 821 F.3d 920 (7th Cir. 2016).

391. *Id.* at 925.

392. *Id.* at 926.

393. *Id.*

394. *Id.*

395. For example, Jesse Porter, an eighty-nine-year-old man, died after complications from a police dog bite when a police officer lifted the dog over a security fence and released it near Porter’s home. He was not the suspect. *See McKay v. City of Hayward*, 949 F. Supp. 2d 971, 975–76 (N.D. Cal. 2013). The city agreed to a \$1.5 million settlement. Associated Press, *Calif. City to Pay \$1.5M in Police Dog Bite Case*, SAN DIEGO UNION-TRIB. (July 18, 2013, 11:23 AM), <https://www.sandiegouniontribune.com/sdut-calif-city-to-pay-15m-in-police-dog-bite-case-2013jul18-story.html>.

396. *See Meade, supra* note 8, at 399; Pineda et al., *supra* note 8, at 352–53.

397. Meade, *supra* note 8, at 398–99.

398. *Id.* at 399.

399. *Id.*

study points to the size, breed, and training of police dogs to explain why police dog bites were so much more severe than domestic dog bites.⁴⁰⁰ One additional explanation that the study does not explore is whether in some cases police dog victims were admitted to the hospital because jails lack the facilities to address injuries that, in some domestic dog bite incidents, might be addressed at home, though this may be mitigated by the hospital admission rate which reflects only those who were admitted to a hospital ward after being seen in the ER.⁴⁰¹

The study reflects the seriousness of police canine bites, as the *Lawson* plaintiffs argued.⁴⁰² The *Lawson* plaintiffs alleged that from June 1990 to June 1992, LAPD dogs bit 44% of all suspects they located.⁴⁰³ Of those, over 90% required medical treatment: 37% had to be hospitalized, and another 56% required medical treatment, including reconstructive surgery.⁴⁰⁴ The individuals' alleged offenses did not correlate with their risk of injury. The complaint alleged that hospitalizations occurred in 45% of bites of auto theft suspects and 28% of armed robbery suspects.⁴⁰⁵ The overall 37% hospitalization rate for canine force compared to a hospitalization rate of only 2% for police uses of force other than dogs.⁴⁰⁶

It cannot be overemphasized that there is no reliable data regionally or between agencies over time regarding the range and frequency of police dog bite injuries. A case study of four LAPD canine bites from the 1990s illustrates the gruesome injuries that dogs can inflict, and given the lack of comprehensive data, all that can be said is that the injuries described in the study are within the range of possible dog bite injuries. In one case, an eighteen-year-old boy was bitten in the throat, paralyzing his left vocal cord.⁴⁰⁷ In another, a twenty-nine-year-old man was bitten on his right arm and both legs, resulting in ulnar and tibial fractures and wounds that required skin grafts.⁴⁰⁸ In the third case, a thirty-eight-year-old man was bitten on both arms and his right leg, causing wounds that required vascular surgery.⁴⁰⁹ The final case study was of a twenty-three-year-old man who had been in a shoot-out with police and had gunshot wounds to his head in addition to dog bites to both arms.⁴¹⁰ His wounds included fractures from the dog bites and multiple puncture wounds.⁴¹¹

400. *Id.*

401. *See id.* at 398.

402. Third Amended Complaint, *supra* note 211.

403. *Id.* at 24. Plaintiffs relied on data provided by LAPD in its discovery. *Id.* at 24 n.2.

404. *Id.* at 4, 24.

405. *Id.* at 25 n.3.

406. *Id.* at 24–25.

407. Pineda et al., *supra* note 8. The eighteen-year-old was treated at the hospital for seven days before being discharged to the County Jail Infirmary. *Id.*

408. *Id.*

409. *Id.* at 353–54. The man was treated for nine days at the hospital before being discharged to the County Jail Infirmary. *Id.* at 354.

410. *Id.* at 354.

411. *Id.*

The severe injuries associated with police dog bites result from the animals' training to bite and hold their victims.⁴¹² Police dogs tend to be large animals: from 1988 to 1990, the LAPD's dogs, German shepherds and Rottweilers, weighed between seventy and ninety pounds or more.⁴¹³ They are also trained to bite down hard. Studies show that police dogs' bites exert a force between 450 and 800 pounds per square inch, as compared to between 200 and 400 pounds per square inch for domestic dogs.⁴¹⁴ Police dogs' jaws are strong enough to bite through sheet metal, and some have compared their bites to shark bites.⁴¹⁵

The dogs are trained to use a "full-mouth bite . . . using all their teeth, including the incisors in the front and the molars in the back in order to strengthen their 'hold' on the suspect."⁴¹⁶ The bite-and-hold technique also extends the period of the wound's exposure to the dog's mouth, leading to a higher risk of bacterial contamination and wound infection.⁴¹⁷ Many bite-and-hold dogs are trained in the "bite-until-passive" technique, meaning they continue to bite into the victim's body as long as the person struggles.⁴¹⁸ Of course, the impulse to struggle against a painful bite is natural, so some departments instruct their officers that struggle should not be used to justify a continued bite.⁴¹⁹

Medical studies further demonstrate the outsized injury rates of police canine force as compared to other types of force. One study compared patients of Memorial Regional Hospital in Hollywood, Florida, who came to the emergency department with injuries from Taser and K-9 bites from June 1, 2011, to June 30, 2016.⁴²⁰

The study found that dog-bite patients were more likely to need medical interventions and to require specialized care unavailable in an emergency department. According to a medical analysis, while 70% of the dog bite patients could have received emergency department care, 30% required specialized care that would

412. See Meade, *supra* note 8, at 399.

413. *Id.*

414. *Id.*; Pineda et al., *supra* note 8, at 352–53.

415. Ashley Remkus, *We Spent a Year Investigating Police Dogs. Here Are Six Takeaways.*, MARSHALL PROJECT (Oct. 2, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/02/we-spent-a-year-investigating-police-dogs-here-are-six-takeaways> [https://perma.cc/W6H3-978Q].

416. Meade, *supra* note 8, at 399.

417. Pineda et al., *supra* note 8, at 353, 356.

418. Meade, *supra* note 8, at 399.

419. STOUGHTON ET AL., *supra* note 184, at 221 (citing Seattle Police Dep't Pol'y § 8.300-POL-2).

420. Andre V. Coombs, Stephanie A. Eyerly-Webb, Rachele J. Solomon, Rafael Sanchez, Seong K. Lee, Eddy H. Carrillo, Chauniqua Kiffin, Andrew A. Rosenthal, Jill Whitehouse, Barbara Germain & Dafney L. Davare, *Investigating Clinical and Cost Burdens of Law Enforcement-Related K9 Injuries: The Impact of "the Bite" on a Community Hospital*, 85 AM. SURGEON, 64, 65 (2019). The study collected data regarding the type of medical procedures required, costs incurred for medical care, patient length of stay, and, for K9 injuries, information about wound characteristics. The study population was relatively small: 155 patients, 97% of whom were male. Police documented that the patients had been "aggressive" in 23 cases, and in 19 of those, police deployed a Taser. Six patients possessed deadly weapons, and police deployed dogs in two of those cases, both against patients armed with guns. *Id.* at 66.

only be available in a tertiary care facility.⁴²¹ Those injured by dogs skewed younger and included four pediatric patients.⁴²² Of the four children bitten by police dogs, two had injuries treatable by emergency departments, while the other two required specialty surgical services.⁴²³

By contrast, all of the Taser patients could be treated by an emergency department, and many did not need treatment at all.⁴²⁴ It is worth noting, however, that some police agencies require all people who are tased to be medically cleared, which may skew the treatment numbers. The study did not discuss the policies of the law enforcement agencies included. Twenty-one percent of Taser patients required a medical procedure, and one died, though the study hypothesized that this was likely due to drugs.⁴²⁵ By contrast, 47% of K-9 patients needed at least one medical procedure, and 5% required four or more medical procedures.⁴²⁶ The study also noted that delays in appropriate care could increase mortality, which is more likely in areas that lack access to trauma care.⁴²⁷

Despite the clarity of medical evidence, some police departments and criminologists maintain that police dog bites constitute superficial wounds.⁴²⁸ Courts' characterizations often adopt these understatements of harm. In *Miller v. Clark County*, the Ninth Circuit contrasted the training of a police canine to "bite and

421. *Id.* The study categorized dog bite injuries as grade I, grade II, grade III, or grade IV. *Id.* The study provides photographic examples of how injuries were categorized in addition to descriptions. *See id.* at 66–67. Grade I injuries were described as “[a]ny simple laceration” or “[s]oft tissue injuries,” which included “[s]uperficial hand lacerations <10 cm,” injuries “[t]o the torso or extremity <10 cm²,” or injuries “[t]o the head or neck ≤4 cm²” not involving the face. *Id.* at 66 tbl.1. Grade I injuries could be treated by the emergency department. *Id.* Grade II injuries were described as soft tissue injuries that included “[h]and lacerations ≥10 cm” that did not expose a tendon, vessel, or nerve; injuries “[t]o the torso or extremity ≥10 cm² and <20 cm²”; or injuries “[t]o the head or neck >4 cm² [w]ith involvement of face <25%.” *Id.* Grade II injuries required a “[g]eneral surgeon, trauma surgeon, or plastic surgeon.” *Id.* Grade III injuries were also soft tissue injuries but included “[h]and lacerations ≥10cm” that exposed a tendon, vessel, or nerve without injury; injuries “[t]o the torso or extremity ≥20 cm²,” and injuries “[t]o the head or neck >4 cm²” that involved between 25% and 50% of the face. *Id.* Grade III injuries could not be treated by a “general surgeon” and required a trauma surgeon or plastic surgeon. *Id.* Grade IV injuries were described as “[a]ny soft tissue or hand injury that involves motor nerve, genitalia, or vascular injury,” or that involves more than 50% of the face. *Id.* Grade IV injuries required a trauma surgeon, plastic surgeon (for motor nerve injury), or vascular surgeon, and possibly urology services for genitourinary injuries. *Id.*

422. *Id.* at 66.

423. *Id.* at 66–67. One pediatric patient had Grade II injuries and the other suffered Grade III injuries. *Id.*

424. *Id.* at 67. At most, Taser injuries required the level of care required by a Grade I K9 injury. *Id.*

425. *Id.*

426. *Id.* Of the seventy-five patients with K9 injuries that were “graded” for injury severity, 52 (69.3%) had grade I injuries, 9 (12%) had grade II, 13 (17.3%) had grade III, and 1 (1.4%) suffered grade IV injuries. *Id.* at 66.

427. *Id.* at 69.

428. CHAPMAN, *supra* note 21, at 96 (quoting a Richmond, California Police Department report, stating that although “[a] club can deliver a death-dealing blow, . . . a bite from a dog to the leg or arm of an attacking rioter will merely render the attacker less effective or useless”); *id.* at 109 (describing Montgomery County, Maryland Sergeant McGrogan as noting that “in almost all of the incidents in which the dogs were involved, the wanted person was located and taken into custody with a minimum of force, receiving at most a dog bite”).

hold a suspect's arm or leg" with the disallowed "maul[ing] [of] a suspect."⁴²⁹ Yet, by definition, police dog "bite-and-hold" procedures cause a dog to maul its victims.⁴³⁰ Police statistics and medical studies contradict trainers' and officers' claims that police dogs do not rip, tear, or maim.⁴³¹ Courts' resistance to recognizing these harms permits officers to use dogs, whose teeth are dangerous weapons, in a wide array of situations. Courts' failure to appreciate the severity of police canine violence is further exacerbated by inadequate jurisprudential justification of police canine force.

B. THE INADEQUATE JUSTIFICATION OF CANINE VIOLENCE

In a detailed critique of *Graham* as a means of regulating police violence, Rachel Harmon has pointed out that the Fourth Amendment regulation of police force is "deeply impoverished."⁴³² The case and its progeny fail in part due to the undertheorized justification for police force. Harmon fills this gap with three possible justifications for constitutionally permissible police violence: "(1) *law*—assisting our institutions of criminal adjudication, most commonly by enabling a lawful arrest or facilitating an authorized search; (2) *order*—maintaining public safety by preventing or stopping disorderly conduct; and (3) *self-defense*—protecting the officer from physical harm."⁴³³ Harmon places these justifications in contrast to impermissible justifications, such as punishment and deterrence.⁴³⁴

The most commonly invoked justification for police use of canine force is the "law" rationale⁴³⁵—that otherwise, the suspect would escape. When flight is the justification, the underlying interest is in arrest so that the state can apply its criminal laws. Harmon suggests that the "law" interest is higher in more serious cases, and therefore, in those cases, more force is reasonable.⁴³⁶

429. 340 F.3d 959, 964 (9th Cir. 2003).

430. The Oxford English Dictionary defines "maul," when used with respect to animals, as "to tear and mutilate by clawing, biting, etc." *Maul*, OXFORD ENG. DICTIONARY, www.oed.com/view/Entry/115149 (last visited Apr. 14, 2023). Though trainers like Kenneth Lickliger, who trains and sells police dogs, insist "[t]he dogs are 'not taught to rip, they're not taught to tear, they're not taught to maim,'" videos of police canine force show dogs biting their victims while whipping their heads back and forth, creating tearing in addition to puncture wounds. VanSickle et al., *supra* note 177 (quoting Lickliger and linking to videos of police canine bite incidents).

431. *See, e.g.*, Meade, *supra* note 8. Though the courts are the focus of this Article, it should also be noted that police departments' own characterizations of police canine force contribute to this confusion when they compare police canine force to pepper spray or batons or, even worse, omit police dogs from use-of-force guidelines and policies. *See, e.g.*, *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998) (noting Oakland Police Department in California considers dogs as less dangerous weapons than police batons and does not include dogs in guidelines on nonlethal force); *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (noting Hemet Police Department in California classifies both pepper spray and police dogs as intermediate force).

432. Harmon, *supra* note 317, at 1119.

433. *Id.* at 1158.

434. *See id.* at 1151–53, 1155, 1159.

435. This contrasts with other use-of-force situations where self-defense is the most common justification. *See id.* at 1147 n.131.

436. *See id.* at 1159.

The “law” justification is closely coupled with the “order” rationale—that the person who would escape is dangerous. Both severity and flight are directly incorporated into the *Graham* factors, but the fact of flight fails to guide the officer as to how to weigh flight against the severity of the offense and whether the suspect poses a threat. The severity of the crime analysis fails in part because the Court has never clearly articulated what severity stands in for. Federal courts’ severity analysis has often been conclusory and untethered from any particular purpose. As a result, offenses from driving under the influence to all manner of felonies have been treated as serious,⁴³⁷ without regard to what that seriousness entails.

Insofar as seriousness is meant to be a proxy for threat,⁴³⁸ it replicates a question already raised by the *Graham* factors. Moreover, if severity connotes threat, evidence that a person is unarmed, which provides direct evidence that a person is not an immediate threat, should overcome the seriousness of the alleged offense, which serves as indirect evidence that a person is a threat.⁴³⁹ Likewise, given the “minor and often arbitrary” distinction between felonies and misdemeanors,⁴⁴⁰ a severity analysis should not serve as the indication of an equally weighty interest in “law” or in “order” for all felony offenses.

Complicating the *Graham* analysis further, the factors of severity of offense and whether the suspect poses a threat often collapse into the flight analysis. As Alice Ristroph has argued, nonsubmission constitutes a safe harbor for police violence.⁴⁴¹ Flight and resistance, by and large, are seen to justify the use of force, even where a totality-of-the-circumstances analysis suggests that force was otherwise unreasonable.⁴⁴² The abandonment of a serious analysis of the severity-of-the-crime prong of *Graham* expands the safe harbor of flight.⁴⁴³ The harbor is further enlarged by police officers’ views, often accepted by juries, that flight itself can serve to demonstrate adequate dangerousness to justify force.⁴⁴⁴ This flattening of the *Graham* factors into a multi-part test of compliance with police commands creates a permission structure for dog bites, because dogs are a weapon often used when people are hiding or fleeing from police.⁴⁴⁵ Indeed, courts have

437. See, e.g., *Escobar v. Montee*, 895 F.3d 387, 394 (5th Cir. 2018) (noting that the court held that DUI was a serious offense in *Cooper v. Brown*, 844 F.3d 517, 522 (5th Cir. 2016), so felony assault must also be a serious offense for purposes of the *Graham* factors).

438. See Harmon, *supra* note 317, at 1160 (“The severity of the crime may aid an officer’s assessment, during arrest or flight, of how dangerous a suspect is, especially if that danger is otherwise ambiguous.”).

439. See STOUGHTON ET AL., *supra* note 184, at 49–50 (explaining that although “[t]he severity of the crime can be an important gauge for assessing an individual’s dangerousness,” it becomes “less useful as an indicator of dangerousness” “[a]s the officer gathers additional information”).

440. *Tennessee v. Garner*, 471 U.S. 1, 14 (1985).

441. Ristroph, *supra* note 212, at 1208.

442. See *id.*

443. See *id.* at 1209.

444. *Id.*

445. See, e.g., *Cooper v. Brown*, 844 F.3d 517, 521, 524–25 (5th Cir. 2016) (litigating use of a dog against fleeing misdemeanor DUI suspect); *Maney v. Garrison*, 681 F. App’x 210, 220 (4th Cir. 2017) (describing siccing of a police dog on a person who was hiding); *Stole & Toohey*, *supra* note 2.

gone so far as to justify the use of police dog bites to effect *Terry* stops—an intrusion that requires no more than reasonable suspicion, sometimes based only on flight from police.⁴⁴⁶

As courts have recognized, minoritized people often have good reason to fear or avoid the police, making them more likely to flee, regardless of guilt.⁴⁴⁷ In the context of police dog force, that also makes minoritized people more likely to be pursued and bitten. When told by an officer that she should not have run from the police, one Black woman expressed that she was afraid of being shot, as she had seen on the news.⁴⁴⁸ Although the police officer dismissed her fears as unwarranted, the officer's flip response was undermined by Judge Carlton Reeves' order granting qualified immunity in another case, *Jamison v. McClendon*, which recites nineteen cases of police killings of Black people.⁴⁴⁹

A lack of data about when police canines are deployed is an obstacle to evaluating the state interests at stake. The best available information comes from news reports that show that police use biting dogs against people fleeing nonviolent property offenses.⁴⁵⁰ By contrast, police argue that the dogs are used to capture violent criminals and that they are especially useful for searching wide areas for armed people suspected of violent felonies.⁴⁵¹

Police rarely invoke Harmon's third possible justification, "self-defense" in the traditional sense,⁴⁵² to justify dog bites. Police sometimes describe their release of a dog as a preemptive measure to prevent them from having to use other forms of force in self-defense.⁴⁵³ Preemptive uses of canine force by officers fail to fit neatly into any use-of-force category, because the use of police canines in those instances is part investigatory tool, part weapon. Sending a dog—trained to bite—to find someone, who perhaps does not know police are looking for them, is not

446. See, e.g., *Maney*, 681 F. App'x at 220 (describing individual's "actively hiding from the police as they approached" as contributing to officers' finding of reasonable suspicion, ultimately leading to use of police dog). But see *id.* at 230–31 (Harris, J., dissenting) (explaining that no reasonable officer would think it constitutional to effectuate a *Terry* stop through use of a police dog bite). In *United States v. Lawshea*, Lawshea was speaking to another man in a housing complex. 461 F.3d 857, 858 (7th Cir. 2006). The other man went into a nearby apartment, so Lawshea walked away. *Id.* When officers followed Lawshea in their patrol car, Lawshea looked back at the officers and began to run away. After the officer continued to follow Lawshea in his car, and after giving a warning, the officer released their K-9 on Lawshea. *Id.* The Seventh Circuit concluded that "Lawshea's flight . . . in a high-crime area just before midnight gave the officer a reasonable suspicion" to conduct a *Terry* stop on Lawshea. *Id.* at 859. The court also held that the use of a police dog to bite after Lawshea ignored orders to stop did not "transform the *Terry* stop into an arrest." *Id.* at 860.

447. See *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

448. *Warning: Brentwood Police Dog*, *supra* note 217, at 02:24.

449. 476 F. Supp. 3d 386, 390–91 (S.D. Miss. 2020).

450. See, e.g., Sernoffsky & Fernandez, *supra* note 347; Stole & Toohey, *supra* note 2.

451. See Sernoffsky & Fernandez, *supra* note 347.

452. Harmon describes this as self-defense applied because of an imminent threat to the officer. Harmon, *supra* note 317 at 1167.

453. See Harmon, *supra* note 317, at 1167–68 (noting the "many cases of excessive force . . . designed to preempt resistance" to the officer). This rationale was also used by colonizers during the Maroon war. Johnson, *supra* note 28, at 79 ("In this way canine combat was discursively figured as a preemptive attack undertaken as an act of self-preservation rather than as an act of aggression.").

neatly justified by “law,” “order,” or “self-defense” but can be conceived of at the cross-section of these justifications or as a safety measure. The permissibility of preemptive uses of canine force not timed to the emergence of an imminent threat is discussed further in the subsequent Section.

Another advantage police see in using a dog is that, in some instances, an officer can call back the dog before it bites, which one cannot do with other weapons such as a Taser or a gun.⁴⁵⁴ This depends, of course, on the dog being within eyesight and earshot of the handler such that the handler can make the decision that force is unnecessary before the dog bites. For dogs that are released ahead of handlers, off-lead, this is less likely, because the dogs are trained to bite without further command.⁴⁵⁵ The distance between dog and handler also requires the dog to follow the officer’s commands without hands-on interventions.

One might also question the extent to which officers are justified in engaging in defense of others when it comes to the dog itself. An August 25, 2022 incident in Tucson, Arizona, starkly illustrates this conundrum. That day, police confronted Francisco Javier Galarza, wanted on a felony arrest warrant, outside a convenience store.⁴⁵⁶ Galarza fled, the officers sent a dog after him, and the dog bit him, pulling him to the ground.⁴⁵⁷ Galarza then pointed a gun at the dog’s head, and officers immediately shot and killed him.⁴⁵⁸ In some states, dogs are considered property, and thus can only be defended with non-deadly force.⁴⁵⁹ Yet civil and criminal laws have increased the penalties associated with harming or injuring police dogs, elevating them above house pets.⁴⁶⁰ Police affiliation, therefore, changes dogs’ legal status and recognition of harms to them.⁴⁶¹

454. Martin Kaste, *Videos Reveal a Close, Gory View of Police Dog Bites*, NPR (Nov. 20, 2017, 5:01 AM), <https://www.npr.org/2017/11/20/563973584/videos-reveal-a-close-gory-view-of-police-dog-bites> [<https://perma.cc/8XZT-9DWH>].

455. *See, e.g.*, *Watkins v. City of Oakland*, 145 F.3d 1087, 1091 (9th Cir. 1998) (“Oakland, at the time of the incident, employed a ‘bite and hold’ canine policy. Police dogs were trained and tested to bite solidly, bite hard, and hold on. The dogs were trained to rebite if needed and to bite whatever part of the person’s body is nearest to them. They were not trained to avoid biting any part of the anatomy. Oakland’s policy allowed handlers to release the dogs to find and bite suspects even where the handler had no reason to believe that the person was armed. Police dogs were allowed to act independently of the handler and were thus often out of visual contact when they found and bit a person.”).

456. Katherine Donlevy, *Tucson Cops Kill Man After He Points Gun at Police Dog’s Head: Video*, N.Y. POST (Sept. 28, 2022, 6:19 PM), <https://nypost.com/2022/09/28/tucson-cops-kill-man-after-he-points-gun-at-police-dogs-head-video/> [<https://perma.cc/A7SG-UNEJ>].

457. *Id.*

458. *Id.*

459. *But see, e.g.*, Ariz. Rev. Stat. § 13-408 (permitting use of deadly force to defend property in certain situations).

460. *See, e.g., id.* § 13-2910(10).

461. This parallels statutes that make police a special class for purposes of protection from homicide or assault and battery. *See, e.g., id.* § 13-751(F)(8) (making a person’s status as a police officer an aggravating factor for purposes of the death penalty); *id.* § 13-1204(A)(8)(a) (making an assault against a police officer an aggravated assault). It could also be seen as a facet of the carceral turn in animal protection, thoroughly explored by Justin Marceau in *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019). While that may explain the support of organizations of People for the Ethical Treatment of Animals (PETA) for police dogs despite their opposition to animal labor in other contexts,

Though police canines are put in dangerous situations by police officers, officers are often quite attached to their dogs.⁴⁶² In many departments, the dog lives at the officer's home, is a part of the officer's family, and retires into the handler's household.⁴⁶³ It is perhaps unsurprising, then, that officers sometimes escalate their uses of force when they perceive a suspect to be interfering with their dog.

Cases illustrate that suspects are put at even greater risk when they, as a natural consequence of being attacked by a dog, try to release themselves from the dog and meet the handler's ire.⁴⁶⁴ One might analogize a person grabbing or kicking the dog to a person reaching for an officer's gun, baton, or Taser, but the analogy falls apart because the police dog cannot be wielded against the officer by the subject of the dog attack. Therefore, it is far more likely that an officer's reaction to a person attempting to extricate himself from a police dog's mouth is related to the officer's emotional connection to the dog—one that may interfere with the officer's judgment.⁴⁶⁵ It also seems understandable, insofar as dogs are not just pieces of equipment. While, like other police technology, they are expensive to replace, they are also living beings.

The lack of data about police dog use makes it difficult to assess the extent to which police use dogs in service of impermissible justifications for force. For example, some high-profile instances of police canine force suggest that police use dogs to punish people for their flight.⁴⁶⁶ Punishment as a justification for police force is usually rejected, in part due to the clear shortcomings of process that lead to police-inflicted punishment.⁴⁶⁷ Although police often consider punishment to be an inappropriate use of dogs, more police accept another justification that legal theorists have long rejected: the use of pain to deter wrongdoing.⁴⁶⁸ Police report using dogs not only to cause pain for the purpose of gaining

the special status of police more likely explains the treatment of police dogs, given the laws that protect them over and above the protection afforded to other dogs.

462. See Wall, *supra* note 113, at 865.

463. See, e.g., PATROL CANINES GUIDANCE, *supra* note 250, at 9–10; David “Lou” Ferland, *How to Retire a Police K-9*, POLICE MAG. (Apr. 4, 2019), <https://www.policemag.com/509276/how-to-retire-a-police-k-9> [<https://perma.cc/3KTN-LU3M>].

464. See, e.g., *Priester v. City of Riviera Beach*, 208 F.3d 919, 923 (11th Cir. 2000) (describing that while police dog bit man lying on the ground, man tried to kick dog in order to stop it from biting him, and officer pointed a gun at the man's head and said, “You kick him again, I will blow your mother fucking brains out”); *Kopf v. Wing*, 942 F.2d 265, 267 (4th Cir. 1991) (describing when a male subject tried to pull the dog off another subject, the police officer said, “don't touch my dog' in a ‘real angry voice’” and struck the man in the head with a nightstick); *Malone v. City of Fort Worth*, No. 09-CV-634-Y, 2014 WL 5781001, at *10 (N.D. Tex. Nov. 6, 2014) (describing officer that put his gun to Malone's head and said, “Fuck with my dog and I'll kill you”); see also WONG & BIBRING, *supra* note 10, at 4 (describing fatal incident where police officers struck a suspect on the head with batons when he attempted to stop the canine from biting him, “which by that point had continued for several minutes”).

465. This is exacerbated by the ways law and practice validate this hierarchy of concern as discussed *supra* text accompanying notes 215–22.

466. See, e.g., VanSickle et al., *supra* note 177 (describing an officer “shoving a dog through a truck window and watching it chew on a man inside as he screamed,” leading the president of the Spokane City Council to say that “[i]t seemed like the officers essentially used the dog to punish [the suspect]”).

467. See Harmon, *supra* note 317, at 1151–52.

468. See *id.* at 1152–53; Kaste, *supra* note 454.

compliance, which is permitted under legal theories of justification, but also to deter future wrongdoers from engaging in similar behavior, which is not.⁴⁶⁹

The application of *Graham* to dog bites underscores the weak theoretical underpinnings of the test. Applying Harmon's use-of-force paradigm to dog bites—wherein justified force is limited to law, order, and self-defense—raises difficult questions for courts. The justification of force is further complicated by a weapon that can work outside the presence and without the authorization of a police officer: a problem unique to police dogs. I now turn to how the law as currently applied lacks an analysis of how to deal with a being that “is trained to use force, but lacks the thinking capabilities of a person.”⁴⁷⁰

C. UNINTENDED TARGETS

Police dogs lack the ability to differentiate between their targets and bystanders, and even between their targets and other officers.⁴⁷¹ As a result, police dogs are a weapon that can pose a threat to those who are not their handlers' targets. While a police officer may accidentally shoot a gun or crash a car and hit people that are not the officer's intended targets, which creates its own problems for Fourth Amendment analysis,⁴⁷² a police dog may intentionally bite someone whom the police unintentionally put in the dog's path. Police are aware of this danger. In *Lowry*, a police sergeant admitted in his deposition that “police dogs are not trained to differentiate between ‘a young child asleep or . . . a burglar standing in the kitchen with a butcher knife,’ and will simply bite the first person they find.”⁴⁷³ Numerous canine cases heard in the federal courts—and many that have never been litigated—involve police dog victims who were not committing any crime at all.⁴⁷⁴ Unhoused people living in the area, those mistaken for

469. See, e.g., Kaste, *supra* note 454; Karen Steinrock, *K9 Units Play Valuable Role in the Community*, PENNLIVE (Mar. 23, 2013, 10:00 AM), https://www.pennlive.com/pets/2013/03/k9_units_play_valuable_role_in.html [<https://perma.cc/B3UT-XPHA>] (quoting police dog trainer as saying that the dogs' “very presence is a deterrent to crime”).

470. POLICE EXEC. RSCH. F., *supra* note 250, at 7.

471. See, e.g., Adam Walser, *I-Team: Tampa Bay Area Taxpayers Paying for Settlement Payments in K9 Officer Bites*, WFTS: ABC ACTION NEWS (Aug. 20, 2019, 12:10 PM), <https://www.abcactionnews.com/news/local-news/i-team-investigates/i-team-tampa-bay-area-taxpayers-paying-for-settlement-payments-in-k9-officer-bites> [<https://perma.cc/Q23N-F6ZW>] (describing incidents where a police dog bit a passenger in a car and where a dog bit its handler's wife); Steve Burns, *Officer Fatally Shoots His Police Dog After It Attacks Him*, ATLANTA J.-CONST. (Apr. 27, 2017), <https://www.ajc.com/news/crime-law/officer-fatally-shoots-his-police-dog-after-attacks-him/AgBqo6csyloz0tquOkPfrK/> (reporting that an officer shot his police dog when the dog bit the officer's leg down to the bone during a manhunt).

472. See Stoughton, *supra* note 306, at 538–40.

473. *Lowry v. City of San Diego*, 818 F.3d 840, 846 (9th Cir. 2016), *rev'd en banc*, 858 F.3d 1248 (9th Cir. 2017).

474. For example, see Kaste, *supra* note 451, for descriptions of several cases in which police used dogs to attack innocent people. In one case from 2015 in San Diego, a naked man, high on LSD, was attacked with a police dog, which bit him for fifty-two seconds, causing lasting injuries. *Id.* In another from 2016 in St. Paul, Minnesota, a Black man sitting in his car near his own apartment building was mistaken for a suspect and bitten, with a dog tearing into his leg and causing permanent disfigurement. *Id.* There are numerous other examples across the country. See, e.g., *Roddy v. Canine Officer*, 293 F. Supp. 2d 906, 910 (S.D. Ind. 2003) (hospital employee in parking lot bitten when occupants of a

potential criminal suspects, and even people asleep in their own homes and backyards have been mauled by police dogs.⁴⁷⁵ What's more, complete innocence of any wrongdoing has not afforded people a right to be free from the violence of police dogs.

As Seth Stoughton has pointed out, the Court's decision to regulate police violence through the inapt vehicle of Fourth Amendment seizures leads to absurd results.⁴⁷⁶ In *Brower v. County of Inyo*, the Court held that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied*."⁴⁷⁷ The Court clarified that "[a] seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful."⁴⁷⁸ Yet, "the First, Second, Fourth, Sixth, Seventh, and Tenth Circuits . . . have held that an individual is seized for Fourth Amendment purposes only when he is the *intended* target of the use of force."⁴⁷⁹

With respect to police canine bites, the unintended victim analysis can lead to confusing and confused results. For example, in *Maney v. Garrison*, a police

crashed vehicle fled from a police officer, and the officer did not withdraw the dog but rather held the hospital employee at gunpoint); *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1551–52 (11th Cir. 1989) (police dog set upon a drunk man sleeping in a yard and a man—against whom no charges were filed—who ran from officers when he saw them in a park); *McKay v. City of Hayward*, 949 F. Supp. 2d 971, 975–76 (N.D. Cal. 2013) (bystander bitten when an officer picked up a dog and lowered it over a fence into the backyard of a mobile home, where it was supposed to track an armed robbery suspect; the man died two months later from complications related to the injuries sustained from the bite, which had torn open his leg, exposing tendons and muscle, and later became infected, requiring amputation); *Rogers v. City of Kennewick*, No. CV-04-5028, 2007 WL 2055038, at *1 (E.D. Wash. July 13, 2007), *aff'd*, 304 F. App'x 599 (9th Cir. 2008) (police dog chased a man, who was wanted for traffic infractions on a moped and a misdemeanor violation for failing to stop, went through a hole in a fence, and bit another man, who was sleeping in his stepson's backyard); *Maney v. Garrison*, 681 F. App'x 210, 213–14 (4th Cir. 2017) (unhoused man bitten when a dog was sent into an area near a known unhoused persons' camp, and the dog was not called off until the man would show his hands); *Vathekan v. Prince George's County*, 154 F.3d 173, 176–77 (4th Cir. 1998) (dog bit a woman asleep in her upstairs unit of the home with no warning when dog was sent in after suspected burglar); *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 352–53 (4th Cir. 2010) (missing child bitten by police dog when police decided to send bite-and-hold dog rather than bloodhound to find the child); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 388 (8th Cir. 2007) (dog bit man sleeping in park); *Smith v. City of Auburn*, No. C04-1829RSM, 2006 WL 1419376, at *1 (W.D. Wash. May 19, 2006) (unhoused man sleeping in the park bitten by dog tracking a burglary suspect); *Collins v. Schmidt*, 326 F. Supp. 3d 733, 737 (D. Minn. 2018) (woman bitten while taking out her trash); *Hope v. Taylor*, No. 20-cv-196-T-33AAS, 2020 WL 1677315, at *1 (M.D. Fla. Apr. 6, 2020) (woman bitten when police sent dog after three people who fled from a vehicle that had matched one reported stolen); *Mancini v. City of Indianapolis*, No. 16-cv-02048, 2017 WL 4250112, at *1 (S.D. Ind. Sept. 26, 2017) (woman stepped out of her house after hearing a commotion, got bitten by a dog chasing someone fleeing a traffic stop).

475. See, e.g., *Maney*, 681 F. App'x at 213–14; *Lowry*, 818 F.3d at 846; *Vathekan*, 154 F.3d at 176–77; *Rogers*, 2007 WL 2055038, at *1.

476. Stoughton, *supra* note 306, at 538–40.

477. 489 U.S. 593, 596–97 (1989).

478. *Id.* at 596 (citations omitted).

479. Stoughton, *supra* note 306, at 538 & nn.83–88 (collecting cases).

officer commanded his dog to follow the scent of an unarmed Black man suspected of a robbery at a Sonic drive-in.⁴⁸⁰ The dog followed the scent near an unsheltered persons' encampment, where Maney had planned to sleep that night.⁴⁸¹ Maney fled the encampment when he heard that men were approaching the camp and hid himself in some bushes near a residence.⁴⁸² The dog, Bikkel, followed the scent past Maney and toward the front porch of the house outside which Maney was hiding.⁴⁸³ The dog began "air scenting," which the officer said meant that Bikkel thought the suspect was close.⁴⁸⁴ Bikkel then unexpectedly lunged into the bushes at Maney, biting him.⁴⁸⁵ The officer did not immediately remove the dog, even after realizing Maney, a bald white man, did not match the description of the suspect, because the officer believed the suspect could be nearby and because he was not sure if Maney was armed or dangerous.⁴⁸⁶ After two more bites, the officer removed the dog from Maney, who had been begging the officer to do so.⁴⁸⁷

The Fourth Circuit, citing *Brower*, found that Maney had not been seized for purposes of the Fourth Amendment until the second and third bites because the officer had not intentionally applied the dog to Maney.⁴⁸⁸ Of course, *Brower* states that it should only matter whether the dog was intentionally applied to *anyone*, not just to Maney.⁴⁸⁹ But the Fourth Circuit in *Maney* focused on the idea that the dog's first bite was not intentionally applied *at all*.⁴⁹⁰

The court explained that the dog was only supposed to bite under three circumstances: first, when the dog was commanded to bite; second, when the dog had found the person it was tracking; and third, when either the dog or its handler was attacked.⁴⁹¹ Though the facts indicate that the dog was not commanded to bite, and neither the dog nor its handler were attacked, the court should have found that unleashing the dog to bite someone it is commanded to track constitutes an intentional application of the dog. Much like a heat-seeking missile, the dog has

480. 681 F. App'x at 212–13.

481. *Id.* at 213.

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 214.

486. *Id.*

487. *Id.*

488. *Id.* at 218–19; *accord* *Montanez v. City of Orlando*, 678 F. App'x 905, 911–12 (11th Cir. 2017) (per curiam) (affirming officer's qualified immunity on the grounds that the dog, who allegedly bit Montanez because he fell on an officer, interpreted the movement as an attack against the officer and had not been intentionally applied to Montanez). *But see* *Hope v. Taylor*, No. 20-cv-196-T-33AAS, 2020 WL 1677315, at *3 (M.D. Fla. Apr. 6, 2020) (rejecting the defendant's contention that a dog had not been intentionally applied when it bit someone after an apprehension command because "[o]nce deployed, a police-dog is generally unable to discriminate between suspects and innocent parties and is generally trained to bite whomever it encounters, facts suggesting the officer's intention to seize whomever the dog ultimately does encounter" (quoting *Gangstee v. County of Sacramento*, No. S-10-1004, 2012 WL 112650, at *5 (E.D. Cal. Jan. 12, 2012))).

489. *See* *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989).

490. 681 F. App'x at 219.

491. *Id.* at 213.

been sent out to find a warm body, and if it does, it will bite.⁴⁹² Here, where the dog is on a leash, the officer may have theoretically had an opportunity to recall the dog before it bit someone, but in practice, that did not prevent the dog, sent on its mission, from biting. In these scenarios, the officer should be understood to have assumed the risk that the dog would bite and to have decided that the officer had sufficient knowledge at that time to justify a bite if it is made. The officer, then, is responsible for any error the dog makes. If the officer were not responsible for a dog's mistaken bites, the police would have no responsibility to constrain what are functionally semi-autonomous weapons⁴⁹³ regardless of the harms they cause.

The failure of police dogs to differentiate between people that may pose a threat and those that are merely bystanders is also related to the critical question of when force may be (and is) applied—one that *Graham* fails to answer.⁴⁹⁴ When an officer deploys a dog into a building or down a street, off leash and out of sight, knowing that dog is trained to bite and hold, the officer already should have determined that force is appropriate in that instance, because the officer will not have the opportunity to make a more informed, final determination about the appropriateness of force against the person the dog finds. In those situations, the use of a police dog can be analogized to the preemptive force of a spring gun left unattended to protect private property.⁴⁹⁵ While there may be someone harmful triggering the spring gun (or drawing the dog's bite), the failure to interpose human judgment at the critical moment the force is applied invalidates uses of force that may later be justified by unfolding events.⁴⁹⁶ Similarly, sending a dog into a building ahead of officers may be analogized to tasing the floor of the entire home. Although tasing one occupant who threatens the officers may be appropriate, unparticularized tasing of the entire building would not be.

Harmon argues that for police to use force on the basis of a threat, “visible manifestation” of that threat should be required.⁴⁹⁷ The assumption that someone *might* be armed—based on few or no articulable facts—is at the root of many

492. The Southern District of Indiana came to a similar conclusion in *Mitchum v. City of Indianapolis*, No. 19-cv-02277, 2021 WL 2915025, at *4–5 (S.D. Ind. July 12, 2021), concluding that a dog given a search command was intentionally applied to an innocent bystander but distinguishing cases in which a person had stepped unwittingly into the path of a dog that had “locked on” to a suspect or was tracking a particular scent.

493. One Baltimore K-9 officer described dogs as follows: “The dog is the most potent, versatile weapon ever invented. . . . You can’t shoot around corners, but dogs can go anywhere you direct them—like guided missiles. They never lose races.” Wall, *supra* note 113, at 865.

494. Harmon, *supra* note 317, at 1131.

495. A spring gun is a gun rigged to fire when triggered by a tripwire or other automated device. For a discussion of the lawfulness of people using spring guns to protect their property, see, for example, *State v. Green*, 110 S.E. 145, 148 (S.C. 1921); *Pierce v. Commonwealth*, 115 S.E. 686, 691 (Va. 1923); *State v. Beckham*, 267 S.W. 817, 820 (Mo. 1924); and *Katko v. Briney*, 183 N.W.2d 657, 659–61 (Iowa 1971) (collecting cases).

496. In the spring gun cases, an absent property owner—in contrast to a physically present owner—often had more difficulty demonstrating a justified fear of losing their life or suffering serious harm at the time the spring gun was used on an intruder. See, e.g., *Green*, 110 S.E. at 148.

497. Harmon, *supra* note 317, at 1170.

overzealous uses of police dogs.⁴⁹⁸ Of course, anyone could, in theory, be armed in the commission of even the most minor offense. In the absence of visual confirmation that the target of the police dog is actually a danger (or even actually the suspect), police should not send out a dog that will bite upon contact.

The case of Joseph Pettaway, a Black, Montgomery, Alabama handyman, illustrates the danger of sending a police dog ahead of officers based on unknown, unspecified risks. Pettaway had been working in a house for several days when the Montgomery Police Department (MPD) received a burglary-in-progress call for the location.⁴⁹⁹ Rather than investigating, officers sent a police dog into the otherwise-unoccupied house.⁵⁰⁰ The handler, MPD officer Nicholas Barber, waited about two minutes before removing the dog from Pettaway, who died from his bites.⁵⁰¹ When another MPD officer asked if Barber got “a bite,” Barber responded “F-- yea.”⁵⁰²

Barber decided to risk Pettaway’s life without any articulable facts that suggested imminent danger to the officer or to anyone else in the community. The facts available to the officer at the time he sent the dog after Pettaway would not have been enough to fire indiscriminately into the house with a gun (or even a less dangerous weapon, such as a Taser), but the dog was nonetheless deployed.⁵⁰³ The MPD had no policy responsive to the killing, but a Fourth Amendment framework that had been developed with the deadliness of police dogs in mind would not have relied on the department itself to put this use beyond justification. That constitutional law would make this use of force a close call is a judicial failure. The potential for police dogs to act alone must be weighted much more heavily in courts’ analyses of the dogs’ potential for enacting deadly force.

Having established that the law of police canine force facilitates discriminatory, disproportionate, and misdirected violence, I now turn to how the law and communities should respond to these harms.

IV. LEASHING THE DOGS OF FORCE

Police dogs are not unique in their disproportionate application to minoritized communities. And like other uses of force, it is difficult to hold police accountable for dog bites. Yet police dogs’ history and their capacity to act without or against officers’ instructions differentiates them from other uses of force. Courts

498. See Stole & Toohey, *supra* note 2 (highlighting K-9 officer who “contended officers don’t know in the moment whether a person might be armed,” but citing a review of dog deployments in Baton Rouge, which revealed that “in an overwhelming majority of cases, there was no evidence the people bitten by K-9s posed a grave threat” and “[a]lmost all were unarmed”).

499. Melissa Brown, *A Police Dog Killed Joseph Pettaway. His Family Now Fights for Body Cam Footage of His Final Moments*, MONTGOMERY ADVERTISER (Oct. 1, 2020, 11:03 AM), <https://www.montgomeryadvertiser.com/story/news/2020/10/01/joseph-pettaway-alabama-police-dog-family-fight-body-cam-footage/5802839002/>.

500. *Id.*

501. *Id.*

502. *Id.*

503. *See id.*

have so far failed to contend with these harms. Reformers may argue that fixing the doctrinal errors cataloged above and cabining police canine violence with stricter departmental policies would preserve this law enforcement weapon while better protecting individuals. While policies may reduce the harm caused by individual police departments,⁵⁰⁴ policies do not create a legal right and cannot support a legal remedy.⁵⁰⁵ Instead, policies at most allow for the possibility of administrative remedies when police violate those policies. Administrative remedies punish the person that harmed but do nothing to make the victim whole and do little to prevent future victimization.⁵⁰⁶

In police canine cases, properly understood, there are three legal rights at stake: the right to be free from excessive force, the right to equal protection of the laws, and the right to live free of the badges and incidents of slavery. A more careful application of *Graham* to police dog bites may remedy the harms of excessive force for individual plaintiffs, but it cannot adequately address the failures of equal protection to reach these cases, nor the failure of courts to consider the racialized history of canine policing. This Part will explore how the courts should apply the Thirteenth and Fourteenth Amendments to police canine force and how legislative bodies can respond where courts refuse to act.

A. APPREHENSION DOGS AS UNEQUAL PROTECTION

The past and present of canine policing disproportionately target Black people in the United States.⁵⁰⁷ Some police agencies argue that racial animus—implicit or explicit—does not drive canine policing, because police often release their dogs ahead of them without knowing the subject’s race.⁵⁰⁸ This is not always the case, of course; police have at least rough descriptions at least some of the time when they release their dogs. In addition, given residential segregation (both race- and class-based) in the United States, using police dogs in particular neighborhoods makes it far more likely that the dogs will bite people with certain characteristics, as they did in Los Angeles in the 1990s.⁵⁰⁹

504. See Wasilczuk, *supra* note 303, at 296–98 (describing harm reduction in the context of policing).

505. HARMON, *supra* note 277, at 511 (“Police policies are not like other legal rules that constrain officer conduct. Internal departmental rules do not provide private rights of action for members of the public, and they are usually unenforceable in court.”); see *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (concluding that a governmental policy—there, a restraining order—did not create protected property interest in its enforcement).

506. This is true even when administrative remedies are effective. Rachel Moran has documented how administrative discipline often fails to hold officers accountable. Rachel Moran, *Ending the Internal Affairs Farce*, 64 *BUFF. L. REV.* 837, 853–68 (2016). Ben Grunwald and John Rappaport have demonstrated that, in at least one state, disciplined officers often move on to other law enforcement jobs, where they are able to do more harm. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *YALE L.J.* 1676, 1716–26, 1734 (2020).

507. See, e.g., Loder & Meixner, *supra* note 5, at 12 fig.1 & tbl.2.

508. See, e.g., Sernoffsky & Fernandez, *supra* note 347 (quoting retired Los Angeles Sheriff’s Commander Sid Heal, saying, “We have no idea, is this guy male, female, black, white, large, small?”).

509. See Third Amended Complaint, *supra* note 211.

Unlike other forms of force, police-dog resource allocation holds higher risks for unequal distribution because most departments have a relatively small number of canine teams that can be deployed.⁵¹⁰ As a result, the decision of where and when to deploy those teams can have stark allocation effects. This also makes the potential for selection bias higher when a team is deployed. In addition, police may be more likely to deploy their dogs off leash in locations where they are less concerned with collateral damage, preferring to release dogs where the residents of the area are less politically connected or wealthy as opposed to in wealthy subdivisions.

The current state of equal protection jurisprudence fails to address facially neutral policies with disparate targeting and disparate effects. A more robust application of the Fourteenth Amendment, as Reva Siegel and others have proposed, would recognize that “core convictions about the meaning of equal protection can and do evolve over time.”⁵¹¹ Yet, as lawmakers abandoned explicitly racial justifications for regulations to conform with the Court’s anti-classificationist theory of equality, the “Court never revised doctrines of heightened scrutiny so that judicial review could detect latent bias in the forms of facially neutral state action that resulted.”⁵¹² Therefore, lawmakers and police administrators can adopt policies that continue to construct and reinforce racial hierarchies as long as they do so not because of, but in spite of, those racial effects.

In the area of police apprehension dogs, a more protective, anti-subordinating Equal Protection Clause jurisprudence would require departments whose canine policies result in excessive bites of minoritized people to justify those policies not merely by demonstrating that the departments are not motivated by racial animus, but instead that they have a compelling interest in the policy that cannot be achieved without those racial effects.⁵¹³ In general, the exercise of government

510. For example, the Los Angeles Police Department has approximately 23 members in its K-9 unit but almost 10,000 officers total as of 2020. *See K9 Unit*, L.A. POLICE DEP’T, <https://www.lapdonline.org/inside-the-lapd/k9/> [https://perma.cc/WZ6E-Q78R] (last visited Apr. 5, 2023); Carl Sullivan & Carla Baranauckas, *Here’s How Much Money Goes to Police Departments in Largest Cities Across the U.S.*, MILWAUKEE J. SENTINEL (June 26, 2020, 6:00 AM), <https://www.jsonline.com/story/money/2020/06/26/how-much-money-goes-to-police-departments-in-americas-largest-cities/112004904/>.

511. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997).

512. *Id.* at 1142.

513. This would be a form of strict scrutiny. Three levels of scrutiny apply to challenges under the Equal Protection Clause: strict or heightened scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny applies when a law infringes on a fundamental right or involves a suspect classification, including race. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002). To survive strict scrutiny, the challenged governmental action must further a “compelling governmental interest” and must be narrowly tailored to achieve that interest. *See, e.g.*, Kelso, *supra*, at 234. Intermediate scrutiny applies when a government action affects protected classes that are nevertheless not protected by strict scrutiny, such as gender. *Id.* at 234, 238. When a law affects these classes, it must further an important government interest and do so by means that are substantially related to that interest. *Id.* at 234. Finally, laws that do not involve fundamental rights or suspect classifications are subject only to rational basis review. *Id.* at 228. This

power to limit individual liberty interests must be justified by a government interest. So far, police have been allowed to claim that dogs achieve reductions in injuries to suspects, officers, and the public; more arrests for serious crimes; and lowered crime rates without having to prove that they do any of those things. In order to make these claims to justify the possession of a brutal weapon, police should have the burden of showing that their interest in using dogs is real rather than speculative.

Even under an equal protection jurisprudence that requires justification for facially neutral policies with disparate impacts, one could respond by “leveling up” force.⁵¹⁴ In that scenario, rather than reducing or eliminating the use of police biting dogs, departments could increase the use of dogs to ensure they bite a proportionate share of members of non-historically marginalized groups. As Aya Gruber explains, the problem with this remedy is that it “secur[es] fleeting equality gains . . . at the cost of preserving a historically and symbolically racist institution that imbues blackness with criminality.”⁵¹⁵ Gruber’s critique sounds in a historical grounding of the criminal legal system that recognizes that the system’s practices themselves contribute to the construction and maintenance of race and racial hierarchy.⁵¹⁶

The Court, especially as it exists today, is unlikely to advance an anti-subordinationist Fourteenth Amendment, especially when the envisioned remedy is abolition of a police practice. If, as Gruber persuasively argues, the driving force behind reticence to recognize equality claims in the context of the criminal legal system is not a fear of racial justice but a fear of too much leniency,⁵¹⁷ equality remedies are foreclosed when they do not converge with maintenance of a strong carceral state.⁵¹⁸

Courts’ opinions about police dogs reflect a similar tension. The underlying concern is not (or not just) racial justice. It is that if police dogs are not allowed to bite, too many criminals will escape, and the courts will be responsible because they took tools from law enforcement.⁵¹⁹ Even if true—and there is no evidence to support this—*Garner* stands for the proposition that “[i]t is not better that all felony suspects die than that they escape.”⁵²⁰ Yet in the context of canine bites, courts’ current jurisprudence suggests it *is* better that all felony suspects be mauled than escape. To preserve every possible tool for law enforcement, the courts take law enforcement at its word about unproven

form of review simply requires a law to further a legitimate state interest, and there must be a rational connection between the legitimate interest the law advances and the means by which it advances it. *Id.*

514. Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1367 (2018).

515. *Id.* at 1366.

516. *See supra* Section I.D.

517. *See* Gruber, *supra* note 514, at 1358–64.

518. *See id.* at 1341, 1366 (applying Derrick Bell’s theory of interest convergence to the criminal legal system).

519. *See* *Robinette v. Barnes*, 854 F.2d 909, 914 & n.6 (6th Cir. 1988).

520. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

empirical claims⁵²¹ and ignore that “this institution was born in and infused with discrimination.”⁵²² Instead, the courts should address canine policing’s entanglement with the institution of chattel slavery by analyzing canine policing claims under the Thirteenth Amendment, to which I now turn.

B. APPREHENSION DOGS AS BADGES AND INCIDENTS OF SLAVERY

The deficiency of Fourth Amendment and equal protection doctrine to redress the wrongs of contemporary policing has led scholars such as Brandon Hasbrouck to argue that racialized policing must be addressed as a badge and incident of slavery under the Thirteenth Amendment.⁵²³ William Carter, Jr., writing a decade earlier, called for a reinvigorated vision of the Thirteenth Amendment that would recognize badges and incidents of slavery claims when a plaintiff demonstrates that a policy or practice has two elements: “(1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution.”⁵²⁴ Carter argued that racialized policing’s “centrality” to chattel slavery “renders it a badge or incident of slavery when applied to any person who is singled out for law enforcement attention solely or primarily because of his or her identifiable membership in a feared or hated minority.”⁵²⁵ Carter argued:

Race-based criminal suspicion was crucial to the institution of American slavery in several ways. First, the myth of blacks’ inherent, criminal propensity (and, particularly, violent criminality) was key to dehumanizing the enslaved as “beasts” or chattel over whom brutal control was both needed and justified. Second, the various slave codes in force during slavery and the Black Codes that replaced them after the Civil War enshrined the connection between skin color and criminality into law. These codes added both the enforcement power and perceived legitimacy of the law to the customary stigmatization of blacks as inherently predisposed toward criminality. Third, these oppressive law enforcement practices were based upon explicit appeals to white fear and were thought necessary to ensure white safety.⁵²⁶

Canine policing closely fits Carter’s model. Biting dogs were a key technology of slavery and of the lynch mobs that used them during Jim Crow. Their

521. See Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 855–63 (2014) (describing the Supreme Court’s police-related fact-finding as more often than not relying on its own unsupported judgments). Courts’ reliance on police expertise is not just problematic in canine policing, where little data exists. See generally Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017) (describing courts’ reliance on police expertise in the contexts of expert testimony, probable cause, and vagueness analysis).

522. Gruber, *supra* note 514, at 1365.

523. Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1125 (2020).

524. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1366 (2007).

525. *Id.* at 1372.

526. *Id.* at 1373 (footnote omitted).

disproportionate use against Black Americans reinforces conceptions of Black criminality and places dogs on a hierarchy of humanity above their victims. And their use as a law enforcement weapon plays upon white fears, and those of police officers, that justify violence by claiming it is necessary to ensure white and police officer safety.⁵²⁷

The difficulty with Carter's understanding of racialized policing as a badge and incident of slavery, then, is perhaps the same trap into which equal protection claims often fall: the requirement that the law enforcement "attention" be premised "solely or primarily [on a person's] identifiable membership in a feared or hated minority."⁵²⁸ Rather than only recognizing racialized policing when joined with the smoking gun of animus,⁵²⁹ such as police wielding slurs or joining white supremacist groups, we must also be able to name it when it comes with the kind of prejudice that allows policies to persist "in spite of"⁵³⁰ the damage they will do to minoritized communities.

Carter's conception of the Thirteenth Amendment also recognizes that the badges and incidents of slavery can affect non-Black people in the United States. He allows for redress under the Thirteenth Amendment when the "particular injuries or forms of discrimination [are] so closely tied to the structures supporting or created by the system of slavery that the plaintiff's personal link to that institution becomes less determinative."⁵³¹ The history of canine policing, so deeply intertwined with the practices of chattel slavery, renders it a badge and incident of slavery regardless of the victim's race. It is not simply that dogs, like other instruments such as batons or whips, were used to victimize enslaved people.⁵³² Instead, the subordination of the bitten human to the predatory animal in the hierarchy of concern marks the type of dehumanization that the Thirteenth Amendment was meant to abjure. The injuries, physical mutilation, and degradation wielded to secure compliance are part of the "changing same" of racial-status-enforcing state action that has transformed from slavery to Jim Crow to today.⁵³³

527. Nikhil Pal Singh argues policing is a fundamentally white institution. Nikhil Pal Singh, *The Whiteness of Police*, 66 AM. Q. 1091, 1096 (2014) ("Neither blackness nor whiteness is in this sense strictly reducible to specific white people or black people. Rather, whiteness and blackness as well as other modern racial forms emerge as subject positions, habits of perception, and modes of embodiment that develop from the ongoing risk management of settler and slave capitalism, and more generally racial capitalism (i.e., capitalism).").

528. Carter, Jr., *supra* note 524, at 1372.

529. In some instances, these types of smoking guns come to light. In a deposition, Sergeant Marco Williams, a member of the Talladega Police Department, testified "that he heard Lt. Alan Kelly telling other officers, 'They wanted a dog that would bite a [n-word].'" Challen Stephens, *Police Wanted "a Dog that Would Bite a Black Person,"* MARSHALL PROJECT (Oct. 29, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/29/police-wanted-a-dog-that-would-bite-a-black-person> [https://perma.cc/6HGC-T2V4].

530. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

531. Carter, Jr., *supra* note 524, at 1369.

532. One might make broad-based arguments about the tools of enslavement in general, but I do not take up that issue here.

533. Gilmore, *supra* note 205; see Siegel, *supra* note 206.

Slave dogs prefigured police dogs.⁵³⁴ The refusal to acknowledge the extent and effects of the relationship between slave dogs and canine policing reflects the persistent erasure of Black perspectives and a refusal to view the violence of the criminal legal system from the perspective of the violated.⁵³⁵ For example, when Fraternal Order of Police President Keith Fangman refused to see the parallels between the Cincinnati Police Department's use of police dogs and those in Birmingham in 1963 because he said Cincinnati officers didn't release their dogs and say, "Go get 'em,"⁵³⁶ he ignored the cries of protestors and the DOJ investigation⁵³⁷ that showed that the Department's dog use might appropriately be described that way.

Police canine use is one of the least-studied forms of force, so there is little that can be said about it with certainty. But news reports that collate instances of police canine bites show that they are often used in the context of property crimes, sometimes even retail thefts.⁵³⁸ This use also parallels violence during chattel slavery: when enslaved people ran, it was a threat to both the racial order and to enslavers' property. This emphasis on control of Black people through control of property continued through Jim Crow, when Southern states passed severe penalties for property offenses.⁵³⁹ What's more, the use of police dogs at disproportionately high rates against Black people means that Black people continue to suffer an additional punishment for property offenses as compared to white people. While uses of force are typically not considered punishment, uses of force inflicted without the purpose of securing apprehension or gaining compliance should be considered punishment. Under those criteria, continued bites after a person has submitted and bites in confined spaces, including cars, where a person can neither escape nor comply during a dog attack, should rightly be understood as police-inflicted punishment, not as justifiable force.

A final connection between police dogs and the institution of slavery that must not be overlooked is use of dogs as a psychological weapon. When the St. Louis

534. See *supra* Sections I.A & I.B.

535. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

536. HINTON, *supra* note 122, at 276, 279.

537. See Cincinnati Memorandum of Agreement, *supra* note 150.

538. See, e.g., *We're Tracking Police Dog Bites Across the Country*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/17/we-re-tracking-police-dog-bites-across-the-country> [https://perma.cc/WUT6-WGNV] (last visited Apr. 5, 2023) (cataloging more than 150 incidents involving police dog bites); Fernandez, *supra* note 217 (describing and providing video of a police dog tearing off a woman's scalp in connection with a retail theft arrest); Ashley Remkus, *Alabama Police Dog Bites Man Accused of Shoplifting at Walmart. Doctors Perform 5 Surgeries to Save His Arm.*, AL.COM (Apr. 23, 2021), <https://www.al.com/news/2021/04/alabama-police-dog-bites-man-accused-of-shoplifting-at-walmart-doctors-perform-5-surgeries-to-save-his-arm.html> [https://perma.cc/2A5Y-95FH] (recounting the story of Derek Stokes, whose belly tissue was used to rebuild his arm after a police dog bit him in the course of a shoplifting arrest).

539. See *Slavery by Another Name: Pig Laws and Imprisonment* (PBS television broadcast Feb. 12, 2012), <https://www.pbs.org/video/slavery-another-name-pig-laws-and-imprisonment/> [https://perma.cc/W7WJ-UVGN]; SMITH, *supra* note 15, at 87.

Police Department says it selects German shepherds for the “supreme psychological effect on the people police seek to impress”⁵⁴⁰ and when Ken Licklider justifies the use of dogs at Abu Ghraib by saying that the people in U.S. custody are “very, very afraid of dogs,”⁵⁴¹ the police and military are admitting that they are weaponizing racial and cultural terror. Police dog attacks are traumatizing, whether one was previously fearful of dogs or not. The memories of racialized dog attacks, not “present” within white communities, are “present” and passed down as trauma in Black families.⁵⁴² This may explain part of why more Black Americans express fears of strange dogs than non-Hispanic white Americans.⁵⁴³ The intentional infliction of racial terror in Black communities calls for an elimination of police biting dogs as a badge and incident of slavery. To the extent that courts refuse to constrain police use of a badge and incident of slavery to inflict excessive force disproportionately against minoritized people in the United States, cities and states must step in to disarm police of dogs as weapons.

C. APPREHENSION DOG ABOLITION THROUGH MOVEMENT AND POLITICS

Litigation does not do enough to respond to the problem of police dogs. Despite decades of criticism, the courts have not adopted clarifying tests that impose more structure upon use-of-force analyses or adequately address the interests of those against whom force is being used. Police departments, rather than improving upon the reasonableness framework given to them by courts, have by and large adopted it verbatim, resisting any additional regulation or guidance that could constrain their officers.⁵⁴⁴ In litigation, both police departments and courts refuse to acknowledge the devastating injuries that police dogs inflict, and therefore courts continue to underestimate the government intrusion at stake. Likewise, the current federal courts are unlikely to adopt conceivable Thirteenth and Fourteenth Amendment remedies to address the racialized harms of police dogs. This Section explores how political solutions might change canine policing by creating pressure to change police policies and through movements toward reparation for historical harm.

540. CHAPMAN, *supra* note 21, at 36.

541. All Things Considered, *supra* note 140, at 01:46.

542. IFILL, *supra* note 91, at xvi–xvii (explaining that lynchings felt present to Black people on the Eastern Shore of Maryland while they were long forgotten by most white Marylanders).

543. See, e.g., Benoit Denizet-Lewis, *The People Who Are Scared of Dogs*, PAC. STANDARD (June 14, 2017), <https://psmag.com/social-justice/people-scared-dogs-86713> [<https://perma.cc/B765-LUTU>]; L. Kevin Chapman, Lauren Vines & Jenny Petrie, *Fear Factors: Cross-Validation of Specific Phobia Domains in a Community-Based Sample of African American Adults*, 25 J. ANXIETY DISORDERS 539, 543 (2011); ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY, at ix, 222–28 (1990) (describing Black cultural conventions around dogs in the author’s “Village-Northton” area of a city and describing that “[m]any working-class blacks are easily intimidated by strange dogs, either off or on the leash” and attributing “affection for dogs . . . [to] race more than class”); Maurice Chammah & Abbie VanSickle, *She Went Out for a Walk. Then Drogo the Police Dog Charged.*, MARSHALL PROJECT (Oct. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/10/15/she-went-out-for-a-walk-then-drogo-the-police-dog-charged> [<https://perma.cc/BZ4W-TZLV>].

544. Stoughton, *supra* note 306, at 523–24.

1. Police Policy

Local politics can pressure police policymakers to stop using police dogs for apprehension. The levers of this change may be multi-layered, and some initiatives may pursue a racial justice approach while others may try to persuade their local departments based on financial considerations. Some departments, seeing the controversial nature of police canine use and its liabilities, never implemented police apprehension dogs in the first place.⁵⁴⁵ In other departments, recent incidents have limited apprehensions, put them on hold, or ended them entirely. After a dog bit a Black man who was on one knee with his hands in the air in Salt Lake City in 2020, the mayor announced the dogs would not be used “to engage with suspects,” pending review.⁵⁴⁶ In Washington, D.C., after a police dog from nearby Takoma Park, Maryland, bit a Black woman who was out walking her dog,⁵⁴⁷ the Takoma Park community debated whether to continue funding its K-9 unit.⁵⁴⁸ In the interim, the previous dogs were retired because of age.⁵⁴⁹ Despite objections from the city’s police chief,⁵⁵⁰ the city council decided not to provide funding to purchase any new dogs.⁵⁵¹ And in Baton Rouge, after reporters revealed a pattern of police dog bites against Black children, it took less than twenty-four hours for the mayor to prohibit the dogs’ use against kids unless there was an “immediate threat.”⁵⁵² While not all of these changes are permanent, they show that revelations about what apprehension dogs are actually doing can create political pressure and effect change. Cities that have abandoned dogs for apprehension purposes can provide models of policing for those that are seeking to repair community relationships and address the harms police dogs cause.

A recent study tested what happens when a police agency suddenly suspends its use of apprehension dogs.⁵⁵³ The study tested the claims that police dogs

545. *E.g.*, Sernoffsky & Fernandez, *supra* note 347 (“The city of Berkeley opted against K-9s in the 1970s to avoid all the trouble that comes with them, said East Bay civil rights attorney Jim Chanin.”).

546. Johnny Diaz, *Salt Lake City Suspends Use of Police Dogs in Arrests After Black Man Is Bitten*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/08/13/us/salt-lake-city-police-dog.html>.

547. Chammah & VanSickle, *supra* note 543.

548. *See* CITY OF TAKOMA PARK, TASK FORCE TO REIMAGINE PUBLIC SAFETY, REPORT JULY 2021, at 31 (2021), https://documents.takomaparkmd.gov/initiatives/project-directory/Reimagined%20Public%20Safety/uploads_0721/takoma-park-task-force-to-reimagine-public-safety-report-2021-07-13.pdf [<https://perma.cc/WQZ8-PPPE>]; *City Council Budget Work Session - Monday, April 25, 2022*, CITY OF TAKOMA PARK, <https://takomapark.ompnetwork.org/sessions/243217?embedInPoint=5839&embedOutPoint=12155&shareMethod=link> [<https://perma.cc/7A78-Q3RX>].

549. Letter from Antonio B. DeVaul, Takoma Park Police Chief, to Mayor and Councilmembers of Takoma Park, Maryland 1 (Apr. 7, 2022), https://documents.takomaparkmd.gov/government/city-council/agendas/2022/supplemental-documents/Chief-DeVaul-memo-to-council-on-TPPD_K-9-04072022.pdf [<https://perma.cc/HUF6-JU26>].

550. *See id.* at 1–6.

551. Takoma Park City TV, *City Council Budget Work Session - Monday, May 2, 2022*, at 1:30:24, YOUTUBE (May 2, 2022), <https://www.youtube.com/watch?v=6L7I3TpI2EI> (deciding voting member of the city council stating she is voting to take the K-9 unit out of the budget).

552. WBRZ Staff, *BRPD Revising Policy for Chasing Juvenile Suspects with Police Dogs*, WBRZ2 (Feb. 12, 2021, 12:52 PM), <https://www.wbrz.com/news/brpd-revising-policy-for-chasing-juvenile-suspects-with-police-dogs/> [<https://perma.cc/FZ53-858Q>].

553. Adams et al., *supra* note 6, at 12.

improve officer safety, improve arrestee safety, and reduce the likelihood that people will resist arrest.⁵⁵⁴ The study found no effect on frequency of officer injuries, suspect injuries, or suspect resistance.⁵⁵⁵ It should be noted with respect to both officer and arrestee injuries, the type and severity of injuries were not studied, only the incidence of any injury. This study seems to indicate that alternative forms of force are an adequate substitution for police dogs, though additional studies would help test this claim.

Further proof that police dogs don't have to bite comes from agencies where use-of-force policies limit dog bites so much that they become virtually nonexistent. Take, for example, the New Orleans Police Department (NOPD), which came under fire (and a consent decree) for high bite rates, particularly against Black New Orleanians. In 2010, the DOJ recommended a suspension of the NOPD canine unit because the dogs were out of control, resulting in bite rates as high as six in ten apprehensions.⁵⁵⁶ The dogs had also bitten their handlers, who could not restrain them.⁵⁵⁷ In the interim, NOPD limited its dogs to being used as weapons only when there were specific and articulable facts that a person was an imminent danger to the officers or the community.⁵⁵⁸ The policy also forbade the dogs' use as weapons against children who "pose no immediate threat of serious injury to the officer or others."⁵⁵⁹ Since the handlers and dogs were retrained and the new guidelines were put in place, NOPD has reported four bites in 2016, no bites in 2017, 2018, or 2019, three bites in 2020, and one bite in 2021.⁵⁶⁰ Canine deployments have also dropped from a high of forty-two in 2015 to no more than seventeen in 2017 through 2021.⁵⁶¹

While some might argue that this demonstrates that police canine bites can be used responsibly, even a department with few bites can be prone to their racialized application. For instance, a reduction in bites sometimes increases racial disparities, as has been the case in Portland.⁵⁶² Moreover, if dogs are used to bite infrequently (or not at all), the cost of maintaining the dogs and training them as weapons becomes unjustifiable.⁵⁶³ Instead, the police department can train and

554. *Id.* at 8–11.

555. *Id.* at 18–20 tbl.2.

556. NEW ORLEANS INVESTIGATION, *supra* note 152, at 7.

557. *Id.* at 6–7 ("One dog attacked its handler twice over the period of a few hours while we were on site in October 2010.")

558. NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL, Ch. 41.22 ¶¶ 7–8 (2018), <https://nola.gov/getattachment/NOPD/Policies/Chapter-41-22-Canine-EFFECTIVE-4-01-18.pdf?lang=en-US> [<https://perma.cc/MD6J-S9PZ>].

559. *Id.* ¶ 11.

560. NEW ORLEANS POLICE DEP'T, 2021 USE OF FORCE ANNUAL REPORT 21 tbl.21 (2022), <https://nola.gov/nola/media/NOPD/Consent%20Decree/2021-Use-of-Force-Annual-Report.pdf> [<https://perma.cc/7VVN-WPNC>].

561. *Id.*

562. Jensen, *supra* note 12.

563. Departments with stricter force policies like NOPD often have fewer bites. Similar contrasts can be seen in Bay Area police departments. While the San Jose Police Department had 167 bites over a five-year period, San Francisco and Oakland, both subject to more stringent use-of-force policies, had two and thirteen, respectively. Sernoffsky & Fernandez, *supra* note 347. Indeed, two agencies, the

maintain dogs used to search for drugs, explosives, or missing people without having to overcome the resistance of dogs to learning to bite people and without the grave risk to the public that police apprehension dogs pose.⁵⁶⁴

Insurers may also play an important role. In some jurisdictions, law enforcement agencies have had to change their approaches to high-speed chases, chokeholds, or de-escalation due to pressure from private insurance companies, who have said they would cancel coverage or not provide it in the first place if the departments did not change their ways.⁵⁶⁵ In small to mid-size cities with canine force problems, insurers could play a similar role in ending canine bites or at least restricting the circumstances under which they can be used.

Police dogs represent a significant cost: one that policing agencies have sometimes turned to charities or private grants to fund. K9s4Cops, a foundation that funds start-up costs for police dog units, says that an individual dog costs between \$15,000 and \$45,000 dollars.⁵⁶⁶ The Stanton Foundation, which funds a first dog program “[a]s part of its ongoing mission to support positive human/dog relationships . . . [and] increase the number of communities with K9 units,”⁵⁶⁷ estimates a \$32,000 start-up cost for the establishment of a canine unit.⁵⁶⁸ Once trained, police canines also have short careers—usually about six

Berkeley Police Department and the Marin County Sheriff’s Office, do not keep biting dogs. Sernoffsky, *supra* note 12.

564. For a detailed explanation of how police dogs must be trained to bite people rather than the decoy suit and to continue to engage despite resistance, see Mike Suttle, *K9 Dog Bite Work Training Guide for Police and Military*, RAY ALLEN MFG. (June 15, 2016), <https://www.rayallen.com/blog/k9-dog-bite-work-training-guide-for-police-and-military/> [<https://perma.cc/CTH4-4YU9>] and Jerry Bradshaw, *Focusing Your Patrol Dog on Human Apprehension*, POLICE K-9 MAG., Mar.–Apr. 2008, at 33. There is a great deal of uncertainty about what policing activities dogs are most useful for, and the bias of handlers plays a role in the accuracy of dogs’ work sniffing drugs. See Martin Kaste, *Eliminating Police Bias When Handling Drug-Sniffing Dogs*, NPR (Nov. 20, 2017, 5:01 AM), <https://www.npr.org/2017/11/20/563889510/preventing-police-bias-when-handling-dogs-that-bite> [<https://perma.cc/3PE8-ZE5C>]; Lisa Lit, Julie B. Schweitzer & Anita M. Oberbauer, *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 387, 391 (2011). Drug dogs, too, can be used as racially biased policing tools. See THOMAS V. MANAHAN, SIXTH SEMI-ANNUAL PUBLIC REPORT OF AGGREGATE DATA SUBMITTED PURSUANT TO THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE, at exhibit G (2002) (including drug dogs). Dogs trained to apprehend can also be dangerous when used to track. See *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348, 352–53 (4th Cir. 2010) (describing how a missing child was bitten by police dog when police decided to send bite-and-hold dog rather than bloodhound to find the child).

565. See Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It*, WASH. POST (Sept. 14, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform/>.

566. *Why We Exist*, K9S4COPS, <https://k9s4cops.org/why-we-exist/> [<https://perma.cc/U7XL-CSB7>] (last visited Apr. 6, 2023).

567. *First Dog Program*, STANTON FOUND., <https://thestantonfoundation.org/canine-welfare/k9-programs/first-dog> [<https://perma.cc/736S-FFJK>] (last visited Apr. 6, 2023). The Foundation lists its current First Dog Program participants on its website. See *Current Participants, First Dog Program*, STANTON FOUND., <https://thestantonfoundation.org/canine-welfare/k9-programs/first-dog/participants> [<https://perma.cc/MQE9-WZ69>] (last visited Apr. 6, 2023).

568. STANTON FOUND., MODEL BUDGET FOR ESTABLISHMENT OF K-9 UNIT (2021), https://thestantonfoundation.org/assets/home/Updated-Model-Budget_2021-10-27-124939.pdf [<https://perma.cc/E6GY-8RNB>]. Interestingly, the Stanton Foundation’s program will only fund dual-certified (apprehension and detection) dogs, and the Foundation specifically addresses the notion that some

years.⁵⁶⁹ The costs of purchasing dogs and replacing those who retire are just the beginning. Though many canine force suits are unsuccessful, the costs of litigation and settlement based on police dog injuries can still amount to a financial burden for departments.⁵⁷⁰ In addition to grant funding, agencies often turn to public fundraising. One grant writer encourages departments to “[c]onsider scout troops, school groups, business and fraternal organizations, or even local businesses” and notes that departments have sold K-9 calendars and stuffed animals to raise money for their canine units.⁵⁷¹

Though some police make the argument that if police canine force is unavailable when a person runs from the police, they will be forced to shoot,⁵⁷² that is probably not the case. First, it is clear from case law that in many of the scenarios in which officers use police dogs, they would not be justified in using their firearms.⁵⁷³ Second, while some studies show that intermediate force weapons can reduce injuries to officers and civilians,⁵⁷⁴ a study of the Chicago Police Department’s use of Tasers showed no substitution effect.⁵⁷⁵ Instead, due to the

departments find that “a shepherd seems too heavy handed” and would prefer “a friendly Labrador.” *FAQ, First Dog Program*, STANTON FOUND., <https://thestantonfoundation.org/canine-welfare/k9-programs/first-dog/faq> [<https://perma.cc/9S9Y-JQ5J>] (last visited Apr. 6, 2023).

569. Linda Gilbertson, *How to Start and Fund a Police K-9 Unit*, POLICE1 (Feb. 7, 2019), <https://www.police1.com/k-9/articles/how-to-start-and-fund-a-police-k-9-unit-94keHTkGMPY5eHkA/> [<https://perma.cc/Q9NP-GWPV>].

570. See, e.g., Associated Press, *York Releases Video Showing Police Dog Attack that Led to \$325,000 Settlement*, PRESS HERALD (Jan. 14, 2022), <https://www.pressherald.com/2022/01/13/york-releases-video-showing-police-dog-attack-that-led-to-325000-settlement/> (describing a \$325,000 settlement in police dog bite case); Gennady Sheyner, *Palo Alto Owes \$135K to Victim of Police Dog Attack*, PALO ALTO ONLINE (Jan. 5, 2022, 2:39 PM), <https://www.paloaltoonline.com/news/2022/01/05/palo-alto-owes-135k-to-victim-of-police-dog-attack> (documenting a \$135,000 settlement for a police dog bite of a man sleeping in a shed); Associated Press, *San Diego to Pay \$600K to Woman Who Was Severely Injured in Police Dog Attack*, NBC NEWS (Sept. 20, 2022, 1:17 PM), <https://www.nbcnews.com/news/us-news/san-diego-pay-600k-woman-was-severely-injured-police-dog-attack-rca48574> [<https://perma.cc/NT8S-RDQP>] (describing \$600k settlement with a woman that was attacked in her yard after a police dog escaped from its trainer’s yard); Richard H. Polsky, *Animal Behavior Expert Opinion in Lawsuits Stemming from Dog Bites by Police Canines*, ANIMAL BEHAV. COUNSELING SERVS., INC., <https://www.dogexpert.com/verdicts-settlements-police-dog-bite-lawsuits/> [<https://perma.cc/A8GD-L7YM>] (last visited Apr. 6, 2023) (noting settlements reached in cases in which Dr. Polsky served as an expert, including a \$1.5 million settlement resulting from the police dog attack of an eighty-nine-year-old man who later died, possibly as a result of his injuries); Walsler, *supra* note 471 (revealing that \$1.8 million had been paid out by Tampa Bay-area departments as a result of police dog bites since 2016). Given that there is no national tracking of police dog bite injuries or deaths, there is no way to know the total cost of police dog bite litigation and settlements in the United States.

571. Gilbertson, *supra* note 569.

572. See, e.g., Stole & Toohey, *supra* note 2 (quoting Baton Rouge Police Department spokesperson as saying that, with dogs, police are able to “us[e] less lethal (force) to take [suspects] into custody as opposed to maybe having to elevate it to possibly lethal force”).

573. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (requiring the officer to have “probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others” in order to deploy deadly force to stop a fleeing felon).

574. See STOUGHTON ET AL., *supra* note 184, at 212 (noting that research shows that, relative to other uses of force, electric control weapons such as Tasers reduce rate and severity of officer and suspect injuries when deployed correctly).

575. Bocar Ba & Jeffrey Grogger, *The Introduction of Tasers and Police Use of Firearms: Evidence from the Chicago Police Department*, 109 AEA PAPERS & PROC. 157, 159 (2019).

increased use of Tasers but no decrease in use of firearms, overall use of force increased when Tasers were introduced.⁵⁷⁶ This lack of substitution of Tasers for firearms calls for further study of whether police use dogs when they would otherwise use firearms.

The trajectory of police dog use for cell extractions may also provide a roadmap for reduction or elimination of police apprehension dogs. In the context of carceral facilities in the United States, there is a well-known history of dog use for perimeter patrol and contraband detection.⁵⁷⁷ In 2006, Human Rights Watch documented five states that used dogs for another purpose: cell extraction.⁵⁷⁸ That same year, two states, Arizona and Massachusetts, stopped using dogs for cell extractions.⁵⁷⁹ In most cell extraction procedures using dogs, the dog and its handler first enter a cell block with the dog barking loudly and jumping against the cell door and window.⁵⁸⁰ The dog's behavior "is intended to terrify and intimidate the prisoner into compliance," and if he does not comply, the dog is sicced on the prisoner, biting whatever part of the prisoner it can grab first with a "full-mouth bite."⁵⁸¹

Like police dog apprehensions, bites during cell extractions can cause serious injuries.⁵⁸² Unlike police dogs, however, prison officials tend to oppose the use of dogs, believing there are other, better options available and noting "that dogs are different; they cannot simply be considered as another way of exercising force over a prisoner; that there is something inherently troubling about the use of a trained attack dog to bite prisoners."⁵⁸³ In addition to Arizona and Massachusetts, Oregon banned the use of dogs for cell extractions in 2019 after a lawsuit, and the same year, the military revised its regulations to ban dogs from guarding detainees and prisoners or being used to intimidate or threaten them.⁵⁸⁴

That has not meant change is unidirectional. Human Rights Watch's 2006 report does not document dog attacks on prisoners in Virginia, but two 2021 lawsuits reveal longstanding complaints about the use of attack dogs against people

576. *Id.*

577. See HUM. RTS. WATCH, CRUEL AND DEGRADING: THE USE OF DOGS FOR CELL EXTRactions IN U.S. PRISONS 1, 5 n.3 (2006), <https://www.hrw.org/reports/2006/us1006/us1006web.pdf> [<https://perma.cc/48SV-6WGD>].

578. *Id.* at 8 (listing Connecticut, Delaware, Iowa, South Dakota, and Utah as states still permitting cell extractions with dogs).

579. *Id.*

580. *Id.* at 5.

581. *Id.*

582. *Id.* at 7 ("I raised my left hand to block the dog's bite and it sank its teeth completely through my hand . . . My left hand has suffered permanent damage. I lost a lot of feeling in my middle and ring fingers and I have a 'pin & needles' feeling in my index finger and thumb. This is due to multiple nerves being severed from the dog bite.").

583. *Id.* at 14; *see id.* at 12–15.

584. Theresa Vargas, *Virginia Is Using Dogs to 'Terrify and Attack' Prisoners, Say Lawsuits that Describe One Man as Mauled in His Cell*, WASH. POST (Mar. 6, 2021, 12:00 PM), https://www.washingtonpost.com/local/virginia-is-using-dogs-to-terrify-and-attack-prisoners-say-lawsuits-that-describe-one-man-as-mauled-in-his-cell/2021/03/06/db035be8-7e17-11eb-85cd-9b7fa90c8873_story.html; Michael Rollins, *Bill Banning Use of Dogs to Remove Inmates from Cells Signed by Gov. Brown*, KGW8 (June 12, 2019, 10:10 AM), <https://www.kgw.com/article/news/bill-banning-use-of-dogs-to-remove-inmates-from-cells-passes-senate/283-3ada03db-76f2-4b3f-9c48-2774a6b55817> [<https://perma.cc/ZH4T-WZRE>].

in the state's prisons.⁵⁸⁵ It remains to be seen whether the lawsuits will prompt changes to Virginia policy.

Of course, policy change does not just happen. The instances cataloged above all occurred after reporting that showed egregious and extreme police dog bites. Instances like these have led popular media to question whether police dogs' use as weapons can survive an era in which the goriness of these attacks is made widely available to the public, either through body camera footage or bystander videos.⁵⁸⁶ But the countervailing forces are also strong. In Takoma Park, police told the public that dispensing with the K-9 unit meant taking away a tool to protect innocents from "violent offenders."⁵⁸⁷ While Takoma Park still got rid of its dogs, fears of crime, so prevalent in American politics, are likely to result in different choices in some communities,⁵⁸⁸ especially with the dearth of data to clarify dogs' costs and benefits. Whether the focus is on egregious bites or exceptional apprehensions, a lack of comprehensive information makes democratic deliberation more difficult. As Julie Sze points out, these "spectacles of excess," while drawing attention to the technology of police dogs, can hide the normalized, "typical and accepted conditions of life and death."⁵⁸⁹ A focus on situations in which police dogs kill can contribute to the "misconception that the killings are the anomalous, unauthorized acts of rogue officers" or dogs.⁵⁹⁰ This diverts attention from normalization of dogs as weapons in departments that have frequent bites, and casts individual blame on officers and dogs without recognizing the framework that facilitates these outcomes.⁵⁹¹

585. See Vargas, *supra* note 584; John Kiriakou, *Prisoners Sue Virginia Department of Corrections Over Canine Attacks*, REASON (Nov. 22, 2021, 10:00 AM), <https://reason.com/2021/11/22/prisoners-sue-virginia-department-of-corrections-over-canine-attacks/> [<https://perma.cc/V26M-XVUB>].

586. Kaste, *supra* note 454. For videos portraying police dog violence, see VanSickle et al., *supra* note 177. Content warning: the videos are graphic and upsetting. Advocates against dog use for hunting humans have long used images to make their point. In Marcus Rainsford's 1805 *An Historical Account of the Black Empire of Hayti*, the author used images to show the "horror" of using "bloodhounds to hunt and kill enemies of war." Johnson, *supra* note 28, at 66. Sara Johnson writes that Rainsford's "stated purpose was to 'excite the detestation he urges against the very idea of ever again introducing these animals under any pretexts to the assistance of an army.'" *Id.*

587. Kevin Lewis, *Takoma Park City Council Juggles Whether or Not to Fund Police K9 Unit in Its FY 23 Budget*, 7NEWS (Apr. 26, 2022, 6:53 PM), <https://wjla.com/news/local/takoma-park-police-department-k9-unit-dog-city-council-debate-funding-budget-chief-antonio-devaul> [<https://perma.cc/K22K-SFPN>].

588. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–24 (2001); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 107 (2019). The media's "bad news bias" likely exacerbates public perceptions of danger. See German Lopez, *A Drop in Murders*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/briefing/crime-data-us-mass-shootings.html>.

589. Sze, *supra* note 347, at 61, 67.

590. Ristroph, *supra* note 212, at 1184.

591. See PHILLIP ATIBA GOFF, ELIZABETH HINTON, TRACEY L. MEARES, CAROLINE NOBO SARNOFF & TOM R. TYLER, RE-IMAGINING PUBLIC SAFETY: PREVENT HARM AND LEAD WITH THE TRUTH 9 (2019), https://law.yale.edu/sites/default/files/area/center/justice/re-imagining_public_safety_final_9.10.19.pdf [<https://perma.cc/TK5A-7JJJ>].

2. Reparations

Changes to police dog policies may have the greatest effect when paired with departmental commitments to acknowledge, apologize for, and take steps to repair the historical harms of policing. Police dogs, like police officers, have been “face[s] of oppression, enforcing laws that ensured legalized discrimination and denial of basic rights.”⁵⁹² These harms have not been, and cannot be, addressed only through litigation. As Alexis Karteron demonstrates, even when individual litigants manage to jump through the many hoops required to receive damages for police violence, those damages do little to address collective or cultural trauma and rarely spur forward-looking change.⁵⁹³ As a result, Karteron proposes a robust conception of reparations for police violence as a complement to litigation efforts.⁵⁹⁴ Given police apprehension dogs’ legacy, their abolition should be one component of repair. Though this repair would be most effective at the federal level, the current state of U.S. politics suggests that states or localities would be more likely to prohibit police apprehension dogs.⁵⁹⁵

The Constitution grants Congress authority to prohibit police apprehension dogs as a badge and incident of slavery.⁵⁹⁶ In addition to models put forth by Hasbrouck and Carter, more than two hundred years of sustained use of dogs to disproportionately harm minoritized people in the United States and around the world to secure imperial projects demonstrates the entanglement of canine policing with oppression and dispossession. Canine policing, as an institution, constructs and reinforces racial hierarchies in the communities where it operates, excluding Black and other minoritized people from civic space and discourse.⁵⁹⁷ The institution revives and embodies generational trauma and struggle and pushes some to the margins at the expense of the security—real or imagined—of others.⁵⁹⁸

592. *Id.* at 8 (describing 2016 remarks of Terrence Cunningham, president of the International Association of Chiefs of Police, apologizing “for the historical mistreatment of communities of color”).

593. Alexis Karteron, *Reparations for Police Violence*, 45 N.Y.U. REV. L. & SOC. CHANGE 405, 411 (2021).

594. *See id.* at 420–25. In some communities, reparations will require more than policy change or ending apprehension dog programs. In places where police dog violence has been widespread, and especially in places where it has direct connections to controlling movements for liberation, the programs of reparations in Chicago and Philadelphia can provide examples of paths forward. *See id.* at 422–25. Public apologies, mental health services, and more robust school curricula are among the changes that could be considered. *See id.*

595. For example, the U.S. Congress could not pass the George Floyd Justice in Policing Act, which took more modest steps toward police reform. *See Bipartisan Negotiations on Capitol Hill Failed to Produce a Police Overhaul Bill*, NPR (Sept. 24, 2021, 5:20 AM), <https://www.npr.org/2021/09/24/1040353440/bipartisan-negotiations-on-capitol-hill-failed-to-produce-a-police-overhaul-bill> [<https://perma.cc/VC8E-Z275>]. It was not until 2022 that Congress made lynching a federal hate crime. *See Eric McDaniel & Elena Moore, Lynching Is Now a Federal Hate Crime After a Century of Blocked Efforts*, NPR (Mar. 29, 2022, 4:36 PM), <https://www.npr.org/2022/03/29/1086720579/lynching-is-now-a-federal-hate-crime-after-a-century-of-blocked-efforts> [<https://perma.cc/NH98-XA3K>].

596. *See, e.g.*, Hasbrouck, *supra* note 523, at 1125.

597. *See supra* Part I.

598. *See Ristroph, supra* note 212, at 1218–19 (“The constitutional doctrine that purportedly regulates these police forces may not reflect racial animus, but it does reflect a normative judgment

The American people should decide if unproven claims of policing benefits are worth the expenditure of time, money, and humanity that we forfeit through the continued employment of apprehension dogs. The history of police canine force is a history of racism's "changing same."⁵⁹⁹ A case-by-case balancing test takes the onus off us, as residents of the United States, for the ghastliness of asserting our interests in apprehension and prosecution with maulings,⁶⁰⁰ but we should not be let off so easily. Though police dogs' history may not be enough to compel Congress to act, the racialized terror and injuries inflicted by police dogs and their slave dog predecessors can be used to convince state and local legislative bodies—and perhaps even police departments themselves—that healing racial and cultural trauma and repairing past wrongs includes ending the use of dogs to apprehend people.⁶⁰¹

Some police departments have seen the importance of acknowledging their role in racialized oppression, though their efforts and success have been uneven.⁶⁰² In Stockton, California, a series of changes including truth and reconciliation processes have shown promise.⁶⁰³ Meanwhile, in Portland, though police executives see the value in apologizing for past wrongdoing, the police union has fought against the proposition that their members should take accountability for acts for which they are not directly responsible.⁶⁰⁴ Changes in leadership can also quash progress.⁶⁰⁵ Nevertheless, a discussion that surfaces generational, cultural, and historical harm has value for addressing a fraught topic such as police dogs, about which both sides have strongly-held beliefs. A truth and reconciliation process that confronts the blood stains borne by police canine units may also help police departments more honestly evaluate how the dogs' symbolism and historic

about the distribution of violence: The perceived gains in public safety and 'effective law enforcement' of expansive police authority are worth the costs that this authority imposes on persons of color.").

599. Gilmore, *supra* note 205.

600. See Stoughton, *supra* note 1, at 323 ("Treating police violence as a static, hygienic exercise of government authority insulates society from the consequences of its approval, unfairly shifting disapproval for police actions onto individual officers instead of the society that condoned some abstract understanding of what they would be doing. It allows society to overlook or ignore the raw reality of police violence, freeing the public from having to confront difficult regulatory questions about where and how to draw lines that separate permissible and impermissible behavior.").

601. Cf. Bryan Stevenson, *We Need to Talk About an Injustice*, TED, at 08:38 (Mar. 5, 2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice [<https://perma.cc/W8HF-7PFA>] (describing racial terror against Black Americans and the need for truth and reconciliation to address that history).

602. See, e.g., Jonathan Levinson, *Portland Looks for Firm to Lead "Truth and Reconciliation" Process with Police Bureau*, OPB (Oct. 7, 2022, 6:51 PM), <https://www.opb.org/article/2022/10/07/portland-city-council-mayor-ted-wheeler-police-bureau-excessive-force-committee-reconciliation/> [<https://perma.cc/2VL8-BGMA>] (describing Portland's proposal for a truth and reconciliation commission); Michael Friedrich, *A Police Department's Difficult Assignment: Atonement*, BLOOMBERG: CITYLAB (Oct. 23, 2019, 1:06 PM), <https://www.bloomberg.com/news/articles/2019-10-23/what-police-community-reconciliation-can-look-like> (surveying the Stockton, California and Birmingham, Alabama police departments' efforts at truth and reconciliation).

603. See Friedrich, *supra* note 602; GOFF ET AL., *supra* note 591, at 8.

604. See Levinson, *supra* note 602.

605. See Friedrich, *supra* note 602 (noting that a change in leadership hampered continued reconciliation efforts in Birmingham).

use should be weighed when determining the costs and benefits of apprehension dogs. Ultimately, the only way to distance police dogs from their historical use may be to discontinue their weaponization.

CONCLUSION

Police biting dogs have never been proven to lower crime rates, reduce officer or arrestee injuries, or increase arrests for serious crimes. Nevertheless, courts resist curbing their weaponization in the face of the gory injuries they inflict and their disproportionate use against minoritized people. In the United States, these dogs come from a long line of attack dogs bred to terrorize and maim Indigenous, Black, and Latine people and were used by settlers, slave catchers, white supremacists, and militaries from the 1600s through the Civil Rights Era to today.

Federal courts have tools to rein in apprehension dogs: the Fourth Amendment could treat dogs as deadly force, the Thirteenth Amendment could prohibit biting dogs as badges and incidents of slavery, and the Fourteenth Amendment could require police to justify their use of policies with disparate harms. For all the law could do, courts' current orientation toward police violence, equal protection, and the badges and incidents of slavery suggest the most immediate path to change is through political action. Data gathering and reporting will be central to making the case to abolish police dog apprehensions. Only once people know and understand the history and brutality of police dogs will the terrorizing and maiming cease.⁶⁰⁶

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606. Roberts, *supra* note 201, at 76.