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Grace Hambuchen

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NOTE

Dog Process or Due Pupcess? Federal Court Misses Opportunity to Modernize Pet Due Process Jurisprudence

Lunon v. Botsford, 946 F.3d 425 (8th Cir. 2019).

*Grace Hambuchen**

I. INTRODUCTION

Nicknames such as Boo Bear, Snookums, Sweet Precious Baby, or Cutie Patootie fondly show how owners might typically interact with their pets.¹ With Americans spending approximately \$95.7 billion on pets in 2019,² the Uniform Trust Code expressly allowing trusts to care for deceased owners' pets,³ and the COVID-19 pandemic bringing a sharp increase in dog adoptions,⁴ pets are becoming an ever more significant part of the American family. When a pet escapes or goes missing, most owners

*B.A., Saint Louis University, 2019; J.D. Candidate, University of Missouri School of Law, 2022; Managing Editor, *Missouri Law Review*, 2021-2022. I am grateful to Professor Wilson Freyermuth for his kindness, brilliance, and support during the writing of this Note, as well as the *Missouri Law Review* for its help in the editing process.

¹ Third person plural pronouns are used in place of third person singular pronouns.

² *Americans' Pet Spending Reaches Record-Breaking High: \$95.7 Billion*, AM. PET PRODS. ASS'N (Feb. 27, 2020), https://www.americanpetproducts.org/press_releasedetail.asp?id=205 [https://perma.cc/3PPM-WAA5].

³ UNIF. TR. CODE § 408.

⁴ Kim Kavin, *Dog adoptions and sales soar during the pandemic*, WASH. POST (Aug. 12, 2020, 8:00 AM), <https://www.washingtonpost.com/nation/2020/08/12/adoptions-dogs-coronavirus/> [https://perma.cc/BFF3-PF3A].

desperately want them to return home safely;⁵ microchipping is one proactive, reliable option for owners to help ensure they do.⁶

Additionally, local municipalities recognize the potential microchips offer to quickly find lost pets,⁷ and accordingly, frequently require citizens to microchip their pets.⁸ However, according to *Lunon v. Botsford*, a recent decision from the U.S. Court of Appeals for the Eighth Circuit, procedural due process does not require an animal control officer to scan an impounded dog for a microchip, even where a microchip scanner is readily available.⁹ This Note reveals the alarming ease with which an owner's protected property interest in their pet can be extinguished and how the court's decision works against the local government interest in efficiently identifying owners of stray animals and keeping stray animal populations under control. Moreover, it argues that the court missed an opportunity to modernize due-process jurisprudence and the law governing pet owners' property interests in light of the United States Supreme Court's decision in *Jones v. Flowers*.¹⁰

Part II of this Note explores the facts and holding of *Lunon*. Part III provides background on due process generally and the relationship between due process and animals. Part IV then discusses the Eighth Circuit's majority opinion and concurring opinions. Finally, the Part V reviews the impact the present holding has on pet owners' due process

⁵ See, e.g., Emily Caldwell, *Microchips Result in Higher Rate of Return of Shelter Animals to Owners*, OHIO STATE NEWS (Oct. 11, 2009), <https://news.osu.edu/microchips-result-in-higher-rate-of-return-of-shelter-animals-to-owners/> [https://perma.cc/5U48-29V7].

⁶ See, e.g., Liz Donovan, *Three Reasons to Microchip Your Dog*, AM. KENNEL CLUB (June 8, 2015), <https://www.akc.org/expert-advice/health/three-reasons-to-microchip-your-dog/#:~:text=Unlike%20a%20collar%2C%20which%20can,your%20pet%20goes%20missing%20here> [https://perma.cc/QL67-7JFA]; Tod Gill, *Fayetteville's pet microchip law goes into effect in January 2012*, FAYETTEVILLE FLYER (Dec. 7, 2011), <https://www.fayettevilleflyer.com/2011/12/07/fayettes-pet-microchip-law-goes-into-effect-in-january-2012/> [https://perma.cc/2DTS-ZS6S].

⁷ See Chastity Dillard, *Microchipping pets save lives and reduce taxpayer's cost*, DAILY IOWAN (May 8, 2012), <https://dailyiowan.com/2012/05/08/microchipping-pets-save-lives-and-reduce-taxpayers-cost/> [https://perma.cc/2FBU-RNBV] (explaining the less time a pet spends in a shelter, the less money it costs the taxpayer to take care of the lost animal). Microchips are tiny, rice-sized transponders placed under the skin of the pet, which store a unique ID number that can be used to quickly retrieve a pet owner's contact information. See *How do Pet Microchips Work?*, PETFINDER, <https://www.petfinder.com/dogs/lost-and-found-dogs/how-pet-microchips-work/> [https://perma.cc/6LJ8-H553] (last visited Aug. 9, 2021). Microchips are used as a second chance to identify a lost pet whose collar might also be missing. *Id.*

⁸ See, e.g., Gill, *supra* note 6.

⁹ *Lunon v. Botsford*, 946 F.3d 425, 431 (8th Cir. 2019).

¹⁰ *Jones v. Flowers*, 547 U.S. 220, 220 (2006).

rights concerning their pets and on local governments' interest in microchipping pets in their jurisdictions.

II. FACTS AND HOLDING

In 2016, Darryl Lunon purchased a purebred female German Shephard and named her Bibi Von Sonenberg ("Bibi").¹¹ Lunon's vet implanted a microchip with a unique identifying number in Bibi and placed a tattoo of the same identifying number in her ear.¹² Bibi also had a tag on her collar listing her name, Lunon's address, and Lunon's telephone number.¹³ Lunon purchased Bibi not only as a companion but also to breed her and sell purebred German Shephard puppies.¹⁴

Bibi ran from Lunon's backyard in central Arkansas on February 14, 2017, after being spooked by a thunderstorm.¹⁵ The same day, when Lunon discovered Bibi had escaped, he immediately began looking for her.¹⁶ Lunon searched his neighborhood, spoke with neighbors, posted flyers, posted on social media, and requested a national, regional, and local search using Bibi's microchip information.¹⁷

On February 15, 2017, Lunon's neighbor, Will Quinn, discovered Bibi in his garage.¹⁸ Quinn called the Pulaski County Sheriff's Office and, eventually, Pulaski County Sanitation and Animal Services ("PCAS") dispatched the only animal control officer on duty that day, Officer Jonathan Dupree.¹⁹ Dupree captured Bibi without incident and noted she had a collar, but he could not locate an identifying tag.²⁰ Dupree then took

¹¹ *Lunon*, 946 F.3d at 427; The Brief of the Appellee at 5, *Lunon*, 946 F.3d 425 (No. 18-3314).

¹² The Brief of the Appellee, *supra* note 11, at 5.

¹³ The Brief of the Appellee, *supra* note 11, at 5–6. It is disputed whether or not Bibi had a collar when Animal Control detained her. The Brief of Appellants Botsford and Dupree at 2, *Lunon*, 946 F.3d 425 (No. 18-3314).

¹⁴ The Brief of the Appellee, *supra* note 11, at 5.

¹⁵ *Lunon*, 946 F.3d at 427–28; Linda Satter, *Court overturns lost-dog ruling as federal judges reject central Arkansas owner's claim*, ARK. DEMOCRAT GAZETTE (Dec. 29, 2019, 9:12 AM), <https://www.arkansasonline.com/news/2019/dec/29/court-overturns-lost-dog-ruling-2019122/> [<https://perma.cc/F6T2-WGYF>].

¹⁶ The Brief of the Appellee, *supra* note 11, at 8; Appellants' Brief of Defendant-Appellants Botsford and Dupree at 3, *Lunon*, 946 F.3d 425 (No. 18-3314).

¹⁷ The Brief of the Appellee, *supra* note 11, at 8.

¹⁸ *Lunon*, 946 F.3d at 428.

¹⁹ *Id.*

²⁰ *Id.* In a footnote, the court accepts Lunon's testimony regarding Bibi having a tag in compliance with the county ordinance, but notes it is undisputed that Dupree did not see a tag. *Id.* at 428 n.1.

Bibi to the North Little Rock Animal Shelter (“NLRAS”), which contracts with Pulaski County to accept stray dogs.²¹

PCAS Procedure provides:

It shall be the responsibility of the Animal Service Officer who brings an animal into the North Little Rock Animal Shelter to make a kennel card for the animal. It shall also be the responsibility of this person to scan the animal for an implanted microchip and note it on the kennel card. All animals should be scanned [unless dangerous]. The Microchip Scanner is located above the work table in the kennel and must be returned there after each use!²²

Dupree did not scan Bibi for a microchip, nor did he correctly complete Bibi’s kennel card.²³ Dupree left the space for microchip information blank and incorrectly listed Bibi as “male/not sterilized.”²⁴ PCAS policy and a Pulaski County ordinance require PCAS officials to notify the known owner of a captured animal within forty-eight hours of impoundment.²⁵ However, because Dupree did not find an identifying tag and failed to scan Bibi, he did not discover that Lunon was Bibi’s owner.²⁶

On February 17, 2017, Lunon called PCAS and other officials in North Little Rock to ask whether any officers had seized Bibi or had custody of her.²⁷ The officials told Lunon they did not have any dogs with the name Bibi or description similar to Bibi’s in the shelter.²⁸ Additionally, Lunon shared Bibi’s description with local veterinarians and asked them to look out for female German Shepherds and scan them for a microchip.²⁹ Per North Little Rock Municipal Code, “[i]f the owner of an impounded dog fails or refuses to reclaim such dog within five days after impoundment, the city animal shelter is hereby authorized to release such dog to a person other than the owner upon the payment of required fees or to humanely euthanize the dog.”³⁰ After a five-day hold, NLRAS put Bibi

²¹ *Id.* at 428.

²² *Id.* (citing PULASKI COUNTY SANITATION AND ANIMAL SERVICES DEPT. PROCEDURE P14-06).

²³ *Lunon*, 946 F.3d at 428.

²⁴ *Id.*; The Brief of the Appellee, *supra* note 11, at 13.

²⁵ The Brief of the Appellee, *supra* note 11, at 7–8; PULASKI CNTY., ARK., CODE OF ORDINANCES, Ordinance No. 81-OR-27, art. 4, 6-23-81.

²⁶ *Lunon*, 946 F.3d at 428.

²⁷ The Brief of the Appellee, *supra* note 11, at 8; Appellants’ Brief of Defendant-Appellants Botsford and Dupree, *supra* note 16, at 3.

²⁸ The Brief of the Appellee, *supra* note 11, at 8.

²⁹ *Id.*

³⁰ *Lunon*, 946 F.3d at 428; NORTH LITTLE ROCK MUN. CODE § 3.1.7(B).

up for adoption,³¹ and on February 24, 2017, Christopher Vance adopted her.³² As required by the North Little Rock Animal Control, NLRAS sterilized Bibi on February 28, 2017.³³ Vance subsequently gave Bibi to his mother-in-law, Deloris Lovell.³⁴

On March 18, after Quinn saw Lunon's signs for Bibi, he informed Lunon he reported a stray dog in his garage and animal control had seized it.³⁵ Lunon went to the Pulaski County Sheriff's Office and obtained a copy of the report concerning the incident Quinn described.³⁶ Lunon then went to PCAS to find Bibi and discovered NLRAS had picked up Bibi but subsequently adopted her out to a new owner.³⁷

On June 19, 2017, Lunon filed a complaint against Vance, Lovell, Pulaski County, and the City of North Little Rock in the Circuit Court of Pulaski County.³⁸ Lunon asserted claims of negligence for failure to follow proper procedure and requested a writ of replevin directed at Vance and Lovell for the return of Bibi.³⁹ Judge Mary McGowan heard only the replevin case and ordered Vance and Lovell to return Bibi to Lunon.⁴⁰

Though Lunon was reunited with Bibi, PCAS and NLRAS had deprived her of any economic value by spaying her. Lunon therefore amended his complaint, adding claims under 42 U.S.C. § 1983 for violations of Lunon's procedural due process rights under the Fourteenth Amendment. These claims stemmed from PCAS Director Kathy

³¹ *Lunon*, 946 F.3d at 428.

³² The Brief of the Appellee, *supra* note 11, at 10; Appellants' Brief of Defendant-Appellants Botsford and Dupree, *supra* note 16, at 3.

³³ The Brief of the Appellee, *supra* note 11, at 10.

³⁴ *Id.*

³⁵ *Id.* at 8–9; Appellants' Brief of Defendant-Appellants Botsford and Dupree, *supra* note 16, at 3–4; Separate Appellant David N. Miles, III's Brief at 3, *Lunon*, 946 F.3d 425 (No. 18-3314).

³⁶ The Brief of the Appellee, *supra* note 11, at 9.

³⁷ *Id.*; Appellants' Brief of Defendant-Appellants Botsford and Dupree, *supra* note 16, at 3–4.

³⁸ The Brief of the Appellee, *supra* note 11, at 10. "Lunon also named PCAS; Kathy Botsford, the Director of PCAS, in her official capacity; Dupree in his official capacity; North Little Rock Animal Control; and Miles in his official capacity as the Director of North Little Rock Animal Control." *Id.* at n.4.

³⁹ *Id.* at 11. A writ of replevin is "[a]n action seeking return of personal property wrongfully taken or held by the defendant. Rules on replevin actions vary by jurisdiction." *Replevin*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/replevin> [<https://perma.cc/89RU-Y87G>] (last visited Apr. 13, 2021). Before this state court hearing, Lunon amended his complaint to add Pulaski County and North Little Rock as parties asserting that each violated his due process rights under the Fourteenth Amendment when Bibi was seized, sterilized, and adopted without notifying Lunon. The Brief of the Appellee, *supra* note 11, at 12.

⁴⁰ The Brief of the Appellee, *supra* note 11, at 17.

Botsford's and North Little Rock Animal Control Director David Miles's alleged failure to train persons under their supervision concerning proper intake procedure, which required microchip scanning and owner notification.⁴¹ Lunon also claimed the inadequate training caused to Dupree to deliberately disregard these procedures, inevitably leading to Bibi's sterilization and subsequent adoption.⁴² Finally, Lunon alleged Defendants perpetuated a policy of routinely disregarding local ordinances and rules requiring animal services officers to scan every impounded pet for a microchip.⁴³

Defendants removed the case to the United States District Court for the Eastern District of Arkansas, where Dupree, Botsford, and Miles, filed a motion for summary judgment, arguing they were entitled to qualified immunity from Lunon's claims against them in their individual capacities.⁴⁴ The District Court denied the motion, finding genuine issues of material fact and holding that the defendants were not entitled to qualified immunity.⁴⁵ Defendants then filed an interlocutory appeal.⁴⁶

The Court of Appeals held a shelter is not constitutionally required to affirmatively provide notice to an owner when "an animal shelter holds a stray dog for more than five days and then adopts out and spays the dog after the owner fails to file a claim."⁴⁷ Because there was no procedural due-process violation, the court held that each defendant was entitled to qualified immunity as a matter of law.⁴⁸

III. LEGAL BACKGROUND

While the court may have ultimately decided this case on qualified immunity grounds, it serves as a thought-provoking example of modern due process jurisprudence — specifically, the relationship between due

⁴¹ *Id.* at 18. To clarify, the public entities named as defendants are Pulaski County, PCAS, the City of North Little Rock, and North Little Rock Animal Control. The individual defendants named in their official capacities are Animal Control Officer Jonathan Dupree of the PCAS, PCAS Director Kathy Botsford, and City of North Little Rock Animal Control Director David Miles. *Lunon v. Botsford*, 946 F.3d 425, 427 (8th Cir. 2019).

⁴² The Brief of the Appellee, *supra* note 11, at 18.

⁴³ *Id.* at 34.

⁴⁴ *Id.* at 19. It is important to note Dupree and Botsford filed a response together, but Miles filed an independent response. Appellants' Brief of Defendant-Appellants Botsford and Dupree, *supra* note 16, at 8; Separate Appellant David N. Miles, III's Brief, *supra* note 35, at 9.

⁴⁵ *Lunon v. Vance*, No. 4:17-CV-00623-BSM, 2018 WL 10127530, at *6 (E.D. Ark. Oct. 25, 2018), *rev'd sub nom.* *Lunon v. Botsford*, 946 F.3d 425 (8th Cir. 2019).

⁴⁶ The Brief of the Appellee, *supra* note 11, at 21.

⁴⁷ *Lunon*, 946 F.3d at 431.

⁴⁸ *Id.* at 431–32.

process and pets. This Part first provides a general explanation of the Due Process Clause coupled with a discussion of property interests in pets. Second, it explores a parallel due process case, *Jones v. Flowers*, concerning notice of tax sales.⁴⁹

A. The Due Process Clause & Pets

The Fourteenth Amendment contains a due process clause which prohibits the state from depriving any “of life, liberty, or property, without due process of law.”⁵⁰ This clause is interpreted to provide two types of protection to U.S. citizens: substantive due process and procedural due process.⁵¹ Substantive due process requires the government to have sufficient justification before taking away a person’s life, liberty, or property,⁵² while procedural due process concerns the process the government must follow before doing so.⁵³ Typically procedural due process claims arise from disputes regarding the form of hearing or type of notice the government must provide.⁵⁴ In bringing a Section 1983 claim, the plaintiff must allege a government official deprived them of the right to due process while following a law, statute, ordinance regulation, custom or usage.⁵⁵ Additionally, the United States Supreme Court has consistently held that allegations of negligence cannot support procedural due process claims;⁵⁶ the due process guarantee only protects against intentional acts by government officials.⁵⁷

Procedural due process claims require analysis of two important questions: First, was the plaintiff deprived of a constitutionally protected

⁴⁹ *Jones v. Flowers*, 547 U.S. 220 (2006).

⁵⁰ U.S. CONST. amend. XIV, § 1. Note the Fifth Amendment also contains a Due Process Clause with similar language. *See* U.S. CONST. amend. V.

⁵¹ *United States v. Salerno*, 481 U.S. 739, 746 (1987).

⁵² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 592 (6th ed. 2019).

⁵³ *Id.* at 591. To see the difference, one may look to constitutional parental rights to child custody. *Id.* at 592. For example, “procedural due process requires that the government provide notice and a hearing, and that there be clear and convincing evidence of a need to terminate custody, before parental rights are permanently ended. Because the right to custody is deemed a fundamental right, substantive due process requires that the government prove that terminating custody is necessary to achieve a compelling purpose, such as the need to prevent abuse or neglect of the child.” *Id.*

⁵⁴ *Id.* at 591. Because procedural due process is at issue here, substantive due process will not be talked about further.

⁵⁵ 42 U.S.C. § 1983; *see, e.g., Monell v. Dep’t of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 691–92 (1978).

⁵⁶ *See Zinermon v. Burch*, 494 U.S. 113, 143 (1990) (O’Connor, J., dissenting).

⁵⁷ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

interest in life, liberty, or property?⁵⁸ Second, if yes, what process is due concerning the deprivation?⁵⁹ The Constitution does not create specific property interests.⁶⁰ However, there is no question that when the government deprives an individual of real or personal property, due process is implicated⁶¹ Generally, property interests are created and defined by independent sources such as state law, which generate entitlements to specific benefits.⁶²

The judicial system has long held that animal owners have substantial property interests in their domesticated pets, especially in their income-generating animals.⁶³ Dog-breeding is recognized as a taxable, legitimate source of income when breeders abide by the proper legal regulations.⁶⁴ Moreover, states often codify an owner's property interest in their dog.⁶⁵ Under some state laws, courts have held that even owners of unlicensed dogs retain a property interest in their dogs.⁶⁶ However, a pet owner's

⁵⁸ *Siebert v. Severino*, 256 F.3d 648, 659 (7th Cir. 2001) (quoting *Porter v. Dibilasio*, 93 F.3d 301, 305 (7th Cir. 1996)).

⁵⁹ *Id.*

⁶⁰ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

⁶¹ *CHEMERINSKY*, *supra* note 52, at 591. For example, your home or land for the building of an interstate. *Id.*

⁶² *Roth*, 408 U.S. at 577.

⁶³ *Siebert*, 256 F.3d at 660 (holding owner had substantial property interest in horses); *Porter*, 93 F.3d at 306–07 (holding owner had substantial property interest in horses); *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *4 (N.D. Ga. May 25, 2016) (holding owner had substantial property interest in high-step gait breeding horses); *Daskalea v. Wash. Humane Soc'y*, 480 F. Supp. 2d 16, 34 (D.D.C. 2007) (undisputed owner had protected property interest in dog purchased for companionship and breeding); *Temple v. Cleve Her Many Horses*, 163 F. Supp. 3d 602, 624 (D.S.D. 2016) (owner had protected property interest in incoming-generating cattle).

⁶⁴ *See, e.g., Dragonwood Conservancy, Inc. v. Felician*, No. 16-CV-534, 2019 U.S. Dist. LEXIS 99777, at *20 (holding claims of lost breeding rights are lost profits and plaintiffs may recover for those damages); Glenye Cain Oakford, *Tax Tips for Dog Breeders*, AM. KENNEL CLUB (Mar. 21, 2016), <https://www.akc.org/expert-advice/dog-breeding/tax-tips-for-dog-breeders/> [<https://perma.cc/PUL8-HJDY>] (“One basic thing to remember is that, even if you breed dogs as a hobby, income you make from that activity—e.g., when you sell a puppy—is taxable.”).

⁶⁵ *See, e.g., ARK. CODE ANN. § 20-19-302(5)(A)* (2021) (“‘Owner’ means any person who: Has a right of property in a dog, cat, or other animal...”); 3 PA. CONS. STAT. § 459-102 (2021) (“When applied to the proprietorship of a dog, includes every person having a right of property in such dog, and every person who keeps or harbors such dog or has it in his care, and every person who permits such dog to remain on or about any premises occupied by him.”).

⁶⁶ *Smith v. City of Detroit* 751 F.App'x 691, 696 (6th Cir. 2018). Unlicensed here just means the owner did not license the dog through the City. *Id.* at 692.

“protected property interest wanes” but is not extinguished if their pet escapes.⁶⁷

Where a protected property interest exists, a determination must be made about what process is due before the government deprives a citizen of that interest.⁶⁸ In general, courts consistently hold “some form of hearing is required before an individual is finally deprived of a property interest.”⁶⁹ Due process pre-deprivation hearings, where feasible, apply to temporary deprivations and permanent deprivations.⁷⁰ The modern test used to determine what process is required comes from *Mathews v. Eldridge*.⁷¹ The *Mathews* test requires balancing three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷²

Courts have broad discretion in applying the *Mathews* test, including in cases involving animals.⁷³ In *Porter v. DiBlasio*, the court held the government must provide owners proper notice and an opportunity to be heard before permanently terminating the owner's interest in an animal.⁷⁴ In *Porter*, Porter's nine thoroughbred racehorses were in the care of another when the county seized all of the horses present at that individual's

⁶⁷ Hansen v. Black, 872 F.3d 554, 559 (8th Cir. 2017); see also Altman v. City of High Point, 330 F.3d 194, 205–06 (4th Cir. 2003) (“Put simply, while we do not denigrate the possessory interest a dog owner has in his pet, we do conclude that dog owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and unsupervised, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance.”).

⁶⁸ Siebert v. Severino, 256 F.3d 648, 659 (7th Cir. 2001) (quoting Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir. 1996)).

⁶⁹ Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citing Wolff v. McDonnell, 418 U.S. 539, 557–558 (1974)); see also Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir. 1996) (“The presumption is that an individual is entitled to notice and an opportunity for a hearing prior to the state's permanent deprivation of his property interest.”).

⁷⁰ Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158, 1162 (7th Cir. 1992).

⁷¹ 424 U.S. 319 (1976).

⁷² *Id.* at 335.

⁷³ CHEMERINSKY, *supra* note 52, at 630; see also Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting) (“The balance is simply an ad hoc weighing which depends to a great extent upon how the Court subjectively vies the underlying interests at stake.”).

⁷⁴ Porter v. DiBlasio, 93 F.3d 301, 303 (7th Cir. 1996).

farm.⁷⁵ Though the county knew of Porter’s ownership interest in the horses, it did not notify Porter that it would treat his horses as strays, putting them up for adoption after a five-day holding period.⁷⁶ Applying the *Mathews* factors, the court first determined it was undisputed that an individual has a substantial interest in maintaining ownership of their animals, particularly “potential income-generating animals.”⁷⁷ Second, the court noted the high risk an owner faces of permanent and wrongful deprivation of rights under a brief five-day redemption period.⁷⁸ Notice to the owner and a hearing would allow the owner to challenge the legality of the original animal seizure and the costs incurred as a result of it.⁷⁹ Third, requiring notice and a hearing before terminating a known owner’s interest in their animals would not significantly burden the government because there is already a five-day redemption period in which a hearing could be held.⁸⁰

In *O’Keefe v. Gist*, a police officer responded to a report of a stray dog.⁸¹ The officer picked up the dog and determined it had no identifiable owner due to its lack of a collar.⁸² The officer did not check the dog for a microchip, which it had, because the officer did not have a scanner readily available.⁸³ The court held procedural due process does not require municipal or state officials to scan a stray dog for a microchip where no microchip scanner is readily available.⁸⁴ Visually inspecting the dog to determine it was a stray and that the owner was unknown was sufficient to meet due process requirements considering the owner received an effective post-deprivation remedy of reclaiming his dog.⁸⁵ Using the *Mathews* factors,⁸⁶ the court first determined the officer lawfully and properly took possession of the dog as a stray.⁸⁷ Second, the court noted

⁷⁵ *Id.*

⁷⁶ *Id.* at 303–04.

⁷⁷ *Id.* at 306–07. The court also emphasizes “[o]ther types of animals more commonly kept as pets have a different, but not necessarily lesser, value to their owners, generally in the form of companionship.” *Id.*

⁷⁸ *Id.* at 307.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *O’Keefe v. Gist*, 908 F. Supp. 2d 946, 956 (C.D. Ill. 2012).

⁸² *Id.*

⁸³ *Id.* at 956–57.

⁸⁴ *Id.* at 962.

⁸⁵ *Id.*

⁸⁶ The court in *O’Keefe* ultimately determined the police officer, who gave the dog to the individual at the police station instead of taking it to the pound to be processed and held for the waiting period, acted randomly and without authorization. *Id.* at 959–60. Thus, the post-deprivation remedies were sufficient to meet due process requirements. *Id.*

⁸⁷ *Id.* at 961.

pre-deprivation procedures were not feasible in this situation because the officer could not, through visual inspection, determine the dog's owner before the officer seized the dog.⁸⁸ Moreover, the post-deprivation remedies were sufficient to provide due process to the dog's owner because the owner reclaimed the dog through a replevin hearing.⁸⁹ Third, the administrative and fiscal burden "requiring all municipalities to scan every stray cat and dog for microchips would outweigh the burden imposed on pet owners either to put identification tags on the animals or to use post-deprivation procedures to recover lost pets."⁹⁰

As stressed in *O'Keefe*, despite the presumption that an individual is entitled to adequate notice and an opportunity to be heard before governmental deprivation of a property right, a pre-deprivation hearing is not required in all circumstances.⁹¹ Due process only requires "such procedural protections as the particular situation demands."⁹² For example, a remedy in common-law-tort or a post-deprivation hearing may satisfy due process.⁹³

B. Jones v. Flowers

Due process jurisprudence has evolved to require more of the State before depriving an individual of a protected property interest. In light of society's advancements in communication, in *Jones v. Flowers*, the Supreme Court heightened the notice requirements the state must follow before selling a property to satisfy a tax burden.⁹⁴ In *Jones*, Gary Jones moved from his long-time home on North Bryan Street in Little Rock, Arkansas, to an apartment after his divorce.⁹⁵ Jones's ex-wife continued to live in the home.⁹⁶ Jones successfully paid off his mortgage in 1997 but failed to pay property taxes, so the property was then certified as delinquent.⁹⁷ The Commissioner of State Lands ("Commissioner") "attempted to notify Jones of his tax delinquency and the State's right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address."⁹⁸ No one was home to sign for the certified letter,

⁸⁸ *Id.*

⁸⁹ *Id.* at 961–62.

⁹⁰ *Id.* at 962.

⁹¹ *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *O'Keefe*, 908 F. Supp. 2d at 951.

⁹² *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁹³ *Zinermon v. Burch*, 494 U.S. 113, 128 (1990).

⁹⁴ *Jones v. Flowers*, 547 U.S. 220, 239 (2006).

⁹⁵ *Id.* at 223.

⁹⁶ *Id.*

⁹⁷ *Id.* ("Jones paid his mortgage each month for [thirty] years, and the mortgage company paid Jones' property taxes.")

⁹⁸ *Id.*

and no one went to the post office to retrieve the letter within the fifteen-day holding period.⁹⁹ The post office then returned the unopened letter to the Commissioner, labeling it as unclaimed.¹⁰⁰ Two years passed, and before the public sale of the property, “the Commissioner published a notice of public sale in the Arkansas Democrat Gazette.”¹⁰¹ The Commissioner sent an additional notice to Jones at the North Bryan Street address, but the letter was returned again, labeled as unclaimed.¹⁰² The Commissioner subsequently sold the property to Linda Flowers, delivered an unlawful detainer notice to the property, and served notice on Jones’ daughter, who then contacted Jones to notify him of the tax sale.¹⁰³ The Supreme Court granted certiorari to determine “whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered.”¹⁰⁴ The Court held “the State should have taken additional reasonable steps to notify Jones, if practicable to do so” because a person “desirous of actually informing” an individual of an impending tax sale of a house “would [not] do nothing when a certified letter sent to the owner is returned unclaimed.”¹⁰⁵

The Court determined there were several reasonable steps the State could have taken to notify Jones.¹⁰⁶ For example, the State could have sent the notice by regular mail, so no signature was required, potentially allowing the new resident of the house to notify the postman of the previous owner’s new address or notify the prior owner directly.¹⁰⁷ The Court also said the State could have posted a notice on the front door or addressed the undeliverable mail to “occupant,” increasing the likelihood the present occupant would read the notice and alert the owner.¹⁰⁸ Thus, considering the options the state has to notify an individual, the state must do more to try and inform an owner of the potential deprivation of their

⁹⁹ *Id.* at 223–24.

¹⁰⁰ *Id.* at 224.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 225.

¹⁰⁵ *Id.* at 221, 229, 234 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

¹⁰⁶ *Id.* at 234.

¹⁰⁷ *Id.* at 234–35.

¹⁰⁸ *Id.* at 235. The Court presumes the present occupant will notify the owner because the notice affects their current property interest in the property as well. *Id.* The Court also notes “[f]ollowing up by publication was not constitutionally adequate under the circumstances presented here because, as [the Court has] explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale.” *Id.* at 237.

property when a notice letter is returned unclaimed.¹⁰⁹ The Court did not hesitate to modernize notice requirements in light of society's contemporary norms of communication. This implies that advancements in technology to identify a lost pet's owners may also require the state to do "a bit more."

IV. INSTANT DECISION

There are two ultimate issues in this case: First, whether Lunon had a procedural due process right to affirmative pre-deprivation notice before the state interfered with his property interest in Bibi by spaying her and adopting her out;¹¹⁰ and second, whether Dupree, Botsford, or Miles, in their individual or official capacities, violated this right.¹¹¹

A. Majority Opinion

The Majority resolved these issues by first explaining the rules surrounding qualified immunity.¹¹² Next, the court discussed whether Lunon had a protected constitutional due process right that the state violated.¹¹³ Finally, the court determined whether Defendants were entitled to qualified immunity.¹¹⁴

The Majority explained, "[q]ualified immunity shields public officials from liability for civil damages if their conduct does not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"¹¹⁵ To defeat a summary judgment motion based on qualified immunity, Lunon was required to show that "the individual defendants acting in their individual capacities violated a constitutional or statutory right that was clearly established at the time of the violation."¹¹⁶

The court noted the purpose of the Due Process Clause is to restrict "governmental decisions which deprive individuals of 'liberty' or 'property' interests."¹¹⁷ The Majority explained property interests "are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims

¹⁰⁹ *Id.* at 239.

¹¹⁰ *Lunon v. Botsford*, 946 F.3d 425, 427 (8th Cir. 2019).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 432.

¹¹⁵ *Id.* at 429 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹¹⁶ *Id.* (citing *Hansen v. Black*, 872 F.3d 554, 557–58 (8th Cir. 2017)).

¹¹⁷ *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)).

of entitlement to those benefits.”¹¹⁸ With this formula, the Majority focused on determining whether Lunon had a protected right to procedural due process before his property interest, in Bibi, was infringed.¹¹⁹

The Majority laid out century-old Supreme Court precedent to explain how the law considers property interests in dogs generally.¹²⁰ Despite assuming dogs are property, dogs are “still be subject to the police power of the state, and might be destroyed or otherwise dealt with” without divesting the dog’s owner of any federal right, “as in judgment of the legislature is necessary for the protection of its citizens.”¹²¹ Additionally, the Majority discussed Arkansas law concerning livestock and due process.¹²² The Supreme Court of Arkansas in *Howell v. Daughet* held “under the police power there can be a summary seizure and sale of trespassing stock without personal service of notice on the owner, and without any kind of judicial proceedings” without violating any rights related to the seizure and sale of property.¹²³ Moreover, the Supreme Court of Arkansas also held five days’ notice via public posting was sufficient to satisfy due process where an owner’s swine escaped, were impounded, and then sold.¹²⁴ The Majority noted the protected property interest of a dog owner “waned if his pet escapes” and is allowed to run “unleashed, uncontrolled, and unsupervised,” becoming “a public nuisance.”¹²⁵

The Majority ultimately applied the aforementioned law to determine whether Lunon had a protected right to procedural due process before his property interest was infringed.¹²⁶ Lunon claimed defendants “violated his procedural due process right to affirmative notice before Bibi was adopted out and spayed.”¹²⁷ However, the Arkansas case law in *Howell* and *Dodson* rejected this claimed procedural right.¹²⁸ Thus, if those decisions defined “the dimensions of Lunon’s procedural due process property interest . . . then he has no due process claim.”¹²⁹ The Majority concluded,

¹¹⁸ *Id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 430.

¹²¹ *Id.* (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704 (1897)).

¹²² *Id.*

¹²³ 230 S.W. 559, 560 (Ark. 1921).

¹²⁴ *Fort Smith v. Dodson*, 46 Ark. 296, 298–99 (1885).

¹²⁵ *Lunon*, 946 F.3d at 430 (first quoting *Hansen v. Black*, 872 F.3d 554 (8th Cir. 2017); then quoting *Altman v. City of High Point, N.C.*, 330 F.3d 194, 206 (4th Cir. 2003)).

¹²⁶ *Id.* at 431.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (The Majority also notes however “[i]f those decisions are instead viewed as declaring ‘what process is due,’ that is a federal question so they are not controlling precedents.”).

following other court decisions, pre-deprivation notice is not constitutionally required where a stray dog is held for more than five days by an animal shelter, and then after the owner fails to file a claim, adopted out and spayed.¹³⁰

Next, the court analyzed whether each defendant's conduct individually violated Lunon's right to procedural due process.¹³¹ Dupree did not deprive Lunon of a protected property interest by collecting and impounding a stray dog.¹³² Moreover, because there is "no constitutional duty to scan a stray dog for a microchip," and officials do not lose qualified immunity merely for violating an administrative or statutory provision, Dupree's failure to scan Bibi [] did not deprive Lunon of procedural due process.¹³³ The court held that Botsford and Miles were also entitled to qualified immunity because not only did they not participate in Bibi's initial intake, adoption, or sterilization, but no subordinate violated Lunon's constitutional rights.¹³⁴

B. Concurring Opinion

The Concurrence agreed with the court that Dupree, Botsford, and Miles were entitled to qualified immunity because they did not violate any of Lunon's clearly established rights.¹³⁵ Specifically, the Concurrence agreed there was no precedent supporting Lunon's claim he was entitled to pre-deprivation notice before Bibi was sterilized and placed up for adoption.¹³⁶ However, the Concurrence suggested Lunon may have had a stronger claim than other similarly situated plaintiffs.¹³⁷

The Concurrence differed from the Majority concerning "whether Lunon presented sufficient evidence to support a due process claim against one or more of the defendants under the framework of *Mathews v. Eldridge*."¹³⁸ Even though Lunon's private interest was weakened by the

¹³⁰ *Id.*; see *Fabrikant v. French*, 691 F.3d 193, 214 (2d Cir. 2012); *Wall v. City of Brookfield*, 406 F.3d 458, 459–60 (7th Cir. 2005); *O'Keefe v. Gist*, 908 F. Supp.2d 946, 952–53 (C.D. Ill. 2012); *Lamare v. N. Country Animal League*, 743 A.2d 598, 603 (1999); *Jenkins v. City of Waxahachie*, 392 S.W.2d 482, 484 (Tex. Civ. App. 1965).

¹³¹ *Lunon*, 946 F.3d at 431.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 432. Lunon claimed Botsford was liable for violating his procedural due process rights because she "instituted and enforced an established pattern of non-compliance" with the county directives concerning scanning strays for microchips and giving notice to owners. *Id.* (quotations omitted).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 433; 424 U.S. 319 (1976).

fact Bibi escaped, the *Mathews* factors still provided him a strong claim: there was a risk of erroneous deprivation, there was high value in scanning a stray animal for a microchip to identify its potential owner, who could then be notified, and the burden created by scanning for a microchip with an already accessible scanner was small.¹³⁹ The Concurrence went on to criticize the Majority for citing the tired Arkansas cases *Howell v. Daughet* and *Fort Smith v. Dodson* because each was decided long before the Supreme Court “developed its modern due process jurisprudence, so they are both non-binding and outdated.”¹⁴⁰ Nonetheless, the Concurrence agreed with the Majority regarding qualified immunity, resolving the appeal.¹⁴¹

V. COMMENT

First, this comment addresses the uncertain legal analysis in *Lunon* and the inadvertent precedent the decision created.¹⁴² Second, it examines the *Lunon* precedent in conjunction with unbridled powers the state may use to easily deprive a pet owner of their property interest. Third, this comment analyzes the counterproductive effect this precedent has on prevailing policies surrounding dog ownership and the owners themselves. Finally, it discusses the missed opportunity to modernize due process jurisprudence in relation to pets.

A. *The Shortfalls and Impact of Lunon*

As the Concurrence in *Lunon* properly alludes to, the *Mathews* test should have been used to thoroughly discuss the constitutional due process claim raised in this case.¹⁴³ First, applying the *Mathews* test, it is clear *Lunon* and dog owners generally have a protected property interest in the ownership of their pets.¹⁴⁴ This general interest applies whether the pet in question is for companionship purposes or income-generating purposes.¹⁴⁵

¹³⁹ *Lunon*, 946 F.3d at 433.

¹⁴⁰ *Id.* (first citing *Howell v. Daughet*, 230 S.W. 559 (1921); and then citing *Fort Smith v. Dodson*, 46 Ark. 296 (1885)).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 433.

¹⁴⁴ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁴⁵ *Siebert v. Severino*, 256 F.3d 648, 660 (7th Cir. 2001) (holding owner had substantial property interest in horses); *Porter v. DiBlasio*, 93 F.3d 301, 306–7 (7th Cir. 1996) (holding owner had substantial property interest in horses); *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *4 (N.D. Ga. May 25, 2016) (holding owner had substantial property interest in high-step gait breeding horses); *Daskalea v. Washington Humane Soc’y*, 480 F. Supp. 2d 16, 34 (D.D.C. 2007) (undisputed owner had protected property interest in dog purchased for

The Majority in *Lunon* neglects this point.¹⁴⁶ Instead, the Majority only emphasizes century-old precedent stating that, even assuming dogs are property, “they would still be subject to the police power of the state and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.”¹⁴⁷ The Majority again cites more archaic precedent stating “property in dogs ... may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right.”¹⁴⁸ It would be unreasonable to dispute the notion that animals in the community, under appropriate circumstances, are subject to police power when public safety requires drastic action.¹⁴⁹ However, the Majority misses the point. The state has the power to take action, but the reality of the issue in *Lunon* concerns the balance between that police power and a pet owner’s protected property interest in their animal. The Majority failed to take into account or even acknowledge that modern due process jurisprudence recognizes a pet owner has a property interest in their dog, despite and separate from the police power to control animals in the community.¹⁵⁰ The two points are allowed to exist in harmony: dog owners can have a property interest in their pets, but the state can also, in appropriate circumstances, deprive owners of that interest.

Regarding the second *Mathews* factor, the risk of erroneous deprivation of a pet owner’s interest is high because officials customarily ignore the requirement to scan impounded pets for microchips.¹⁵¹ If officers fail to check a dog for a microchip, this situation will likely recur; a microchipped dog is impounded, the owner not notified, and the animal

companionship and breeding); *Temple v. Cleve Her Many Horses*, 163 F. Supp. 3d 602, 624 (D.S.D. 2016) (owner had protected property interest in incoming-generating cattle).

¹⁴⁶ See, e.g., *Lunon*, 946 F.3d at 430.

¹⁴⁷ *Id.* (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704 (1897)).

¹⁴⁸ *Id.* (quoting *Nicchia v. People of State of New York*, 254 U.S. 228, 230–31 (1920)).

¹⁴⁹ See, e.g., *Chloe Melas, 6-year-old boy praised by Anne Hathaway on social media for saving little sister from dog attack*, CNN (July 17, 2020, 11:24 PM), <https://www.cnn.com/2020/07/15/entertainment/little-boy-saves-sister-dog-attack-anne-hathaway-trnd/index.html> [<https://perma.cc/N6VX-LV2H>].

¹⁵⁰ *Siebert*, 256 F.3d at 660 (holding owner had substantial property interest in horses); *Porter*, 93 F.3d at 306–07 (holding owner had substantial property interest in horses); *McSwain*, 2016 WL 4150036, at *4 (holding owner had substantial property interest in high-step gait breeding horses); *Daskalea*, 480 F. Supp. 2d at 34 (holding undisputed owner had protected property interest in dog purchased for companionship and breeding); *Temple*, 163 F. Supp. 3d at 624 (holding owner had protected property interest in incoming-generating cattle).

¹⁵¹ The Brief of the Appellee at 34, *Lunon v. Botsford*, 946 F.3d 425 (8th Cir. 2019) (No. 18-3314); 42 U.S.C. § 1983; see, e.g., *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 690–91 (1978).

sterilized, put up for adoption, or euthanized.¹⁵² Additionally, the value of scanning an impounded animal for a microchip is incredibly high because if the animal has a microchip, its owner can be immediately contacted to retrieve the lost animal; thus, no significant deprivation occurs.¹⁵³ According to a 2009 study, among the owners contacted about a lost pet, approximately seventy-four percent wanted the animals returned.¹⁵⁴

Third, requiring officials to scan impounded animals for a microchip, where a microchip scanner is already readily available, does not put a fiscal or administrative burden on the government.¹⁵⁵ In fact, before the present litigation, Kathy Botsford, Defendant in *Lunon* and director of Pulaski County Animal Services, authorized the purchase of more microchip scanners so workers in the field could scan captured animals immediately and take the animal directly to the owner.¹⁵⁶ Most municipalities have scanners readily available,¹⁵⁷ most vets scan pets for microchips,¹⁵⁸ and universal microchip scanners can easily be purchased online.¹⁵⁹

Thus, the Majority's failure to at the very least wholly analyze the *Mathews* factors left its reasoning confusing and unpersuasive. The precedent the Majority created is alarming. The Majority confirms due process does not require an animal control officer to scan impounded pets

¹⁵² See *Lunon*, 946 F.3d at 427–28. In fact, “owners were found for 72.7 percent of microchipped animals. Among those found, 73.9 percent of the owners wanted the animals back in their homes.” Caldwell, *supra* note 5.

¹⁵³ *How Does Pet Microchipping Work?*, PETKEY, <https://petkey.org/public/howitworks.aspx> [<https://perma.cc/6EVQ-EQRK>] (last visited Sept. 23, 2021).

¹⁵⁴ Caldwell, *supra* note 5.

¹⁵⁵ See, e.g., Kate Coil, *Memphis Animal Services, Fire Department team up to help lost pets*, TENN. MUN. LEAGUE, <https://www.tml1.org/town-and-city/memphis-animal-services-fire-department-team-help-lost-pets> [<https://perma.cc/89HD-YQ9X>] (last visited Apr. 1, 2021); *Animal Control receives grant for universal chip scanner*, SHIRLEY MASS. (June 26, 2019, 10:08 AM), <https://www.shirley-ma.gov/animal-control/news/animal-control-receives-grant-universal-chip-scanner> [<https://perma.cc/CX8B-AERZ>]; *What Our Grants Do*, AKC REUNITE, <https://www.akcreunite.org/inaction/> [<https://perma.cc/34YC-NU6V>] (last visited Apr. 1, 2021).

¹⁵⁶ Linda Satter, *Court overturns lost-dog ruling as federal judges reject central Arkansas owner's claim*, ARK. DEMOCRAT GAZETTE (Dec. 29, 2019, 9:12 AM), <https://www.arkansasonline.com/news/2019/dec/29/court-overturns-lost-dog-ruling-2019122/> [<https://perma.cc/KEX8-Z8DV>].

¹⁵⁷ See, e.g., *supra* note 155.

¹⁵⁸ *Microchipping FAQ*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/microchipping-animals-faq> [<https://perma.cc/VHZ9-83S4>] (last visited Apr. 1, 2021).

¹⁵⁹ See, e.g., *Dog Microchip Scanners*, LONG LIVE DOG, <https://longlivedog.com/dog-microchip-scanners/> [<https://perma.cc/RN9V-63AU>] (last visited Apr. 1, 2021).

for microchips even when the officer has a microchip scanner readily available.¹⁶⁰ For a system relying so heavily on checks and balances, animal control officers seem unchecked under this decision.

B. The Unbridled Power of the State

The *Lunon* precedent is deeply concerning because it further empowers the state to easily disrupt the property interests of both original and adopted pet owners. Because animal control is a component of a state government, permitted to exercise the state's police power, pets may "be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens."¹⁶¹ Accordingly, under certain circumstances, government officials may shoot and kill a pet owner's dog if they are running at large,¹⁶² pose a threat,¹⁶³ or even wounding sheep.¹⁶⁴ In determining the lost pet's fate, the law does not distinguish between the reasons why a pet might be loose.¹⁶⁵ Government officials may seize and impound a stray animal, and after the proper holding period, potentially as short as forty-eight hours, officials may adopt the animal out, sell it, or even euthanize it.¹⁶⁶ Most cities require animal control officials to notify owners – identified from tags, microchips, or tattoos – that their pets have been impounded.¹⁶⁷ However, if officials do not find these identifiers or, as in the present case, properly search for them, then no further action is required to identify the owner.¹⁶⁸ After the holding period and before adoption, most states require facilities to spay or neuter pets.¹⁶⁹ Some

¹⁶⁰ *Lunon v. Botsford*, 946 F.3d 425, 431 (8th Cir. 2019) ("But there is no constitutional duty to scan a stray dog for a microchip . . .").

¹⁶¹ *Fabrikant v. French*, 691 F.3d 193, 209 (2d Cir. 2012) (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 701–02 (1897)).

¹⁶² *Altman v. City of High Point*, 330 F.3d 194, 207 (4th Cir. 2003).

¹⁶³ *Carroll v. Cty. of Monroe*, 712 F.3d 649, 652 (2d Cir. 2013) (reasonable jury unlikely to find officer shooting allegedly aggressive dog unreasonable force); *but see Brown v. Muhlenberg Twp.*, 269 F.3d 205, 218–19 (3d Cir. 2001) (court recognizes reasonable jury could conclude officer shooting dog caused severe emotional distress on owner).

¹⁶⁴ MO. REV. STAT. § 273.030 (1939).

¹⁶⁵ Rebecca F. Wisch, *Detailed Discussion of State Dog Impound Laws*, MICH. ST. U. C. L. ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/detailed-discussion-state-dog-impound-laws#id-2> [https://perma.cc/HP6T-K4TQ] (last visited Apr. 12, 2021).

¹⁶⁶ Rebecca F. Wisch & Ashley Dillingham, *Table of State Holding Laws*, MICH. ST. U. C. L. ANIMAL LEGAL & HIST. CTR. (2017), <https://www.animallaw.info/topic/state-holding-period-laws-impounded-animals> [https://perma.cc/QR9X-Z4DZ] (last visited Apr. 12, 2021).

¹⁶⁷ *See, e.g.*, ST. LOUIS COUNTY, MO., CODE § 611.090 (2005).

¹⁶⁸ *See, e.g.*, *Lunon v. Botsford*, 946 F.3d 425, 430 (8th Cir. 2019).

¹⁶⁹ Wisch & Dillingham, *supra* note 166.

states' allow for the sale of pets to research facilities for experimental purposes.¹⁷⁰ Most alarming, as in the present case, government officials seemingly face few repercussions for depriving a pet owner of their pet, even when done in violation of local law.¹⁷¹

Beyond depriving a pet's original owner of their property interest in the animal, careless action on the part of state actors can also upset the expectations of adopted pet owners.¹⁷² Here, Vance and his mother-in-law presumed that Bibi belonged to them as their pet once her adoption was final.¹⁷³ In fact, most adopted pet owners understandably assume once they adopt a pet, the pet becomes their property, protected under relevant law.¹⁷⁴ Ordinarily, this notion of absolute ownership holds.¹⁷⁵ For example, if a family adopts a dog from a shelter, and the shelter complied with all laws regarding the pet's transfer of title, then the former pet owner likely cannot reclaim the pet as their own.¹⁷⁶ As discussed above, the government officials likely had the right to pick up the pet and put it up for adoption *after* the original owner failed to claim the pet within the designated holding period.¹⁷⁷ However, if the involved government officials violated the original pet owner's rights, the adoption may be invalidated, and the pet returned to the original owner by no fault of the adopting family, as occurred in the present case.¹⁷⁸ For example, an

¹⁷⁰ See *Kovar v. City of Cleveland*, 102 N.E.2d 472 (Ohio Ct. App. 1951).

¹⁷¹ See, e.g., *Lunon*, 946 F.3d at 430.

¹⁷² See *id.* at 429, 946 F.3d at 429 (“Lunon recovered ownership of Bibi from Vance in a state court replevin action.”).

¹⁷³ See *id.* (“Lunon recovered ownership of Bibi from Vance in a state court replevin action.”).

¹⁷⁴ See, e.g., *Sample Adoption Contract*, FOREVER HOME RESCUE FOUND., <https://www.aforeverhome.org/forms/sample-adoption-contract/> [<https://perma.cc/PU75-3KKB>] (last visited Apr. 12, 2021) (“[T]he dog, is being transferred to the adopting owner with the understanding that the adopter is taking possession of the dog to treat and to be responsible for it as their own dog... I understand that by voluntarily signing this agreement, I am entering into a legal and binding contract with A Forever Home Rescue Foundation. Breach of any term(s) of this agreement is deemed actionable . . .”).

¹⁷⁵ See *Lamare v. N. Country Animal League*, 743 A.2d 598 (Vt. 1999); see also Christopher A. Berry, *Frequently Asked Questions on Lost Pets*, MICH. STATE UNIV. COLL. L. ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/intro/lost-dogs#q5> [<https://perma.cc/43H8-L2VU>] (last visited Apr. 21, 2021).

¹⁷⁶ See *Lamare*, 742 A.2d at 605; see also *Frequently Asked Questions on Lost Pets*, *supra* note 175.

¹⁷⁷ *Frequently Asked Questions on Lost Pets*, *supra* note 175.

¹⁷⁸ *Id.*; see also *Lunon v. Vance, et al.*, CV-17-3097 (Pulaski Cnty. Ark. Cir. Ct. 2017), *rev'd sub nom.* *Lunon v. Botsford*, 946 F.3d 425 (8th Cir. 2019); *Woods v. Kittykind, Inc.*, 801 N.Y.S.2d 782 (N.Y. Sup. Ct. 2005) (unpublished table decision) (court held defendant must disclose cat's adopted owner's information so plaintiff may attempt to regain ownership of cat because defendant failed to sufficiently prove proper procedure followed in adopting cat out).

adoption might be invalidated if the shelter acquired the pet illegitimately, did not make adequate efforts to find the owner, did not keep the pet for the entire holding period or violated the pet owner's constitutional rights.¹⁷⁹ The original owner may immediately regain ownership through a replevin action, extinguishing the presumably stunned adopted pet owner's property interests.¹⁸⁰ While Lunon was fortunate to have Bibi returned to him, no doubt Vance and Lovell were also heartbroken and surprised to have what they believed to be their new family pet taken away from them.

Thus, pet owners – either original or adopted– may not realize how little power they have concerning their property rights in their pet against the state or because of the state's actions.¹⁸¹ The court's decision in *Lunon* only adds to the State's limitless power over pets.

C. The Policy Predicament

The *Lunon* Majority created an antagonistic policy predicament. Municipalities and animal activist groups vehemently encourage or even mandate that pet owners microchip their animals to increase the likelihood and ease of returning the pet to its owner.¹⁸² But, the Majority's due-process analysis lackadaisically concludes that even when a pet has a microchip, officers who have a microchip scanner readily available need not use it before potentially depriving a pet owner of their ownership rights.¹⁸³ This situation seems counterproductive. Pet owners and municipalities enacting microchip legislation clearly rely on the

¹⁷⁹ *Frequently Asked Questions on Lost Pets*, *supra* note 175.

¹⁸⁰ *See, e.g.*, ARK. CODE ANN. § 18-60-808(b) (2015) (plaintiff can establish prima facie evidence that he/she has right to immediate possession of the property in replevin action).

¹⁸¹ *Supra* notes 161–66. A similar situation is arising in the Chicago, Illinois area. Kelly Davis, *Woman suing shelter after lost dog put up for adoption*, FOX 2 NOW (Dec. 23, 2021), [https://fox2now.com/news/woman-suing-animal-shelter-after-her-lost-dog-was-put-up-for-adoption/#:~:text=CHICAGO%20\(WGN\)%20E2%80%94%20Chicago,he%20was%20just%20a%20puppy](https://fox2now.com/news/woman-suing-animal-shelter-after-her-lost-dog-was-put-up-for-adoption/#:~:text=CHICAGO%20(WGN)%20E2%80%94%20Chicago,he%20was%20just%20a%20puppy) [https://perma.cc/9ZHN-2ZK2]. A young woman's dog, Zeus, was detained by Chicago animal enforcement and subsequently put up for adoption. *Id.* Animal enforcement did not contact the young woman about Zeus even though, as documented within intake papers, Zeus was wearing his collar with his name and owner's contact information sewn into the collar. *Id.* It will be interesting to observe the legal battle between the former owner and new owner of Zeus — all due to animal enforcement's unchecked actions. *Id.*

¹⁸² *See, e.g.*, Donovan, *supra* note 6; Gill, *supra* note 6; *but see* Stephen D. Lott, *Getting Under Fido's Skin: Analyzing the Objections to Mandatory Pet Microchipping Laws*, 7 OKLA. J. L. & TECH. 52 (2011).

¹⁸³ *See, e.g.*, Lunon v. Botsford, 946 F.3d 425, 430 (8th Cir. 2019); O'Keefe v. Gist, 908 F. Supp. 2d 946, 953–54 (C.D. Ill. 2012).

microchips actually being scanned for the legislation to achieve its intended purpose.¹⁸⁴ In this context, the Majority's adamant references to local Arkansas law and procedures are ironic because even the local Little Rock government encourages pet owners to microchip dogs:

Your pet cannot talk. If he is lost, the only hope of identifying him is his city dog license or a microchip. You should have a picture of your pet, as well as a description including height, weight, age, color and distinctive markings. These items will help us determine whether or not your pet is in our care.¹⁸⁵

Moreover, multiple cities in Arkansas mandate that owners microchip their pets.¹⁸⁶ For example, in 2012, Fayetteville required pet owners to microchip their animals based on the opinion that microchips are “highly regarded as a strategy for minimizing euthanasia in shelters and returning animals home.”¹⁸⁷ In 2019, Fort Smith required all cats and dogs to be microchipped and licensed to, among other things, “ensure pets could get home without being taken to a shelter.”¹⁸⁸ In 2010, Springdale required all pet owners residing in city limits to microchip cats and dogs and to register pets with the city's animal services department.¹⁸⁹

Most shelters adopting out pets, and even many local ordinances, require microchips to be implanted before the pet leaves the facility.¹⁹⁰ Additionally, even the policies not followed in the present case require animal control officers to scan impounded animals for microchips.¹⁹¹

¹⁸⁴ See, e.g., *Animal Services Division*, CITY OF LITTLE ROCK, <https://www.littlerock.gov/city-administration/city-departments/housing-and-neighborhood/animal-services-division/> [<https://perma.cc/LS2B-KS27>] (last visited Mar. 15, 2021).

¹⁸⁵ See, e.g., *id.*

¹⁸⁶ *Infra* notes 190–92.

¹⁸⁷ Gill, *supra* note 6.

¹⁸⁸ Brett Rains, *What to know about Fort Smith's new pet laws*, 40/29 NEWS (Aug. 7, 2019), <https://www.4029tv.com/article/what-to-know-about-fort-smiths-new-pet-laws/28639811> [<https://perma.cc/Q5WD-LEQ8>].

¹⁸⁹ *Animal Services*, SPRINGDALE, <https://www.springdalear.gov/149/Animal-Services> [<https://perma.cc/3WMH-8L5Q>] (last visited Mar. 15, 2021); see also LITTLE ROCK, ARK., CODE OF ORDINANCES ch. 6, § 6-19(c)(3) (2009) (mandating microchips for potentially dangerous breeds such as pit bulls as part of formal registration requirements).

¹⁹⁰ Dave Schlenker, *Digging into mandatory pet microchipping*, OCALA (Mar. 15, 2019), <https://www.ocala.com/news/20190315/digging-into-mandatory-pet-microchipping> [<https://perma.cc/QKY4-D3GY>] (“Animal shelters, including the county Animal Center and Humane Society, already microchip dogs and cats before they are released for adoption.”); see also JEFFERSON COUNTY, MO., CODE OF ORDINANCES § 215.270 (2016).

¹⁹¹ See generally *Lunon v. Botsford*, 946 F.3d 425, 428 (8th Cir. 2019) (citing PULASKI COUNTY SANITATION AND ANIMAL SERVICES DEPT. PROCEDURE P14-06).

Thus, the *Lunon* majority's heavy reliance on government interests and functions is counterintuitive considering the importance local governments put on microchipping pets.¹⁹² The decision seems to give pet owners little assurance that microchipping their pets will make it easier for the government to return their lost dog. This lack of assurance may hurt the government's interest in microchipping pets. Pet owners may feel that if there are no protections where an animal control officer does not scan their lost pets for a microchip, even if a microchip scanner is readily available, then the purported governmental purpose for microchipping is not truly accurate.

D. A Lost Opportunity

Not only does the Majority in *Lunon* work against the government interest in requiring pet owners to microchip their animals,¹⁹³ but the Majority fails to take the opportunity to modernize due process jurisprudence concerning pets.¹⁹⁴ The Arkansas cases the Majority cited in *Lunon* were decided almost 100 years ago.¹⁹⁵ As the Concurrence points out, these cases were decided well before modern Due Process jurisprudence developed to require the State to take certain steps before depriving an individual of their protected property.¹⁹⁶ According to *Jones*, under Arkansas law, the State was only required to notify the property owner "of his tax delinquency, and his right to redeem the property [after paying the delinquent taxes], by mailing a certified letter" to the individual. If the letter returned was unclaimed, the statute did not require further notice.¹⁹⁷ However, the court held the "State should have taken additional reasonable steps to notify [the property owner], if practicable to do so."¹⁹⁸ The court listed several alternate reasonable steps the State could have taken, each of which would have been relatively easy and would not have imposed a burden on the State.¹⁹⁹ Here, Animal Control Officers, at a minimum, must look for an identifying tag.²⁰⁰ Thus, due

¹⁹² *Id.* at 430.

¹⁹³ *Id.* at 430.

¹⁹⁴ *Id.*

¹⁹⁵ See *Howell v. Daughet*, 230 S.W. 559 (Ark. 1921); *Fort Smith v. Dodson*, 46 Ark. 296 (1885).

¹⁹⁶ *Lunon*, 946 F.3d at 433.

¹⁹⁷ *Jones v. Flowers*, 547 U.S. 220, 223–24 (2006).

¹⁹⁸ *Id.* at 234.

¹⁹⁹ *Id.* at 234–38.

²⁰⁰ ARK. CODE ANN. § 14-54-1102 (2019) (requiring municipalities to give notice to impounded dog "where the dog carries its owner's address"); PULASKI COUNTY, ARK., CODE OF ORDINANCES, ch. 3, art. II, § 3-19 (1981) ("When animal is impounded, the director or his personnel shall give notice to the owner, if known, of at least forty-eight (48) hours.").

process should also require, at a minimum, that if an Animal Control Officer has a microchip scanner readily available, they should scan the pet for a microchip because this requirement would not impose a burden on the State. Notably, even PCAS policy requires Animal Control Officers to scan for a microchip.²⁰¹

Thus, as heeded by *Jones*, “[i]t is not too much to insist that the State do a bit more” before “exerting extraordinary power against a property owner.”²⁰² Here, it is not too much to insist an animal control officer, with a readily available microchip scanner, scan a stray animal for an identifying microchip before potentially depriving a pet owner of their pet. Similarly, it is not too much to insist that the court offer a morsel of updated due process jurisprudence concerning pets in accordance with the “State’s efforts to ensure that its citizens receive proper notice before the state takes action against them” by encouraging pet owners to implant microchips in their pets.²⁰³ The State is already making an effort to help identify and return lost pets., The court’s missed opportunity to modernize due process jurisprudence here may jeopardize these goals and leave room for a situation like this to happen again; or worse, for a pet owner’s dog to be euthanized.

VI. CONCLUSION

Pet owners may not realize how quickly their protected property interest in their pets may be extinguished with seemingly little due process of law. The precedent set in *Lunon* is alarming because it is so contrary to the purposes underlying increasingly common local microchip mandates.²⁰⁴ Cities and animal activist groups advise or require pet owners to microchip their animals to quickly return the animal and maintain safety in the community.²⁰⁵ However, the Majority in *Lunon* decided to alleviate constitutional repercussions for those officers who do not scan an impounded animal for a microchip, even when a microchip scanner is readily available and a local ordinance requires that they do so.²⁰⁶ If the government relies on pet owners to microchip their pets to further public order, then pet owners should also be able to rely on the government to scan the pets for the microchips they had to pay for in the first place. Though the state has the undisputed police power to control stray animals, it seems reasonable to conclude that before permanently

²⁰¹ *Lunon v. Botsford*, 946 F.3d 425, 428 (8th Cir. 2019 (citing PULASKI COUNTY SANITATION AND ANIMAL SERVICES DEPT. PROCEDURE P14-06)).

²⁰² *Jones*, 547 U.S. at 239.

²⁰³ *Id.*; see also *supra* notes 170–90.

²⁰⁴ *Lunon*, 946 F.3d at 430.

²⁰⁵ *Supra* notes 184–90.

²⁰⁶ *Lunon*, 946 F.3d at 430.

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depriving an owner of their pet, an animal control officer must scan the pet for a microchip if a scanner is readily available and it is safe to do so.