

FIDO'S FIDUCIARY: WHY THE EXIGENT CIRCUMSTANCES EXCEPTION SHOULD BE EXTENDED TO COVER WARRANTLESS SEARCHES AND SEIZURES RESULTING FROM A THREAT TO ANIMAL LIFE

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Over thirty years ago the Supreme Court held that “[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.”¹ Today, however, there is still confusion about what procedures animal control officers must follow when the search of a property and the subsequent seizure of an animal are necessary due to abuse or neglect. In these situations, rescue is often delayed because officers are uncertain if the presence of emergency circumstances permits a warrantless search or seizure, or if these actions violate the Fourth Amendment. While a few courts have explicitly extended the emergency circumstances exception to cases involving threats to animal life, all courts should take this step, assuring that the protection of life is not hindered by the fear that crucial evidence will be excluded from court.

Part I of this paper presents an argument for the extension of the exigent circumstances exception to cases involving a threat to animal life. This argument is based on both the legal standard that applies to warrantless search and seizure cases and the policy rationale behind this requirement. Part II discusses the special issues that arise from applying this standard to cases involving animals. This analysis is necessary because animals are legally classified as personal property under state law and have no legal rights of their own.² Part III examines the important role that trial judges play in Fourth Amendment cases. This part looks specifically at

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¹ *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J.)).

² *See e.g.*, *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49-50 (D.Mass. 1993) (“[a]nimals are treated as the property of their owners, rather than entities with their own legal rights.”).

Commonwealth v. Hurd,³ a Massachusetts animal abuse case that hinged on the warrantless search of the defendant’s property, and the subsequent warrantless seizure of his dogs.⁴ The *Hurd* court ruled that the exigent circumstances exception did not apply to the facts as presented, but did not decisively resolve whether it could ever apply to a case involving an imminent threat to animal life.⁵ This paper argues that if the *Hurd* court had examined the facts more closely, it would have found that exigent circumstances were present and that the application of the emergency exception doctrine was appropriate.

I. LEGAL BASIS FOR THE EXIGENT CIRCUMSTANCES EXCEPTION

A. *Standard of Judgment*

The Fourth Amendment of the United States Constitution protects all citizens against “unreasonable searches and seizures”⁶ by government actors.⁷ Searches and seizures conducted without a warrant “are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.”⁸ One such exception, known as the “exigent” or “emergency circumstances” exception, permits warrantless searches or seizures conducted in response to a perceived “need to assist persons who are seriously injured or threatened with such injury.”⁹ Seven states and the District of Columbia have extended the

³ 743 N.E.2d 841 (2001).

⁴ *Id.* at 843 (“Prior to trial, the defendant filed a motion to suppress all evidence obtained as a result of a search of his premises. . . .”).

⁵ *Id.* at 846 (“Even were we to assume, without deciding, that the emergency principle does extend to animals, we hold that no such exception applied here.”).

⁶ U.S. CONST. amend. IV.

⁷ *See* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“[T]he Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment]. . . .”).

⁸ *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted).

⁹ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

application of this exception to cases where immediate action is necessary to prevent further harm to animals.¹⁰

The test for whether the exigent circumstances exception applies to a given set of facts is one of objective reasonableness.¹¹ A warrantless search or seizure “is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer's state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’”¹² Although “reasonableness” in a specific case depends on an examination of “the totality of the circumstances[,]”¹³ the Supreme Court has held that, in general, “warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.”¹⁴ Determination of whether a specific case meets this standard is a fact based inquiry.¹⁵ The validity of a warrantless search or seizure by an animal control officer thus depends on whether the action was reasonable in light of all of the facts of the case.

The totality of the circumstance test is reinforced by “a balancing of the need for the particular search against the invasion of personal rights that the search entails.”¹⁶ Just as it would for a case involving a threat to human life, a court evaluating the validity of a warrantless search or seizure involving a threat to animal life must consider: “the scope of the particular

¹⁰ Tuck v. United States, 477 A.2d 1115, 1120 (1984) (warrantless entry and seizure of a rabbit from a store display window); Morgan v. State, 656 S.E.2d 857, 860 (Ga. 2008) (warrantless entry into, and seizure of dogs from the defendant’s backyard); People v. Thornton, 676 N.E.2d 1024, 1028-1029 (Ill. 1997) (warrantless entry into, and seizure of dog from the defendant’s locked apartment); State v. Stone, 92 P.3d 1178, 1184 (Mont. 2004) (warrantless entry into, and seizure of animals from the defendant’s fenced in yard); Ohio v. Kilburn, 1998 Ohio App. LEXIS 1200, 13-14 (warrantless entry into, and seizure of animals from the defendant’s house); State v. Davis, Not Reported in S.W.3d, 2005 WL 2255968, 1 (Tenn. Crim. App. 2005) (warrantless entry into, and seizure of animals from the defendant’s unlocked apartment); Pine v. State, 889 S.W.2d 625, 631-632 (Tex. App. 1994) (warrantless entry onto, and seizure of horse from the defendant’s ranch); State v. Bauer, 379 N.W.2d 895, 898-899 (Wis. 1985) (warrantless seizure of a dead horse from a driveway in front of the defendant’s property).

¹¹ *Brigham City*, 547 U.S. at 403.

¹² *Id.* (changes made in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

¹³ *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

¹⁴ *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

¹⁵ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

¹⁶ *Id.*

intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”¹⁷

In addition to looking at the circumstances under which the actual search or seizure takes place, courts will also look at the gravity of the offense which motivates the challenged action.¹⁸ Generally, a warrantless search or seizure conducted in response to a fine-only offense with no possibility of jail time is unreasonable.¹⁹ By comparison, the same action taken in response to a crime carrying a serious penalty is reasonable.²⁰ The underlying offense in cases involving a threat to animal life is generally cruelty to animals.²¹ While the punishment for animal cruelty varies from state to state, it is often considered a serious offense and is punished with jail time.²² Under this test, a warrantless search or seizure in response to allegations of animal cruelty would most likely be found to be reasonable.

A final factor courts will look at in determining the reasonableness of a warrantless search or seizure is whether securing a phone warrant was impossible or impracticable.²³ Telephone warrants are generally found to be impracticable when the circumstances demanded immediate action.²⁴ Courts most often address this issue in the context of drug cases.²⁵ Courts generally allow warrantless seizures under the emergency circumstances exception when there is

¹⁷ *Id.*

¹⁸ *See* *Welsh v. Wisconsin*, 466 U.S. 740, 753-54 (exigent circumstances did not justify warrantless home arrest to preserve evidence of blood alcohol content of person suspected of DUI because state interest insufficient).

¹⁹ *Id.*

²⁰ *See e.g.*, *United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995) (exigent circumstances justified entry when police responded to report that woman inside was being threatened by suspect with loaded rifle).

²¹ *See e.g.*, *Tuck v. United States*, 477 A.2d 1115, 1117 (1984) (defendant was charged with “one count of cruelty to animals in violation of D.C.Code § 22-801 (1981).”).

²² *See e.g.*, M.G.L.A. 272 § 77 (2007) (“[C]ruelty of any kind shall be punished by imprisonment in the state prison for not more than 5 years or imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$2,500, or by both such fine and imprisonment.”).

²³ *See, e.g.*, *United States v. Cattouse*, 846 F.2d 144, 147-48 (2d Cir. 1988) (search justified because officers lacked sufficient evidence of criminal activity to support probable cause requirement until after drug sale was completed, and twenty minutes between sale and arrest was insufficient time to obtain telephone warrant).

²⁴ *See id.*

²⁵ *See e.g., id.*

a risk that an individual will destroy the drugs before police can obtain a warrant.²⁶ Cases involving a threat of imminent harm to animal life also demand immediate action. While destruction of evidence is a less pressing concern in animal abuse cases, officers generally must act quickly to relieve the animal's suffering. When this is an issue animal control officers should not be forced to choose between immediate rescue and standing by for a warrant so that the animal can subsequently be used as evidence in a criminal case. Under these circumstances action without securing a warrant by phone should be found to be reasonable.

The actions of animal control officers are thus judged by a standard of reasonableness. Warrantless action is reasonable when the need for a search or seizure objectively outweighs the accompanying invasion of personal rights. The need for immediate action is determined by the gravity of the underlying offense and the practicality of securing a telephone warrant. In animal abuse cases the underlying crime is very serious and the need for immediate action stems from a desire to prevent further suffering. The practicality of securing a telephone warrant will depend on the facts of a given situation. However, in most situations the need for warrantless action will most certainly justify the invasion of the rights of a negligent or abuse owner.

B. Policy Rationale Underlying Search and Seizure Requirements

In addition to a judgment of the reasonableness of the search or seizure, the facts of each case “must be viewed in the light of established Fourth Amendment principles.”²⁷ These principles, which are the policy concerns behind the Fourth Amendment's specific protections, include “the history and experience which . . . [the Fourth Amendment] embodies and the

²⁶ See e.g., *United States v. Rico*, 51 F.3d 495, 500-04 (5th Cir. 1995) (warrantless arrest valid because suspect's apparent preparations to leave house in automobile gave police no reasonable alternative to arresting suspect in front of house, creating exigent circumstance of possible destruction of evidence by accomplices able to view arrest from inside house).

²⁷ *Chimel v. California*, 395 U.S. 752, 765 (1969).

safeguards afforded by it against the evils to which it was a response.”²⁸ The major “evils that motivated the framing and adoption of the Fourth Amendment” were the “indiscriminate searches and seizures conducted under the authority of ‘general warrants. . . .’”²⁹ This protection is embodied in the requirement that inferences relating to probable cause “be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”³⁰

However, because the ultimate touchstone of the Fourth Amendment is “reasonableness,” the requirement that a judge must determine “[w]hen the right of privacy must reasonably yield to the right of search[,]”³¹ is subject to certain exceptions.³² These exceptions “have been established where it was concluded that the public interest required some flexibility in the application of the general rule.”³³ Such flexibility is necessary in situations where “the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.”³⁴ Judicial belief that the warrant requirement requires some limited flexibility is so strong that certain exceptions have been repeatedly upheld by courts who simultaneously acknowledge that “each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment. . . .”³⁵ Accordingly, these exceptions have been limited to the extent that they are “necessary to accommodate the identified needs of society.”³⁶

²⁸ *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (dissenting opinion).

²⁹ *Payton v. New York*, 445 U.S. 573, 584 (1980).

³⁰ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

³¹ *Id.*

³² *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *see supra* Part I.A.

³³ *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979).

³⁴ *Id.*

³⁵ *Id.* at 759-60.

³⁶ *Id.* at 759.

In determining whether a general exception to the warrant requirement is proper, judges must ask “not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”³⁷ In *Tuck v. United States* the District of Columbia Court of Appeals held that “the ‘public interest’ in the preservation of life in general and in the prevention of cruelty to animals in particular ‘require[s] some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search.’”³⁸

In *Tuck*, the court asked whether the confinement of “several suffering animals in . . . [a] closed unventilated [pet store] display window[.]”³⁹ when the outside temperature was “at least 103 degrees Fahrenheit[.]”⁴⁰ presented “a situation that the law considers ‘exigent’ so as to dispense with the warrant requirement.”⁴¹ Answering this question in the affirmative, the court found that “the officials were confronting an emergency law enforcement situation, and that their urgent need to act as quickly as possible justified proceeding without a warrant.”⁴² When deciding whether to allow the warrantless seizure, the court focused on “the presence or absence of an ample opportunity for getting a search warrant[.]”⁴³ as qualified by “[t]he need to protect or preserve life or avoid serious injury. . . .”⁴⁴ Specifically addressing the issue of applying the exigent circumstances exception to a “case involved the protection of animal life rather than

³⁷ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534 (1967).

³⁸ *Tuck v. United States*, 477 A.2d 1115, 1120 (1984) (footnote and citation omitted) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759 (1979)). To demonstrate the public interest in preventing cruelty to animals the court cites: D.C.Code §§ 22-801(1981).

³⁹ *Id.* at 1117.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1119.

⁴³ *Id.* at 1120 (citing *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

⁴⁴ *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)).

human life,” the *Tuck* court cited a public interest in preventing harm to animals.⁴⁵ The court then stated that “given the inherent delay in obtaining a warrant, procurement of one under the ‘exigent circumstances’ of this case would most likely have frustrated the effective fulfillment of those public interests.”⁴⁶

The *Tuck* court’s rationale exemplifies the policy underlying the Fourth Amendment’s warrant requirement. In recognizing that this requirement does not pose an absolute bar to warrantless action, the *Tuck* court properly balanced the need to prevent further suffering with the interests that the Fourth Amendment was meant to protect. Other courts should follow the *Tuck* court’s lead and waive the warrant requirement in animal abuse cases where “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”⁴⁷

II. SPECIAL ISSUES PRESENTED BY WARRANTLESS SEARCHES AND SEIZURES OF ANIMALS

Imagine the following scenario. Two cars are parked next to each other in a parking lot. The temperature outside is 100 degrees. Inside the first car is a six month old puppy. Inside the second car is a six month old baby. Both a police officer and an animal control officer are called to the scene. What happens next? In the case of the baby, the police officer immediately opens the car door and rescues him or her. As a human being the baby has an inalienable right to life. The puppy however, is not as lucky. Before the animal control officer can take the same action to rescue the puppy, he is forced to either wait for a warrant,⁴⁸ or determine that the puppy has been abandoned, and therefore a warrant is unnecessary.⁴⁹ While opening the car door to save

⁴⁵ *Id.* (citing D.C.Code §§ 22-801, -814 (1981) (the District’s animal cruelty statute)).

⁴⁶ *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)).

⁴⁷ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534 (1967).

⁴⁸ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁴⁹ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

the baby constitutes a heroic rescue, opening the car door to save the puppy without following one of these two steps constitutes an illegal seizure.⁵⁰

The preceding hypothetical is a very common scenario for animal control officers. When confronted with this situation, animal control officers at the Massachusetts Society for the Prevention of Cruelty to Animals (“MSPCA”) are instructed to conduct a preliminary investigation to determine if the animal has been abandoned.⁵¹ If it is not possible to determine the status of the animal, the officer next must contact local law enforcement.⁵² During this process, the puppy is still locked in the hot car. These procedures are necessary because animals are legally categorized as personal property and have no legal rights of their own.⁵³ While every state has enacted an animal cruelty statute that provide a minimum standard of care that animals must receive,⁵⁴ enforcement of these statutes is often hindered by an animal’s legal status.⁵⁵ This Part will examine the unique issues raised by searches and seizures conducted in response to allegations of animal cruelty.

A. Search

For the purposes of the Fourth Amendment, a “search” occurs when a government actor violates an individual’s privacy rights.⁵⁶ In order for the government’s action to constitute infringement, two factors must be satisfied: (1) the individual must have a subjective expectation

⁵⁰ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁵¹ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁵² Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁵³ *See e.g.*, *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49-50 (D.Mass.,1993) (“[a]nimals are treated as the property of their owners, rather than entities with their own legal rights.”).

⁵⁴ *See e.g.*, M.G.L.A. 272 § 77 (2007) (“[C]ruelty of any kind shall be punished by imprisonment in the state prison for not more than 5 years or imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$2,500, or by both such fine and imprisonment.”).

⁵⁵ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁵⁶ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

of privacy in the protected area; and (2) this expectation must be one that society would find objectively reasonable.⁵⁷ Thus a warrantless search of an individual's enclosed yard would be a violation of the Fourth Amendment, while a similar search of an individual's trash left on the street would not.

A search conducted by an animal control officer does not present any special issues due to the nature of what he is searching for. A warrantless search in response to allegations of imminent harm raises the same issues regardless of whether the recipient of the harm is an animal or a human being. Both scenarios involve a “compelling need for official action[,]” and most likely leave “no time to secure a warrant.”⁵⁸ Accordingly, both searches should be upheld under the emergency circumstances exception to the Fourth Amendment.

B. Seizure

By contrast, the warrantless seizure of an animal presents a particular problem for animal control officers. For the purposes of the Fourth Amendment, “[a] ‘seizure’ of property occurs when there is some meaningful interference with an individual's possessory interests in that property.”⁵⁹ As animals are legally classified as the personal property of their owners, removal of an abused animal constitutes a seizure and is subject to the Fourth Amendment's warrant requirements. There are however, several general exceptions to the warrant requirement that can apply in these situations.

The first category of exceptions applies to animals that are “abandoned,⁶⁰ in plain view,⁶¹ or obtained by consent.⁶² The seizure of an animal under any of these conditions does not trigger

⁵⁷ Katz v. United States, 389 U.S. 347 (1967).

⁵⁸ Michigan v. Tyler, 436 U.S. 499, 509 (1978).

⁵⁹ United States v. Jacobsen, 466 U.S. 109, 113 (1984).

⁶⁰ United States v. Flynn, 309 F.3d 736, 738 (10th Cir. 2002).

⁶¹ Horton v. California, 496 U.S. 128, 136 (1990).

⁶² Koch v. Town of Brattleboro, 287 F.3d 162, 167 (2nd Cir. 2002).

the Fourth Amendment's warrant requirement because the Fourth Amendment does not protect voluntarily surrendered privacy interests.⁶³ This is the most common scenario facing animal control officers at the MSPCA.⁶⁴ While Fourth Amendment concerns are not implicated by animal seizures under these conditions, due to the uncertainty regarding animal seizures in general, MSPCA officers are instructed to conduct a preliminary investigation even when called to retrieve an abandoned animal.⁶⁵

The second category of exceptions covers animals seized as evidence of a crime. This exception covers temporary seizures to investigate whether the property is actually evidence of criminal activity,⁶⁶ and permanent seizures conducted in order to preserve the evidence from imminent destruction or removal.⁶⁷ These cases arise most often in the context of criminal narcotics investigations.⁶⁸ Courts have also applied this exception to police conduct following suspicion of driving while intoxicated; upholding police ordered blood tests to determine a suspect's blood alcohol level.⁶⁹

Applying this exception to emergency seizures of animals creates both a legal and a moral problem. First, the destruction of evidence exception may not apply to animal seizures at all. While drugs or alcohol in the blood stream can both be easily destroyed without police intervention, destruction of an animal in terms of its value as evidence is much more difficult.

⁶³ See *United States v. McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996).

⁶⁴ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁶⁵ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁶⁶ See e.g., *United States v. Place*, 462 U.S. 696, 706 (1983) (temporary seizure of defendant's luggage upheld because police reasonably suspected that it contained "contraband or evidence of a crime").

⁶⁷ See e.g., *United States v. Rico*, 51 F.3d 495, 500-04 (5th Cir. 1995) (warrantless arrest valid because suspect's apparent preparations to leave house in automobile gave police no reasonable alternative to arresting suspect in front of house, creating exigent circumstance of possible destruction of evidence by accomplices able to view arrest from inside house).

⁶⁸ See, e.g., *United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995).

⁶⁹ *Schmerber v. California*, 384 U.S. 757 (1966).

As the animal's body is all that is needed to prove cruelty,⁷⁰ an animal need not be alive to serve as a key piece of the prosecution's evidence. In order for this exception to apply, there would have to be a "reasonable suspicion" that the potential defendant planned to physically dispose of the animal's body.⁷¹ As most animal abuse stems from neglect, quick action following an animal's death is unlikely.⁷²

This leads to the moral problem. While immediate removal of the animal may not be necessary to prevent the destruction of evidence, it is certain necessary to prevent further suffering. Unlike a bag of cocaine which will suffer no effect from the time delay inherent in obtaining a warrant, an abused animal will continue to suffer during this time period. Permitting the warrantless seizure of an animal only when it is necessary to preserve the animal as evidence sends the wrong message to society. Removal only under these circumstances sends a message that prevention of animal suffering is less important than infringement of an abuser's property rights. Not only is this statement cruel, but it runs contrary to the Supreme Court's mandate that determination of Fourth Amendment cases involve a balance of the protected right with the need for warrantless action.⁷³ In the case of a seizure due to neglect or abuse, the need for the seizure unquestionably outweighs the abusive owner's property interests.

In order to prevent this outcome, warrantless animal seizures should be permitted when there is a need to protect life and/or prevent future suffering. This solution requires acknowledgement of the unique nature of an animal – technically property, but possessing the potential to suffer in a way that an inanimate object cannot. Some courts have already accepted

⁷⁰ See e.g., M.G.L.A. 272 § 77 (2007).

⁷¹ See, e.g., *Bartelho* at 442.

⁷² Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

⁷³ *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

this solution, but more must follow their lead before the problem facing animal control officers can be fixed.

III. THE ROLE OF THE JUDGE IN RESOLVING FACT BASED INQUIRES – *COMMONWEALTH V. HURD*

Since the *Tuck* court's ruling in 1984, seven other courts have upheld the protection of animal life as a valid exercise of the exigent circumstances exception.⁷⁴ In stark contrast to this line of cases is *Commonwealth v. Hurd*,⁷⁵ the only case on record that has addressed this issue and found that the exigent circumstances exception did not apply.⁷⁶ *Hurd* is an excellent example of the important role that trial judges play as factfinder in Fourth Amendment cases.

In 2001, the Massachusetts' Appeals Court granted Duane Hurd's motion to suppress all evidence seized from his property in relation to his animal cruelty charge.⁷⁷ Affirming the trial court's decision, the court held that: (1) the warrantless search of Hurd's property was unlawful, as he had a reasonable expectation of privacy in the contents of his backyard; and (2) the emergency exception doctrine did not apply to the facts of the this case, assuming that it extends to animals at all.⁷⁸ As Fourth Amendment is a fact based inquiry, the validity of the warrantless search and seizure at issue in *Hurd* depends on whether the officer's actions were reasonable in

⁷⁴ *Morgan v. State*, 656 S.E.2d 857, 860 (Ga. 2008) (warrantless entry into, and seizure of dogs from the defendant's backyard); *People v. Thornton*, 676 N.E.2d 1024, 1028-1029 (Ill. 1997) (warrantless entry into, and seizure of dog from the defendant's locked apartment); *State v. Stone*, 92 P.3d 1178, 1184 (Mont. 2004) (warrantless entry into, and seizure of animals from the defendant's fenced in yard); *Ohio v. Kilburn*, 1998 Ohio App. LEXIS 1200, 13-14 (warrantless entry into, and seizure of animals from the defendant's house); *State v. Davis*, Not Reported in S.W.3d, 2005 WL 2255968, 1 (Tenn. Crim. App. 2005) (warrantless entry into, and seizure of animals from the defendant's unlocked apartment); *Pine v. State*, 889 S.W.2d 625, 631-632 (Tex. App. 1994) (warrantless entry onto, and seizure of horse from the defendant's ranch); *State v. Bauer*, 379 N.W.2d 895, 898-899 (Wis. 1985) (warrantless seizure of a dead horse from a driveway in front of the defendant's property).

⁷⁵ 743 N.E.2d 841 (2001).

⁷⁶ *Id.*

⁷⁷ *Id.* at 843.

⁷⁸ *Id.* at 846 .

light of the surrounding circumstances.⁷⁹ This section will examine the facts of *Hurd* in detail and explain why a deeper analysis of the facts would have resulted in a different outcome.

The facts of *Hurd*, as described in the court’s opinion, are as follows. On January 16, 1998, Edward Abbott, the Greenfield animal control officer, responded to a call that “there was a ‘dead dog in a hole and another dog with it’ at 29 Washington Street. . . .”⁸⁰ Officer Abbott knew that the defendant, Duane Hurd, lived at this address.⁸¹ Arriving at the property, Officer Abbott “walked onto . . . [Hurd’s] land without a search warrant and observed two dogs, one dead and the other dying, in a cage behind . . . [Hurd’s] home.”⁸² The cage was partially enclosed by an eight-foot high fence, and was not visible from the street.⁸³

After witnessing the condition of the two dogs, Officer Abbott left the property and attempted to locate Hurd at his work.⁸⁴ Unable to locate Hurd, Officer Abbott returned to the Greenfield police station to report the condition of the animals and ask for assistance.⁸⁵ Greenfield Police Officer David Payant accompanied Officer Abbott back to Hurd’s home, where they found Hurd who had returned home.⁸⁶ After reexamining the conditions of the dogs, Officers Abbott and Payant advised Hurd of his Miranda rights and asked to seize the dogs.⁸⁷ Hurd consented and, without a warrant, the officers “photographed [the dogs], removed [them] from the cage, and transported [them] to a veterinarian for examination.”⁸⁸ The veterinarian

⁷⁹ *Scott v. United States*, 436 U.S. 128, 138 (1978).

⁸⁰ *Hurd* at 843.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 843 n.1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

determined that the dead dog had died from starvation.⁸⁹ Hurd was charged with cruelty to animals.”⁹⁰

At trial, Hurd brought a motion to suppress all evidence obtained during the search of his property, including any evidence stemming from examination of his dogs after they were seized.⁹¹ Following an evidentiary hearing, the trial judge granted Hurd’s motion.⁹²

Interlocutory appeal was granted and heard by a three judge panel at the Massachusetts Appeals Court.⁹³ The Appeals Court affirmed the motion to suppress.⁹⁴

“[R]easonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case. . . .”⁹⁵ When reviewing a motion to suppress, the reviewing court must “accept the motion judge’s findings of fact absent clear error.”⁹⁶ Here, the Court of Appeals found the fact that Abbott left the scene to look for Hurd dispositive evidence that the immediate removal of the Hurd’s dog was not necessary.⁹⁷ Accordingly, the court held that Abbott should have secured a warrant before searching Hurd’s property.⁹⁸ In addition, the court upheld the suppression of any evidence stemming from the seizure of Hurd’s dogs because Hurd’s “consent . . . to remove the dogs was obtained through exploitation of the prior illegal entry, . . . [and thus] was not voluntary.”⁹⁹

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Ker v. California*, 374 U.S. 23, 33 (1963).

⁹⁶ *Commonwealth v. Jung*, 651 N.E.2d 1211 (1995).

⁹⁷ *Hurd* at 846 (2001) (“Abbott’s actions after observing the condition of the dogs in the cage does not demonstrate that exigent circumstances were present. He did not immediately remove the dogs from the cage but first attempted to find the defendant at his workplace and then sought assistance from the police. From the time he observed the condition of the dogs until he returned to the defendant’s premises, he had ample opportunity to obtain a warrant.”).

⁹⁸ *Id.*

⁹⁹ *Id.* at 846 n.3.

The reasonableness of a warrantless search is tied directly to the facts in a given case. As a result, issues arise when the factfinder only finds part of the facts. As the Appeals Court only reviews the facts found by the trial judge, the trial judge's role as factfinder in Fourth Amendment cases is incredibly important. Peter Gollub, the head of law enforcement at the MSPCA reinforces this view.¹⁰⁰ Gollub contends that the ability of the trial judge to ferret out any inconsistencies in the factual testimony given at trial is crucial to determining whether the circumstances surrounding a warrantless search or seizure constituted an emergency.¹⁰¹ According to Gollub the importance of the judge's role is due to the unavoidable reality that the prosecution is often overworked and the defense is generally better prepared.¹⁰² Without a trial judge actively attempting to discern what really happened, pivotal facts which may sway the judgment can easily be overlooked.¹⁰³

Hurd presents a perfect example of this principle in action. While the reasonableness of the search at issue clearly rested on whether it qualified for the emergency circumstances exception, the prosecution argued: (1) that the actions taken on Hurd's property by Officers Abbott and Payant did not constitute a search; and (2) in the alternative, "if there was a search, Abbott, as an animal control officer, had a statutory right under *G. L. c. 129, § 7*, to enter the defendant's premises without a warrant, especially where, as here, exigent circumstances were present."¹⁰⁴ The presentation of this argument puts the prosecution's best argument last, and

¹⁰⁰ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

¹⁰¹ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

¹⁰² Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

¹⁰³ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

¹⁰⁴ *Hurd* at 844.

results in the court mixing it together with an argument regarding the validity of administrative searches.

While the Commonwealth's arguments are good secondary arguments, focusing the discussion on the exigent circumstances exception would have brought better attention to the facts as they occurred. This argument would have forced the trial court to recognize that the facts did not quite match up, and motivated him to attempt to discern why. Here, instead of focusing on why Officer Abbott's search did not qualify for the exceptions available to administrative searches, the focus of the court's inquiry should have been why Officer Abbott left Hurd's property if he believed that removal of Hurd's dog was truly necessary. The easy answer to this question is the answer that the court came to – it wasn't necessary to seize the dogs. However, this answer does not reflect the realities of the situation. A deeper analysis of the facts would have revealed the following.

First, the fact that Officer Abbott left Hurd's property to look for him at his place of work was not a reflection of the exigency of the situation. When Officer Abbott arrived on the scene he "felt that if the one [dog that was] still alive did not receive immediate care it would be dead within a very short time."¹⁰⁵ Officer Abbott left the property to find Hurd, not because he felt that the situation did not warrant emergency action, but the exact opposite. Officer Abbott knew Hurd personally, and believed that if he went and spoke with him, Hurd "would probably allow [Abbott] . . . to remove the animals and care for the survivor."¹⁰⁶ In fact this is exactly what

¹⁰⁵ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹⁰⁶ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

happened when Officers Abbott and Payant returned to Hurd's residence and asked permission to seize both animals. Hurd replied: "[g]o ahead, do what you have to do."¹⁰⁷

When the events of *Hurd* occurred, Officer Abbott had only been an animal control officer for ten days.¹⁰⁸ He had no training and "no knowledge of search and seizure procedures. . . ."¹⁰⁹ While large organizations such as the MSPCA instruct their animal control officers to always secure a warrant as a precaution,¹¹⁰ "[s]mall towns like Greenfield appoint animal control officers who have little or no training and expect them to get on with the job."¹¹¹ Accordingly, when presented with his first emergency situation, Officer Abbott "was really at a loss to know what to do. . . ."¹¹² Instead of following the proper procedures and either obtaining a warrant or seizing the dogs immediately, Officer Abbott followed his instincts and acted pursuant to small town culture.

Second, in their analysis, the court stressed the fact that "[f]rom the time [Abbot] . . . observed the condition of the dogs until he returned to the defendant's premises, he had ample opportunity to obtain a warrant."¹¹³ This however, is also inaccurate. Due to the size of the city of Greenfield, Officer Abbott's entire journey from Hurd's property, to Hurd's place of employment, to the police station, and back to Hurd's property, probably took about twelve minutes.

¹⁰⁷ *Hurd* at 844.

¹⁰⁸ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹⁰⁹ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹¹⁰ Telephone Interview with Peter Gollub, Director of Law Enforcement, Massachusetts Society for the Prevention of Cruelty to Animals (March 23, 2009).

¹¹¹ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹¹² Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹¹³ *Commonwealth v. Hurd*, 743 N.E.2d 841, 846 (2001).

The city of Greenfield, Massachusetts, encompasses a total area of 21.9 square miles.¹¹⁴ By comparison, the city of Boston is over four times larger, encompassing 89.6 square miles.¹¹⁵ Hurd's residence is located at 29 Washington Street.¹¹⁶ After examining the condition of the two dogs, Abbott drove to "a local bank" to locate Hurd and to ask for his permission to remove the animals.¹¹⁷ There are currently nine banks in Greenfield.¹¹⁸ The furthest one from the Hurd residence is a Citizens Bank, located at 89 French King Highway.¹¹⁹ This location is approximately two and a half miles from from Hurd's property and should have taken Officer Abbott about five minutes to drive. From the bank, Officer Abbott drove to the police station to ask for assistance.¹²⁰ The Greenfield police station is located at 321 High Street,¹²¹ approximately one mile from the Citizens Bank. This distance could be covered in about a two minute drive. From the police station, Officer's Abbott and Payant returned to Hurd's residence.¹²² The distance from the police station to Hurd's residence is approximately one and a half miles and should take about four minutes to drive. In total, Officer Abbott's trip, which the court relied so heavily on, spanned a distance of approximately five miles and should have taken about twelve minutes to complete. A twelve minute excursion to secure Hurd's consent to remove his dogs does not demonstrate that the situation facing Officer Abbott was not an emergency.

¹¹⁴ http://en.wikipedia.org/wiki/Greenfield,_Massachusetts

¹¹⁵ http://en.wikipedia.org/wiki/Boston,_ma

¹¹⁶ *Hurd* at 843.

¹¹⁷ *Id.* at 846.

¹¹⁸ This is according to a search on www.google.com for "banks in Greenfield, MA." Searching under this title yields the following results: (1) Bank of America (208 Federal Street); (2) The Bank of Western Massachusetts (280 Mohawk Trail); (3) The Bank of Western Massachusetts (45 Federal Street); (4) Franklin First Federal Credit Union (57 Newton Street); (5) Greenfield Savings Bank (114 Main St); (6) TD Banknorth (324 Main St.); (7) Citizens Bank (89 French King Hwy); (8) Greenfield Cooperative Bank (63 Federal Street); and (9) Greenfield Cooperative Bank (277 Federal Street).

¹¹⁹ Citizens Bank – Locations Greenfield, MA, <http://www.citizensbank.com/branchlocator/Default.aspx>.

¹²⁰ *Hurd* at 843.

¹²¹ Greenfield Police Department – Contact Information, <http://www.greenfieldpd.org/contactgpd.html>.

¹²² *Hurd* at 843.

However, it is necessary to point out that during this trip Officer Abbott drove past the Greenfield Court House (located at 425 Main Street).¹²³ One could argue that Abbott easily could have stopped by the courthouse and secured a warrant. There are two arguments that rebut this view. First, Officer Abbott believed he was responding to an emergency situation. Had he been aware of the fact that he needed a warrant to enter Hurd's property, he most certainly would not have felt that the circumstances allowed time to go to the courthouse, find an available judge, explain the circumstances, and wait for the judge to decide if a warrant was valid. Second, in addition to the time constraints imposed by the nature of the circumstances, the specific date on which the events occurred, made this scenario unlikely. The events under review in *Hurd* occurred on January 16, 1998 – the Friday before Martin Luther King, Jr. day weekend.¹²⁴ While it may have been possible for Officer Abbott to secure a warrant during his trip to locate Hurd, the fact that it was the Friday before a long weekend probably made it more difficult than the court acknowledged.

CONCLUSION

Determination of whether a warrantless search or seizure is valid is based on the reasonableness of the action in light of the circumstances of the case. In situations involving threats to both animal and human life, reasonableness is determined by a balance of the rationale underlying the search or seizure and the protected interests that this action invades. In cases where immediate action is necessary to protect life, the exigent circumstances exception permits waiver of the Fourth Amendment's warrant requirement. In *Tuck* and several other cases, this

¹²³ Greenfield District Court – Location, <http://www.mass.gov/courts/courtsandjudges/courts/greenfelddistrictmain.html>.

¹²⁴ *See, e.g.*, *United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995) (entry justified because suspect posed danger to public and normal delay in obtaining warrant may have been exacerbated by holiday).

exception has been applied to uphold warrantless searches and seizures conducted by animal control officers in response to a threat of harm to animal life. All courts should allow exigent circumstances to justify these actions, assuring that the protection of life is not hindered by the fear that crucial evidence will be excluded from court.

As animals have no legal rights of their own, it is up to the courts to ensure that animal cruelty laws are not frustrated by strict application of the Fourth Amendment's requirements. In furtherance of this goal, it is important for courts to remember that one of the key elements of Fourth Amendment analysis is flexibility. This flexibility is embodied in the crucial role that the trial judge plays in resolving Fourth Amendment cases. In these situations it is necessary not only for the trial judge to keep an open mind as to what goal the warrant requirement is furthering, but also as to the practicalities of the situation.

As for the *Hurd* story, it had the following conclusion. After the events of *Hurd*, Officer Abbott completed an eighty-hour course to become a certified Animal Control Officer.¹²⁵ Following this comprehensive course Officer Abbott had very few problems determining what procedures to follow when he received a complaint.¹²⁶ Officer Abbott also sought out mentoring and assistance from Officer Roy Sutton of the Pittsfield MSPCA office.¹²⁷ Lastly, Officer Abbott's memories of the case are positive: "we may have lost the *Hurd* case, but I feel we really won the day because I kept the little dog, brought it back to health and found it a good home."¹²⁸ While the *Hurd* case had a happy ending, other animals may not be as lucky if courts do not

¹²⁵ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹²⁶ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹²⁷ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

¹²⁸ Letter from Edward Abbott, former Animal Control Officer, Greenfield, Massachusetts, to author (April 6, 2009) (on file with author).

extend the exigent circumstances exception to all cases involving an imminent threat to animal life.

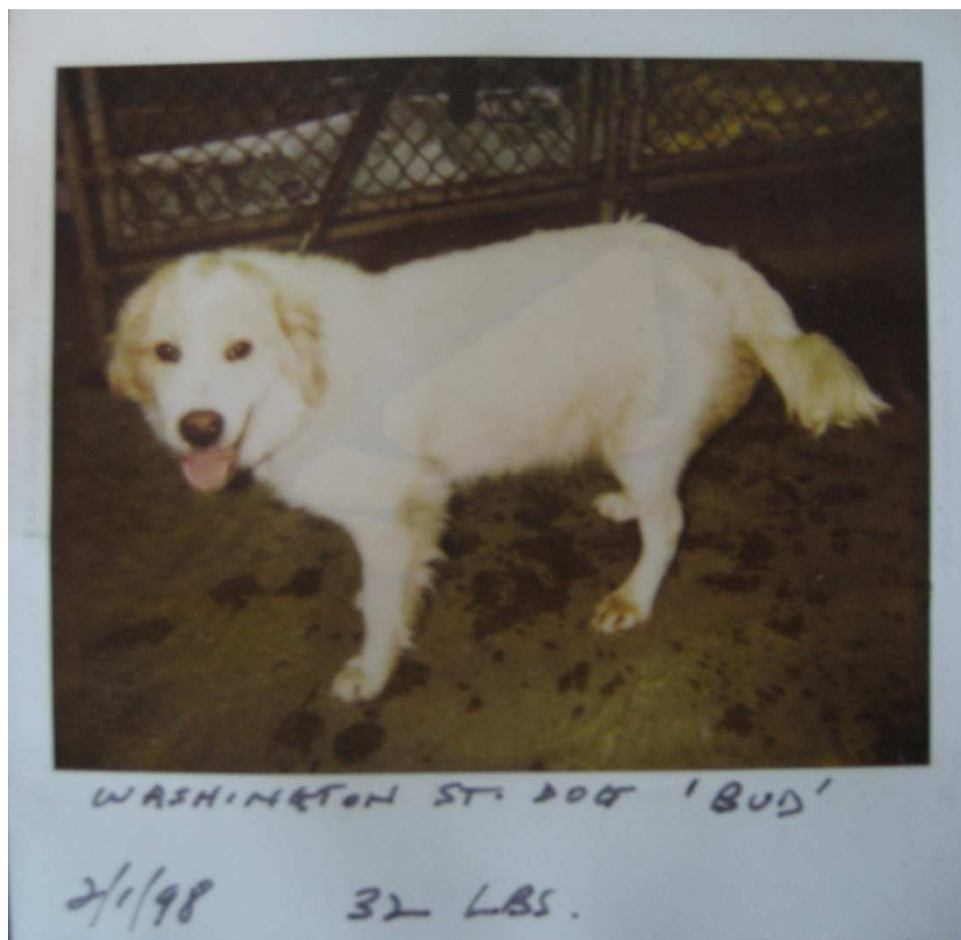
APPENDIX

1. Bud, Hurd's dog, on January 17, 1998 (the day after removal from the Hurd residence). Bud weighed 15.4 pounds.¹²⁹



¹²⁹ Photo provided by Edward Abbott, former Animal Control Officer for the town of Greenfield, Massachusetts (April 6, 2009) (on file with the author).

2. Bud on February 1, 1998 (two weeks after removal). Bud weighed 32 pounds.¹³⁰



¹³⁰ Photo provided by Edward Abbott, former Animal Control Officer for the town of Greenfield, Massachusetts (April 6, 2009) (on file with the author).

3. Bud on February 25, 1998 (5 and a half weeks after removal). Bud weighed 40.3 pounds.¹³¹



¹³¹ Photo provided by Edward Abbott, former Animal Control Officer for the town of Greenfield, Massachusetts (April 6, 2009) (on file with the author).