

A CONUNDRUM FOR ANIMAL ACTIVISTS:  
CAN OR SHOULD THE CURRENT LEGAL  
CLASSIFICATION OF CERTAIN ANIMALS BE  
UTILIZED TO IMPROVE THE LIVES OF  
ALL ANIMALS?  
THE INTERSECTION OF FEDERAL DISABILITY  
LAWS AND BREED-DISCRIMINATORY  
LEGISLATION

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## INTRODUCTION

Animal advocates, like anyone who is trying to change the status quo, must confront complicated issues when determining the optimal approach to try to achieve their goals. Social-justice movements often have to consider whether to focus on changes that may make an immediate impact on the lives of individuals but may not address core problems within the current legal system. The central question of this Article is whether animal advocates should use the special status granted to service and assistance animals, due to their role in the lives of persons with disabilities, to try to confront the problem of breed-discriminatory legislation.

This Article analyzes one of the many issues that animal advocates face when deciding where to focus their efforts. Part I of the Article provides a brief review of the theoretical divisions among animal advocates and discusses the application of two primary approaches to companion and assistance animal issues.<sup>1</sup> Part II of the Article sets forth basic information regarding breed-discriminatory legislation, focusing on recent developments in this area of the law.<sup>2</sup> Part III is the core of the Article, and it analyzes case and legislative law that addresses the intersection of service and assistance animals under the federal Americans with Disabilities Act (ADA), Fair Housing Act (FHA), and breed-discriminatory legislation.<sup>3</sup> Part IV of the Article concludes by providing practical and theoretical considerations for animal advocates who are considering utilizing this avenue to attempt to improve the lives of animals and humans.<sup>4</sup>

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1. *Infra* notes 5-22 and accompanying text.  
 2. *Infra* notes 23-56 and accompanying text.  
 3. *Infra* notes 57-134 and accompanying text.  
 4. *Infra* notes 135-65 and accompanying text.

## I. THE “GREAT DIVIDE” IN ANIMAL ADVOCACY

## A. General Theoretical Issues

Just as with other social movements, the debate over the best way to address issues involving animal advocacy is extremely complex. The current legal status of nonhuman animals as personal property is at the heart of many discussions in the field.<sup>5</sup> The status of animals as property leads to the generally accepted understanding that, currently, animals are protected only when it is in the interest of humans.<sup>6</sup> Polls indicate a majority of people in the United States believe, at a minimum, animals “deserve some protection from harm and exploitation, but it is still appropriate to use them for the benefit of humans.”<sup>7</sup> Commentators have suggested alternatives to the treatment of animals as property, and certainly, in some situations

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5. Rebecca J. Huss, *Valuing Man’s and Woman’s Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 68 (2002) [hereinafter Huss, *Valuing*]. A discussion of the philosophical basis for the status of animals including historical views and religious traditions is beyond the scope of this Article. See PAUL WALDAU, *ANIMAL RIGHTS WHAT EVERYONE NEEDS TO KNOW* 56-73 (2011) (discussing philosophical arguments in the animal-advocacy movement); Huss, *Valuing*, *supra*, at 52-60 (providing a brief discussion of these issues).

6. See, e.g., Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in *ANIMAL LAW AND THE COURTS: A READER* 7, 7 (Taimie L. Bryant, Rebecca J. Huss, David N. Cassuto eds., 2008) (discussing the fact that animal interests are only protected when it is economically beneficial for humans); see also Pia Lucidi et al., *Ethotest: A New Model To Identify (Shelter) Dogs’ Skills as Service Animals or Adoptable Pets*, 95 APPLIED ANIMAL BEHAV. SCI. 103, 103 (2005). The goal of this study appeared to be to provide a method to encourage the use of dogs otherwise confined to shelters to be removed from those facilities and trained for therapy work; however, ultimately the study referenced back to humans’ interest that the dogs had continued utility as service animals. *Id.* at 103 (stating that the “paucity of dogs dedicated to animal-assisted therapy . . . for disabled people creates long waiting lists worldwide and compromises the health of the few certified animals by demanding too much work from them at times, thus jeopardizing their future as service dogs”).

7. Frank Newport, *Post-Derby Tragedy, 38% Support Banning Animal Racing*, GALLUP (May 15, 2008), <http://www.gallup.com/poll/107293/PostDerby-Tragedy-38-Support-Banning-Animal-Racing.aspx>. The survey found that 72% of persons polled within the United States agreed with that statement in 2008, compared to 71% in 2003. *Id.* Note that 25% of people agreed with the statement that “Animals deserve the exact same rights as people to be free from harm and exploitation.” *Id.*

(such as anti-cruelty laws) at least certain animals are treated differently than other forms of personal property.<sup>8</sup>

The “great divide” in animal advocacy between abolitionists and welfarists is the subject of many scholarly works.<sup>9</sup> An

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8. E.g., David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1023 (2010) (proposing a new category of “living property” that would provide for the evolution of legal rights for some animals). Professor Favre has proposed other avenues to change the current legal system, including a system in which property ownership is retained but animals would be provided the status of “juristic persons.” David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 502 (2000). Under Professor Favre’s equitable-self ownership proposal the legal and equitable components of property as it relates to animals would be divided. *Id.* at 489-90. If an animal had equitable title, the legal title owner would remain responsible for the animal but would have an obligation to take the animal’s interests into account. *Id.* at 494-95. Professor Favre has also advocated for the “respectful use” of animals. David Favre, *The Integration of the Ethic of the Respectful Use of Animals into the Law*, 16 BETWEEN SPECIES 166, 167 (2013).

9. E.g., GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION* x-xii (2010) (setting forth the theories supporting animal rights (abolition) and animal protection (regulation) is also referred to as new welfarism) and stating that “[t]he debate between abolition and regulation is at the center of modern animal advocacy”); KIM STALLWOOD, *GROWL: LIFE LESSONS, HARD TRUTHS, AND BOLD STRATEGIES FROM AN ANIMAL ADVOCATE* 175-79 (2014) (discussing rights vs. welfare and regulation vs. abolition); Elizabeth L. DeCoux, *Speaking for the Modern Prometheus: The Significance of Animal Suffering to the Abolition Movement*, 16 ANIMAL L. 9, 9 (2009) (discussing the divide). A broader discussion of philosophical theories supporting animal rights and welfare is beyond the scope of this Article. See, e.g., WALDAU, *supra* note 5, at 173-88 (discussing some of the major figures and organizations in the animal rights movement); Taimie Bryant, *Virtue Ethics and Animal Law*, 16 BETWEEN SPECIES 105, 106 (2013) (exploring the use of virtue ethics in the context of animal law); Huss, *Valuing*, *supra* note 5, at 60-68 (discussing some of the modern theories on animal rights). This divide is not limited to academic scholarship. For example, in the world of dog-breed-specific rescue, one commentator discusses the impact of different philosophies. ANDREI S. MARKOVITS & KATHERINE N. CROSBY, *FROM PROPERTY TO FAMILY: AMERICAN DOG RESCUE AND THE DISCOURSE OF COMPASSION* 44-49 (2014) (dividing the groups into pragmatic and idealist and the individuals involved into dog people and pet people). The conclusion from the data cited in this book found that

the typical (mostly female) person forming the backbone of the breed specific canine rescue movement explicitly rejects the world of animal rights advocates and dismisses animal liberation not only as unrealistic in its aims but also, worse still, detrimental to the very constituents it purports to help, namely the animals.

*Id.* at 302; see also Jessica Greenebaum, “I’m Not an Activist!”: *Animal Rights v. Animal Welfare in the Purebred Dog Rescue Movement*, 17 SOC’Y & ANIMALS 289, 300-02 (2009) (reporting on results of a study of dog rescue volunteers and finding that most “do not associate with activism [or] the animal rights movement”).

abolitionist would eliminate the use of animals by humans for any purpose.<sup>10</sup> Traditionally, a welfarist theory does not challenge the status of animals as property, but focuses on the humane treatment of animals.<sup>11</sup> An additional source of division among animal advocates is whether promoting incremental change is an acceptable strategy or whether allowing for such change is actually detrimental to the movement.<sup>12</sup>

## B. Application of Theoretical Issues to Companion and Assistance Animals

Often, deliberations over the use of animals do not focus on domestic animals acting as companions or assistance animals; however, some commentators have discussed the moral and ethical implications of the use of these animals.<sup>13</sup> One commentator, after considering the research regarding nonhuman animals' attributes, including, among other things, emotions, cognitive capacity, and culture, concluded that "[o]ur growing knowledge of animals brings profound obligations" and "[a]s it becomes clear that other animals

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10. FRANCIONE & GARDNER, *supra* note 9, at 61, 103.

11. DeCoux, *supra* note 9, at 17.

12. FRANCIONE & GARDNER, *supra* note 9, at 61, 103. This book provides a debate between two authors with one of the authors (Francione) stating that "welfarists are wrong to say that abolitionists reject incremental change" but that "abolitionists reject regulatory change that seeks to make exploitation more 'humane' or that reinforces the property status of animals." *Id.* at 61. Professor Francione also sets forth the argument that contemporary welfarists' campaigns reinforce the property status of animals and discusses the problems with single issue campaigns. *Id.* at 29-30, 75-79. The other author (Gardner) provides the viewpoint that an abolitionist perspective is fundamentalist in the sense that it is unwilling "to compromise those beliefs in order to achieve incremental short-term goals that fall short of the ideal end point." *Id.* at 103. Professor Gardner also argues that a welfarist approach is not counterproductive. *Id.* at 104, 120-26; *see also* STALLWOOD, *supra* note 9, at 175-79 (exploring the division between rights/welfare and abolition/regulation).

13. *See* Rebecca J. Huss, *Re-evaluating the Role of Companion Animals in the Era of the Aging Boomer*, 47 AKRON L. REV. 497, 544-49 (2014) [hereinafter Huss, *Aging*] (discussing ethical issues relating to companion and assistance animals); *see* Leslie Irvine, *Pampered or Enslaved? The Moral Dilemmas of Pets*, 24 INT'L J. SOC. & SOC. POL'Y 5, 5 (2004) (discussing ethical issues regarding the keeping of companion animals); Tzachi Zamir, *The Moral Basis of Animal-Assisted Therapy*, 14 SOC'Y & ANIMALS 179, 180 (2006) (discussing ethical issues relating to animal-assisted therapy programs and service animals).

are more like us than not, we must reconsider our treatment of them, even that which appears benign.”<sup>14</sup>

Generally, an individual supporting the abolitionist perspective would argue it is essentially immoral to keep animals for companionship or as assistance animals.<sup>15</sup> Abolitionist theory could support rescue and adoption efforts to care for domesticated animals currently in existence but would cease the breeding of these animals.<sup>16</sup> Under an abolitionist theory, it would be almost impossible to structure a situation where a dog would appropriately be used as a service animal; though, as discussed below, it may be possible for an animal currently in existence to be cared for as a companion animal and still act in a way that provides assistance for an individual with a disability.<sup>17</sup>

Welfarists would generally allow for the keeping of companion and assistance animals with the focus on the appropriate treatment of the animals.<sup>18</sup> For example, aversive training methods, which were very commonly used in the past, are now out of favor with many

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14. Irvine, *supra* note 13, at 5, 14.

15. *Id.* at 14 (concluding under the animal rights perspective it would be immoral to keep animals for humans’ pleasure).

16. Francione & Charlton, *supra* note 6, at 27. Under the abolitionist theory, keeping companion animals, as currently practiced, would eventually end. Irvine, *supra* note 13, at 14.

17. Because the entire theory is based on the elimination of the use of animals by humans, it is consistent with abolitionist theory to focus on the needs of the individual animal; thus, unless it could be shown that an animal, such as a dog, benefited from the dog’s use as a service animal (other than the general benefits of having housing, food, veterinary care, etc.), it would be inappropriate to utilize the dog in this capacity. In theory, some animals may benefit from “having a job”; however, it would be challenging to ensure that the animal’s interest, rather than the human’s interest, is paramount. *See, e.g.,* Kathy Antoniotti, *Working Dogs Need Job to Occupy Them - Great Pyrenees Puzzles Owners With a Change in Conduct. They Learn Pet Needs a Challenge*, AKRON BEACON, June 22, 2013, at E1 (discussing the need for a working dog to have intellectual stimulation). As discussed below, animals that are not individually trained to do work or perform tasks may fit within the definition of assistance animals under the federal Fair Housing Act (FHA). *Infra* notes 88-92 and accompanying text. Thus, in theory, keeping a currently existing animal (and not breeding animals for this purpose), in a situation where the role of the animal is essentially to merely be in the presence of an individual with a disability, could be consistent with some abolitionists’ views. Again, the challenge is to ensure that the animal’s interest is considered rather than the interest of the human with a disability. *See* SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 139-42 (2011) (discussing the use of animal labor, including the use of therapy animals).

18. Irvine, *supra* note 13, at 11.

training professionals and would be of concern to a welfarist.<sup>19</sup> Specific uses of service animals, such as partnering a service animal with an individual who may be unable to care for the animal or could injure an animal (inadvertently or otherwise) would also be of concern to welfarists.<sup>20</sup> The necessity to plan for the retirement of a dog, given the fact that often dogs are not able to act in the role of service animals for the dog's entire lifetime, would also be an example of the type of issue a welfarist would raise.<sup>21</sup>

It is important to consider the basic question of whether dogs should even be in the position of acting as companion or assistance animals; however, a discussion of these underlying ethical concerns is beyond the scope of this Article.<sup>22</sup> Notwithstanding these ethical issues, it appears that society is widely accepting of the use of animals for these particular purposes at this time.

## II. THE ISSUE OF BREED-DISCRIMINATORY LEGISLATION

The reality is that there is a plethora of issues that need to be addressed in the animal-advocacy world. Certainly, from the perspective of the numbers of animals impacted, the treatment and consumption of farmed animals would be at the top of the list.<sup>23</sup> However, given the very small percentage of people in the United

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19. See, e.g., Mardi Richmond, *Guide Dogs for the Blind*, THE BARK, <http://thebark.com/content/guide-dogs-blind> (last visited Oct. 25, 2015) (discussing the transition from what would be considered aversive to positive reinforcement methods by Guide Dogs for the Blind beginning in 2006); James A. Serpell, Raymond Coppinger & Aubrey H. Fine, *Welfare Considerations in Therapy and Assistance Animals*, in HANDBOOK ON ANIMAL-ASSISTED THERAPY THEORETICAL FOUNDATIONS & GUIDELINES FOR PRACTICE 453, 466 (Aubrey H. Fine, ed. 2006) (discussing aversive training methods for assistance animals).

20. Rebecca J. Huss, *Canines in the Classroom: Service Animals in Primary and Secondary Educational Institutions*, 4 J. ANIMAL L. & ETHICS 11, 18-19 (2011) (discussing concerns over the placement of service animals with children on the autism spectrum).

21. Nora Wenthold & Teresa Savage, *Ethical Issues with Service Animals*, 14 TOPICS STROKE REHABILITATION 68, 73-74 (2007).

22. See Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1163-74 (2010) [hereinafter Huss, *Context*] (discussing the history, use, and ethical issues relating to service animals).

23. David J. Wolfson & Mariann Sullivan, *If It Looks Like a Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of "Humane,"* in ANIMAL LAW AND THE COURTS: A READER 94, 94 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008) (stating that more than ten billion animals (excluding fish) are killed for food each year, representing over 98% of the animals with which humans have interaction).

States who identify themselves as vegans or vegetarians, garnering widespread support for change in the treatment of farmed animals (let alone the consumption of animals) is more than a little challenging.<sup>24</sup>

Given that about two-thirds of United States households contain a companion animal, the treatment of this category of animals can be considered a more accessible issue for members of the public.<sup>25</sup> Reports on the various types of abuse and neglect suffered by companion animals generate widespread attention by both social and traditional media.<sup>26</sup> The recent decision by the Federal Bureau of Investigation to include animal cruelty crimes in the agency's National Incident-Based Reporting System also illustrates the importance placed on this type of treatment for certain animals.<sup>27</sup> Some types of abuse of certain animals have resulted in

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24. A recent study found that only 2% of the U.S. population would be considered to be vegetarian or vegan. HUMANE RES. COUNCIL, STUDY OF CURRENT AND FORMER VEGETARIANS AND VEGANS: INITIAL FINDINGS 2 (2014), [https://faunalytics.org/wp-content/uploads/2015/06/Faunalytics\\_Current-Former-Vegetarians\\_Full-Report.pdf](https://faunalytics.org/wp-content/uploads/2015/06/Faunalytics_Current-Former-Vegetarians_Full-Report.pdf). This same study found that approximately 10% of the population identified as formerly following a vegetarian or vegan diet. *Id.* at 5. A 2012 Gallup poll found that 5% of the U.S. population consider themselves to be vegetarian, with 2% of the U.S. population identifying themselves as vegan. Frank Newport, *In U.S., 5% Consider Themselves Vegetarians*, GALLUP, <http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx> (last visited Oct. 25, 2015). For some animal activists, vegan advocacy is of paramount concern. *E.g.*, Corey Lee Wrenn & Rob Johnson, *A Critique of Single-Issue Campaigning and the Importance of Comprehensive Abolitionist Vegan Advocacy*, 16 FOOD, CULTURE & SOC'Y 651, 665-66 (2013) (calling for animal advocates to cease single issue campaigns and challenge the underlying problems of speciesism by utilizing comprehensive vegan outreach).

25. AM. PET PRODS. ASS'N, APPA NATIONAL PET OWNERS SURVEY 2013–2014, at 3 (2013) (reporting survey results indicating that among online U.S. households the percentage of pet ownership is 68%, with dogs owned by 46.7% and cats owned by 37.3% of such households).

26. Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69, 71, 84-85 (2008) (discussing the media coverage in the Bad Newz Kennels dogfighting case); Conor Berry, *FBI Adds Animal Cruelty Cases to National Crime Report as Social Media Helps Publicly Shame Abusers*, MASSLIVE (Sept. 18, 2014), [http://www.masslive.com/news/index.ssf/2014/09/animal\\_cruelty.html](http://www.masslive.com/news/index.ssf/2014/09/animal_cruelty.html) (discussing the role of social media in putting pressure on government officials).

27. E-mail from Drema Fouch, FBI UCR Program, Federal Bureau of Investigation, to Debra Denslaw, Faculty Services Librarian & Associate Professor of Law Librarianship, Valparaiso University Law School (Sept. 25, 2014, 2:03 PM CST) (on file with author). Animal cruelty will be reported as a Group A Offense and a Crime Against Society. The four types of abuse will be simple/gross neglect, intentional abuse and torture, organized abuse (dog and cock fighting), and animal



federal legislation,<sup>28</sup> and many animal-advocacy organizations have campaigns addressing the abuse of animals.<sup>29</sup>

The issue addressed in this Article is not the general concept of the use of animals, or even the treatment of companion animals, but the specific use of a certain breed of dog as an assistance or service animal by a person with a disability. This issue impacts animals on various levels. At the most basic level, keeping companion animals in their homes is an issue of great concern to animal advocates.<sup>30</sup>

Most of the laws relating to the treatment and keeping of companion animals are based in state and local law.<sup>31</sup> Many

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sexual abuse. The change will be implemented in the National Incident-Based Reporting System in 2015, and data will begin to be accepted in January 2016. *Id.* Prior to this time, cruelty to animals was placed in the category of “all other offences.” CRIM. JUST. INFO. SERVS. DIVISION, FED. BUREAU INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM (NIBRS) USER MANUAL 48 (2013), <http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs-user-manual>.

28. *E.g.*, 18 U.S.C. § 48 (2012). After the 2010 Supreme Court case of *United States v. Stevens*, 559 U.S. 460, 482 (2010), found a previous law prohibiting the interstate sale of crush videos invalid, the U.S. Congress passed a new statute narrowing the scope that became effective in December 2010. 18 U.S.C. § 48. Crush videos are defined as various forms of an image that “depict[] actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury.” *Id.* A 2014 case upheld the validity of the new crush video law. *United States v. Richards*, 755 F.3d 269, 279 (5th Cir. 2014).

29. *E.g.*, *Report Animal Cruelty*, ANIMAL CRUELTY, <https://www.aspc.org/fight-cruelty/report-animal-cruelty> (last visited Oct. 25, 2015) (setting forth the steps an individual should take if he or she suspects animal cruelty); *Animal Abuse and Neglect*, HUMANE SOC’Y U.S., [http://www.humanesociety.org/issues/abuse\\_neglect/](http://www.humanesociety.org/issues/abuse_neglect/) (last visited Oct. 25, 2015).

30. Rebecca J. Huss, *Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations*, 39 CONN. L. REV. 2059, 2066 (2007) (setting forth three commonly utilized prongs for implementing non-lethal strategies in pet population control as “(a) increasing adoptions, (b) increasing sterilizations, and (c) increasing the retention of companion animals in homes”); *see also* AM. HUMANE ASS’N, KEEPING PETS (DOGS AND CATS) IN HOMES: A THREE-PHASE RETENTION STUDY, PHASE II: DESCRIPTIVE STUDY OF POST-ADOPTION RETENTION IN SIX SHELTERS IN THREE U.S. CITIES 4-5 (2013), <http://www.americanhumane.org/petsmart-keeping-pets-phase-ii.pdf> (last accessed Jan. 9, 2015) (discussing a three-phase study to better understand why people do not adopt animals and to determine effective strategies to prevent relinquishment to shelters); *Webinars Archive: Pet Retention: Keeping Pets in Their Homes*, BEST FRIENDS, <http://nmhpnetwork.bestfriends.org/Webinars.aspx> (last visited Oct. 25, 2015) (discussing issues that impact pet relinquishment and retention in homes).

31. DAVID S. FAVRE, ANIMAL LAW: WELFARE, INTEREST, AND RIGHTS 34-35 (2008) (stating “[i]n the United States, the governments of the individual states control ownership under property law concepts . . . [a]s such either the state courts

jurisdictions have passed laws regulating the species and number of animals that individuals may keep in their housing, regardless of the treatment of the animals.<sup>32</sup> The standard used to determine whether this type of law is valid is whether the law is rationally related to the allowed concerns of the legislature.<sup>33</sup> In the area of animal regulations, the concerns are generally related to public health, safety, or welfare.<sup>34</sup> Just as with other local ordinances, a state or federal law may preempt the local ordinance.<sup>35</sup>

Breed-discriminatory ordinances restrict or ban the keeping of dogs within a jurisdiction based not on the behavior of the animal but the appearance of the dog.<sup>36</sup> It is important to note that although these laws generally list a breed or breeds of dogs, the description is often based on the appearance of the dog and does not rely on DNA evidence.<sup>37</sup> Recent studies have illustrated that visual identification

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or the state legislatures are fully empowered to deal with the issue of ownership of animals”).

32. Rebecca J. Huss, *Companion Animals and Housing*, in *ANIMAL LAW AND THE COURTS: A READER* 189-97 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008) (analyzing state and local laws). For example, species restrictions may limit the animals that can be kept to certain domesticated animals that are widely considered companion animals, such as cats or dogs, but excluding animals such as potbellied pigs. *Id.* at 194-95.

33. *Id.* at 190.

34. *Id.*

35. *Id.* Note that in some states there is a concept of “home rule” that provides certain local municipalities with more control over these types of regulations. *Id.*; see also Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *DENV. U. L. REV.* 1337, 1340-44, 1374 (2009) (setting forth the framework for home rule and providing an appendix of home rule provisions in the states in 2009); Paul Diller, *Intrastate Preemption*, 87 *B.U. L. REV.* 1113, 1122-32 (2007) (discussing the development of home rule and the previously popular regime referred to as Dillon’s Rule, which provides that municipalities’ power is limited to what is granted to them by the state or necessary to their purpose of incorporation).

36. A.B.A., Resolution, Adopted by the House of Delegates August 6-7, 2012, 2012 AM 100, <http://www.americanbar.org/directories/policy.html> (search “pit bull”) at 1 [hereinafter A.B.A., Resolution] (stating that “[b]reed-discriminatory measures, sometimes referred to as breed-specific measures, distinguish dogs of one or more specific breeds . . . as inherently dangerous because of the dog’s physical appearance”).

37. Katie Bray Barnett, *Breed Discriminatory Legislation: How DNA Will Remedy the Unfairness*, 4 *J. ANIMAL L. & ETHICS* 161, 161 (2011) (discussing the use of physical characteristics rather than DNA in ordinances).

of dogs is frequently inaccurate, even by persons observing dogs on a daily basis, such as shelter workers.<sup>38</sup>

Many national animal-advocacy organizations oppose breed-discriminatory legislation, including the American Humane Association,<sup>39</sup> American Society for the Prevention of Cruelty to Animals,<sup>40</sup> Best Friends Animal Society,<sup>41</sup> and the Humane Society of the United States.<sup>42</sup> Other organizations with an interest in animals

38. Victoria L. Voith et al., *Comparison of Visual and DNA Breed Identification of Dogs and Inter-Observer Reliability*, 3 AM. J. SOC. RES., no. 2, 2013, at 17, 18, 24 [hereinafter Voith, *Comparison of Visual*] (finding a “wide disparity between DNA and visual identification of the predominant breeds comprising a dog . . . indicat[ing] a low level of agreement among people regarding breed composition”); Victoria L. Voith et al., *Comparison of Adoption Agency Breed Identification and DNA Breed Identification of Dogs*, 12 J. APPLIED ANIMAL WELFARE SCI. 253, 261 (2009) (comparing DNA results with breed identification by adopting agencies).

39. Press Release, Am. Humane Ass’n, American Humane Association Applauds President Obama for Joining Groups Opposed to Breed-Specific Legislation (Aug. 22, 2013), <http://www.americanhumane.org/about-us/newsroom/news-releases/president-obama-breed-specific-legislation.html> (referencing the White House response to a petition calling for a ban on breed specific legislation stating, “there is little evidence that supports breed-specific legislation as an effective means of reducing dog bites and dog attacks . . . [o]n the contrary, studies have shown that it is not the breeds themselves that are dangerous, but unfavorable situations that are creating dangerous dogs”).

40. *Position Statement on Breed Specific Legislation*, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-on-breed-specific-legislation> (last visited Oct. 25, 2015) (stating “the ASPCA is not aware of credible evidence that breed-specific laws make communities safer either for people or other companion animals . . . [t]here is, however, evidence that such laws unfairly target responsible pet guardians and their well-socialized dogs, are inhumane, and impede community safety and humane sheltering efforts”).

41. *Pit Bull Terrier Initiatives*, BEST FRIENDS, <http://bestfriends.org/What-We-Do/Our-Work/Initiatives/Pit-Bull-Terrier-Initiatives/> (last visited Oct. 25, 2015) (describing its initiative on pit bulls and stating “[b]ecause legislation targeting dogs by breed—instead of careless owners—has proved ineffective. . . [n]ot only do such laws infringe on basic rights, they fail to enhance public safety for people and pets”).

42. *Why Breed-Specific Legislation Doesn’t Work*, HUMANE SOC’Y U.S. (Jan. 9, 2013), [http://www.humanesociety.org/issues/breed-specific-legislation/fact\\_sheets/breed-specific-legislation-flaws.html](http://www.humanesociety.org/issues/breed-specific-legislation/fact_sheets/breed-specific-legislation-flaws.html) [[https://web.archive.org/web/2015031720100/http://www.humanesociety.org/issues/breed-specific-legislation/fact\\_sheets/breed-specific-legislation-flaws.html](https://web.archive.org/web/2015031720100/http://www.humanesociety.org/issues/breed-specific-legislation/fact_sheets/breed-specific-legislation-flaws.html)]. The Humane Society states:

The HSUS opposes laws and ordinances aimed at forbidding or regulating dog ownership based solely on breed or type of dog. Breed-specific legislation (BSL) does not enhance public safety or reduce dog bite incidents. Rather, such laws, regulations, and ordinances are costly to enforce and harm families, dogs, and communities.

*Id.*

and public health, such as the American Kennel Club,<sup>43</sup> American Veterinary Medical Association,<sup>44</sup> American Veterinary Society of Animal Behavior,<sup>45</sup> Association of Professional Dog Trainers,<sup>46</sup> and the National Animal Control Association<sup>47</sup> also oppose legislation that deems a dog dangerous based on breed rather than behavior.

Organizations that are not focused on the welfare of animals have also considered the issue of breed-discriminatory legislation. In 2012, the American Bar Association<sup>48</sup> (the largest national voluntary association of lawyers in the United States) adopted a policy calling for legislative bodies to enact comprehensive breed-neutral

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43. AM. KENNEL CLUB, CANINE LEGISLATION POSITION STATEMENT “DANGEROUS DOG” CONTROL LEGISLATION, [http://images.akc.org/pdf/canine\\_legislation/position\\_statements/Dangerous\\_Dog\\_Control\\_Legislation.pdf](http://images.akc.org/pdf/canine_legislation/position_statements/Dangerous_Dog_Control_Legislation.pdf) (last visited Oct. 25, 2015) (stating “[t]he American Kennel Club strongly opposes any legislation that determines a dog to be ‘dangerous’ based on specific breeds or phenotypic classes of dogs”).

44. *Dangerous Animal Legislation*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/KB/Policies/Pages/Dangerous-Animal-Legislation.aspx> (last visited Oct. 25, 2015) (stating “[t]he AVMA supports dangerous animal legislation by state, county, or municipal governments provided that legislation does not refer to specific breeds or classes of animals. . . [t]his legislation should be directed at fostering safety and protection of the general public from animals classified as dangerous”); see *Why Breed-Specific Legislation Is Not the Answer*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/public/Pages/Why-Breed-Specific-Legislation-is-not-the-Answer.aspx> (last visited Oct. 25, 2015) (citing to a recent study that illustrated that observers’ identifications of breeds of dogs is often inconsistent, visual identification of breed is unreliable); see also Voith, *Comparison of Visual*, *supra* note 38, at 24 and accompanying text (discussing study finding a disparity between DNA results and visual identification of breeds).

45. AM. VETERINARY SOC’Y ANIMAL BEHAVIOR, POSITION STATEMENT ON BREED-SPECIFIC LEGISLATION 1, [http://avsabonline.org/uploads/position\\_statements/Breed-Specific\\_Legislation-download-\\_8-18-14.pdf](http://avsabonline.org/uploads/position_statements/Breed-Specific_Legislation-download-_8-18-14.pdf) (last visited Oct. 25, 2015) (stating that the position of the organization is that breed-specific legislation “is ineffective, and can lead to a false sense of community safety as well as welfare concerns for dogs identified (often incorrectly) as belonging to specific breeds”).

46. *Breed Specific Legislation*, ASS’N PROF. DOG TRAINERS (2001), [http://www.apdt.com/about/ps/breed\\_specific\\_legis.aspx](http://www.apdt.com/about/ps/breed_specific_legis.aspx) (last visited Oct. 25, 2015) (stating “[t]he APDT opposes any law that deems a dog as dangerous or vicious based on appearance, breed or phenotype. . . [t]he only predictor of behavior is behavior”).

47. NAT’L ANIMAL CARE & CONTROL ASS’N, NACA GUIDELINES 25 (2014), [http://c.y.mcdn.com/sites/www.nacanet.org/resource/resmgr/Docs/NACA\\_Guidelines.pdf](http://c.y.mcdn.com/sites/www.nacanet.org/resource/resmgr/Docs/NACA_Guidelines.pdf) (stating “[d]angerous and/or vicious animals should be labeled as such as a result of their actions or behavior and not because of their breed”).

48. *About the American Bar Association*, AM. BAR ASS’N, [http://www.americanbar.org/about\\_the\\_aba.html](http://www.americanbar.org/about_the_aba.html) (last visited Oct. 25, 2015) (stating “[t]he American Bar Association is one of the world’s largest voluntary professional organizations, with nearly 400,000 members”).

dangerous-dog/reckless-owner laws.<sup>49</sup> In response to an online petition calling for a ban on breed-specific legislation at the end of 2012, the White House official response referenced the community approach to dog-bite prevention advocated by the Centers for Disease Control (CDC) and stated that the White House doesn't "support breed-specific legislation—research shows that bans on certain types of dogs are largely ineffective and often a waste of public resources."<sup>50</sup>

Some organizations have campaigns targeting breed-discriminatory legislation. An example is Best Friends Animal Society (Best Friends).<sup>51</sup> One of Best Friends' initiatives is focused on pit-bull-terrier-like dogs.<sup>52</sup> Best Friends states:

Pit bulls and pit bull mixes are the dogs most at risk of being killed in animal shelters around the country because of the sheer number of them and the negative stigma surrounding them. Best Friends is committed to changing the damaging public perception of pit bulls, who were once considered great family dogs.<sup>53</sup>

At the time of the writing of this Article, nineteen states had passed legislation restricting the ability of a local jurisdiction to enact breed-discriminatory legislation.<sup>54</sup> One of the aspects of Best

49. A.B.A., Resolution, *supra* note 36. The Resolution states: RESOLVED, That the American Bar Association urges all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both dog owners and dogs, and to repeal any breed discriminatory or breed specific provisions.

*Id.*; see also *ABA Adopts Policy Based on Tort Trial & Insurance Practice Section Resolution Urging the Adoption of Breed-Neutral Dog Laws and the Repeal of Breed Discriminatory (Pit Bull) Ordinances*, AM. BAR ASS'N (Aug. 9, 2012), [http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba\\_adopts\\_policyba0.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/aba_adopts_policyba0.html).

50. *Breed-Specific Legislation Is a Bad Idea*, WHITE HOUSE, <https://petitions.whitehouse.gov/petition/ban-and-outlaw-breed-specific-legislation-bsl-united-states-america-federal-level-0> (last visited Oct. 25, 2015).

51. *Our Work*, BEST FRIENDS, <http://bestfriends.org/what-we-do/our-work/> (last visited Oct. 25, 2015) (listing pit bulls, puppy mills, and cats as initiatives the organization has to accomplish its mission to "SAVE THEM ALL").

52. *Pit Bull Terrier Initiatives*, *supra* note 41.

53. *Id.*

54. CAL. FOOD & AGRIC. CODE § 31683 (West 2014) (restricting local authorities from enacting breed-discriminatory ordinances other than ordinances relating to mandatory spay or neuter programs under certain circumstances); see also CAL. HEALTH & SAFETY CODE §§ 122330(c), 122331(a) (West 2014); COLO. REV. STAT. § 18-9-204.5(5)(b) (2014); FLA. STAT. § 767.14 (2014); 510 ILL. COMP.

Friends' initiative regarding pit-bull-terrier-like dogs is to increase the number of states with similar legislation.<sup>55</sup> Although there has been some success in eliminating breed-discriminatory legislation, it is still in place in many communities.<sup>56</sup>

### III. THE APPLICATION OF BREED-DISCRIMINATORY LEGISLATION TO INDIVIDUALS UTILIZING SERVICE AND ASSISTANCE ANIMALS

Two federal laws that activists may utilize in ensuring access for persons with disabilities who have pit-bull-terrier-like dogs are the American with Disabilities Act<sup>57</sup> and the Fair Housing Act.<sup>58</sup> Recent interpretations of both laws provide strong arguments that a breed-discriminatory policy cannot be applied to prevent a person with a disability from being accompanied by his or her pit-bull-terrier-like dog in public accommodations or housing.<sup>59</sup>

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STAT. 5/24 (2014); MINN. STAT. § 347.51 (2014); N.J. STAT. ANN. § 4:19–36 (West 2014); N.Y. AGRIC. & MKTS. LAW § 107(5) (McKinney 2014); OKLA. STAT. tit. 4, § 46(B) (2014); 3 PA. CONS. STAT. § 459-507-A(c) (2014); S.D. CODIFIED LAWS § 40-34-16 (2014); TEX. HEALTH & SAFETY CODE ANN. § 822.047 (1) (West 2014); UTAH CODE ANN. § 18-2-101 (2) (LexisNexis 2014); VA. CODE ANN. § 3.2-6540(C) (2014).

55. *Pit Bull Terrier Initiatives*, *supra* note 41.

56. Aamer Madhani, *U.S. Communities Increasingly Ditching Pit Bull Bans*, USA TODAY (Nov. 18, 2014, 1:10 PM), <http://www.usatoday.com/story/news/nation/2014/11/17/pit-bulls-breed-specific-legislation-bans/19048719/> (stating that “[o]ver the past two years, more than 100 municipalities across the USA have overturned bans and other restrictions that target dogs in the pit bull family . . . [and] [m]ore communities could soon follow suit”).

57. *See generally* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.). The ADA Amendments Act of 2008 was passed to address concerns that case law had established an “inappropriately high level of limitation necessary to obtain coverage under the ADA.” *Id.*

58. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2012).

59. *See infra* notes 60-123 and accompanying text (discussing the application of the ADA and FHA). Note that although the cases discussed herein relate to issues with access with pit-bull-terrier-like dogs acting as service animals, there are certainly cases relating to access where the breed of the dog is not at issue. *See, e.g.*, *Alboniga v. Sch. Bd.*, 87 F. Supp. 3d 1319, 1345 (S.D. Fla. 2015) (ruling on a dispute relating to a service dog being utilized by a minor in a school environment whereby there was no mention of the dog being a Staffordshire terrier although media reports identified the dog's breed); Carol Marbin, *In Fight Over Boy's Service Dog, Broward School Board Is Brought to Heel*, MIAMI HERALD (Feb. 20, 2015), <http://www.miamiherald.com/news/local/community/broward/article10782953.html> (identifying the breed of dog).

### A. Americans with Disabilities Act and Service Animals

The ADA is the comprehensive federal civil rights law prohibiting discrimination on the basis of disability.<sup>60</sup> Individuals with disabilities must be granted access to public entities under Title II<sup>61</sup> and public accommodations under Title III of the ADA.<sup>62</sup>

The ADA requires that public entities (state and local governments) and public accommodations “shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.”<sup>63</sup> Guidance to the rulemaking by the Department of Justice (DOJ) clarified that the position of that agency is to reject the application of breed-discriminatory policies to service animals.<sup>64</sup>

The current ADA regulations include a definition of service animal.<sup>65</sup> Service animal is defined as: “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”<sup>66</sup>

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60. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C.).

61. See generally Title II, 42 U.S.C. §§ 12131-12165.

62. See generally Title III, 42 U.S.C. §§ 12181-12189. Section 504 of the Rehabilitation Act provides, “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a) (2012). If applicable, Section 504 is utilized along with the ADA in service animal cases.

63. 28 C.F.R. § 35.136(a) (2014). The language for public accommodations is substantially the same with the addition of the word “its.” 28 C.F.R. § 36.302(c) (2014) (stating “shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a service animal by an individual with a disability”).

64. See *infra* note 83 and accompanying text (discussing guidance provided by the Department of Justice).

65. Huss, *Context, supra* note 22, at 1174-79 (discussing the proposed ADA regulations). The regulatory language relating to the accommodation of service animals for public entities and public accommodations is essentially the same. See 28 C.F.R. §§ 35.104, 36.104. Although DOJ policy was clear that public entities were required to accommodate service animals, the regulations applicable to public entities prior to March 2011 did not include service animal language. Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,466, 34,477 (June 17, 2008) (to be codified at C.F.R. pt. 35) (discussing the fact that although there was no specific language in the then-current Title II regulation concerning service animals, those entities had the same legal obligations to make modifications as Title III entities).

66. 28 C.F.R. § 35.104. The remainder of the definition is as follows:

The ADA's intersection with breed-discriminatory ordinances is illustrated by the opinion granting a preliminary injunction in *Sak v. City of Aurelia*.<sup>67</sup> Although the *Sak* case involved a local ordinance,<sup>68</sup> its analysis is applicable to other scenarios involving accommodation under the ADA given the parallel language in the Title II and Title III regulations. Thus, if a restaurant, hotel, or other public accommodation had a breed-discriminatory company policy restricting the ability of a person with a disability to be accompanied by a service dog,<sup>69</sup> such business would be in violation of the ADA according to this analysis. The *Sak* case is especially useful for advocates because it could be described as a case that has "good facts" and can serve as a model for future causes of action.<sup>70</sup>

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Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

*Id.* This language is mirrored in regulations applicable to Title III of the ADA. 28 C.F.R. § 36.104. Although not relevant to this Article's discussion regarding breed-discriminatory legislation, the regulations also require entities to make reasonable accommodations to permit the use of a miniature horse as a service animal subject to several assessment factors. 28 C.F.R. §§ 35.136(i), 36.302(c)(9).

67. 832 F. Supp. 2d 1026, 1031 (N.D. Iowa 2011).

68. *Id.* at 1038-39, 1042 (discussing the applicability of Title II of the ADA, stating that "[t]here does not appear to be any dispute that the City of Aurelia is a 'public entity,'" and reiterating a prior holding that "the regulation of any activity by a city, by an ordinance, is, itself, a program, service, activity, or benefit of the City that Title II of the ADA will reach").

69. Absent the ability to restrict service dogs that are disruptive as discussed below. See *infra* note 83 and accompanying text.

70. *United States v. Joseph*, 730 F.3d. 336, 337 (3d Cir. 2013) (stating in a criminal case "[l]awyers and judges are familiar with the well-worn adage that bad facts make bad law . . . [a] possible corollary to this proposition is that good facts make good law"); see also Thomas Saunders, *Settling Without "Settling": School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL'Y REV.



1. *The Person Utilizing the Dog Must Be a Qualified Individual with a Disability*

In order for the ADA to be applicable, a person must fit within the definition of a qualified individual with a disability.<sup>71</sup> Disability is defined as “a physical or mental impairment that substantially limits one or more major life activities.”<sup>72</sup> Mr. Sak, a retired Chicago police officer and veteran,<sup>73</sup> had suffered a stroke leaving him permanently disabled.<sup>74</sup> Mr. Sak utilized a wheelchair and had no control over the right side of his body.<sup>75</sup> The *Sak* court found that “[t]here does not appear to be any dispute that . . . Sak is a ‘qualified individual with a disability’ within the meaning of Title II of the ADA.”<sup>76</sup>

One of the challenges for entities subject to the ADA in determining whether an individual is covered by the law is that regulations make it clear that entities may not inquire “about the nature or extent of a person’s disability” but are only allowed to “ask if the animal is required because of a disability and what work or task the animal has been trained to perform.”<sup>77</sup> In Mr. Sak’s case, his

571, 613 (2004) (citing to Susan Goering explaining the litigation strategy in a school financing case as “[w]e followed the old adage that good facts make good law. . . [a]s an attorney, you take your best case and the most compelling facts you have for a case of first impression” (quoting Interview with Susan Goering, Exec. Dir., ACLU of Md., in Balt., Md. (Jan. 23, 2003))).

71. 42 U.S.C. § 12102 (2012).

72. *Id.* Major life activities are defined as

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

*Id.* (emphases omitted).

73. Note the reference to “good facts” above. Mr. Sak was what might be referred to as a particularly sympathetic plaintiff. Not only was he a veteran and a former police officer, but he moved with his wife to the City of Aurelia to care for his elderly mother-in-law. *Sak*, 832 F. Supp. 2d at 1031.

74. *Id.*

75. *Id.*

76. *Id.* at 1039.

77. 28 C.F.R. §§ 35.136(f), 36.302(c)(6) (2014).

disability was open and apparent; however, many persons with disabilities utilizing service animals may not “appear” disabled.<sup>78</sup> An example would be an individual with Post Traumatic Stress Disorder (PTSD) utilizing a service animal.<sup>79</sup> Such an individual may not have any obvious visible signs of his or her disability, but may be utilizing a psychiatric service animal.

## 2. *The Dog Must Meet the Definition of Service Animal Under the ADA Regulations*

Individual training to “do work or perform tasks” is the key to whether a dog meets the definition of service animal.<sup>80</sup> Mr. Sak’s dog Snickers had been a family pet prior to his stroke.<sup>81</sup> After the stroke, Mr. Sak’s physical therapist trained Snickers to assist Mr. Sak with walking, balance, and retrieving items.<sup>82</sup>

Although Mr. Sak obtained documentation that stated that Snickers was a “certified service animal,” the ADA regulations further provide that entities “shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.”<sup>83</sup> The *Sak* court found that the evidence provided in support of the Saks’ motion “demonstrates that Snickers has been individually trained to do work and to perform tasks for Sak that are directly related to his disability.”<sup>84</sup>

Regardless of a dog’s breed, if the dog has the appropriate temperament and skill set, the dog could be individually trained to do

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78. Huss, *Context*, *supra* note 22, at 1176-79 (discussing concerns about distinguishing between psychiatric service animals that are covered under the ADA with emotional support animals that are not covered by the ADA).

79. Joan Froling, *Service Dog Tasks for Psychiatric Disabilities: Tasks to Mitigate Certain Disabling Illnesses Classified as Mental Impairments Under the Americans with Disabilities Act*, INT’L ASS’N OF ASSISTANCE DOG PARTNERS (IAADP), available at [http://www.iaadp.org/psd\\_tasks.html](http://www.iaadp.org/psd_tasks.html) (last visited Oct. 25, 2015) (listing PTSD as a disabling condition that would be recognized by the ADA).

80. See *supra* note 65 and accompanying text (providing the definition of service animal).

81. *Sak*, 832 F. Supp. 2d at 1031-32 (quoting 28 C.F.R. § 35.104).

82. *Id.*

83. 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6). Mr. Sak obtained this documentation from the National Service Animal Registry, even though such certification is not required by the ADA regulations. *Sak*, 832 F. Supp. 2d at 1032. The National Service Animal Registry is not affiliated with any governmental authority. NAT’L SERV. ANIMAL REGISTRY, *About Us*, <http://nsarco.com/aboutus.html> (last visited Oct. 25, 2015).

84. *Sak*, 832 F. Supp. 2d at 1043.

work or perform tasks for the benefit of an individual with a disability. In fact, at least one organization is focusing on training pit-bull-terrier-like dogs rescued from shelters to act as service dogs.<sup>85</sup>

### 3. *An Entity Must Make a Reasonable Accommodation*

The DOJ's guidance to the ADA regulations specifically addresses the issue of whether an entity may need to make an exception to a breed-discriminatory ordinance or policy.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. . . . [E]ntities have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.<sup>86</sup>

ADA regulations provide that entities may exclude a service animal from the premises if “[t]he animal is out of control and the animal's handler does not take effective action to control it.”<sup>87</sup> In the

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85. See Sue Manning, *Rescued Pit Bulls Fight Stigma by Guiding People in Need* (Feb. 11, 2015, 4:55 PM), <http://news.yahoo.com/rescued-pit-bulls-fight-stigma-guiding-people-174449009.html> (discussing the Assistance Dog Training Program at the Animal Farm Foundation training service dogs and another organization training pit-bull-terrier-like dogs for emotional support); see also ANIMAL FARM FOUND., ASSISTANCE DOG TRAINING PROGRAM, <http://www.animalfarmfoundation.org/pages/Assistance-Dog-Program> (last visited Oct. 25, 2015).

86. Title II Final Rule, 75 Fed. Reg. 56,164, 56,194 (Sept. 15, 2010); Title III Final Rule, 75 Fed. Reg. 56,266, 56,268 (Sept. 15, 2010). Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,216 (Sept. 15, 2010) (implementing the final regulation for Title II of the ADA and providing guidance on changes in the regulations); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,306 (Sept. 15, 2010) (implementing the final regulations for Title III of the ADA and providing guidance on changes in the regulations).

87. 28 C.F.R. § 35.136(b)(1); 28 C.F.R. § 36.302(c)(2)(i). The animal can also be excluded if he or she is not housebroken. 28 C.F.R. § 35.136(b)(2); 28 C.F.R. § 36.302(c)(2)(ii).

*Sak* case, Snickers was described as a “pit bull mix.”<sup>88</sup> At the time of the hearing, Snickers was five and one-half years old and had no history of aggression.<sup>89</sup> The City of Aurelia had an ordinance that made it unlawful to keep or in any way possess a “Pit Bull Dog” within the city, and Mr. Sak did not dispute that Snickers would fall within the definition of a “Pit Bull Dog.”<sup>90</sup>

After the city directed the Saks to remove Snickers from the jurisdiction, the Saks brought a complaint requesting injunctive relief to prevent the city from enforcing the ordinance.<sup>91</sup> The court first established that Title II of the ADA would apply in that there was no dispute that the city was a “public entity.”<sup>92</sup> The court also reviewed the regulations in the ADA specifically requiring public entities to accommodate service animals.<sup>93</sup>

In finding that Mr. Sak had shown a likelihood of success on his claim that the city was violating the ADA through the application of the ordinance, the judge quoted the ADA regulations’ guidance and enjoined the city from applying the ordinance against Snickers.<sup>94</sup> Of specific note, the judge ended his opinion by stating that “[t]his is one small, but vital step for Sak, one giant leap for pit bull service dogs.”<sup>95</sup>

The *Sak* case did not go to trial on the merits. The City of Aurelia executed a Release and Settlement Agreement in June 2012, allowing the Saks to keep Snickers in the city throughout both Mr. Sak’s and his wife’s lifetimes. The Saks agreed to keep or erect an eight-foot fence around their yard and keep Snickers on a leash if outside their property, and the city paid the Saks \$30,000.<sup>96</sup>

As illustrated by the *Sak* case, the ADA can be used by individuals with pit-bull-terrier-like service dogs to assert rights of accommodation and access; however, if applicable, the FHA provides an alternative with broader coverage for persons with disabilities who utilize assistance animals.

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88. *Sak*, 832 F. Supp. 2d at 1031.

89. *Id.*

90. *Id.* at 1033.

91. *Id.* at 1037.

92. *Id.* at 1039.

93. *Id.* at 1041.

94. *Id.* at 1044, 1047.

95. *Id.* at 1048.

96. Release and Settlement Agreement Among James Sak, Peggy Leifer and the City of Aurelia (June 27, 2012) (on file with author).

## B. Fair Housing Act

The FHA was part of the Civil Rights Act of 1968.<sup>97</sup> The Fair Housing Amendments Act was enacted in 1988 expanding the FHA to include persons with disabilities in the classes of persons protected from housing discrimination.<sup>98</sup> The DOJ and the Department of Housing and Urban Development (HUD) are jointly responsible for enforcing the FHA<sup>99</sup> with HUD being responsible for the administration of the FHA.<sup>100</sup> Similar to the expansive coverage of the ADA, the FHA covers a wide range of housing, including single-family homes in some circumstances.<sup>101</sup>

Also similar to the ADA, plaintiffs may prove discrimination under the FHA by showing a failure to provide a reasonable accommodation.<sup>102</sup> The FHA's definition of discrimination includes refusing "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary

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97. 42 U.S.C. §§ 3601-3631 (2012); *see also* H.R. REP. NO. 100-711, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, at 2176 (discussing the background and need for the FHA).

98. 42 U.S.C. § 3601; *see also* H.R. REP. NO. 100-711, at 17, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (discussing the need for an amendment to the FHA to protect them). The FHA originally provided protection from discrimination in housing on the basis of race, color, national origin, or gender. 42 U.S.C. § 3605(a). The FHA is sometimes referred to as the Fair Housing Amendments Act. References in this Article to the FHA include the FHA as amended by the Fair Housing Amendments Act. The FHA actually utilizes the term "[h]andicap" rather than disabled, and it is defined as someone with "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment." 42 U.S.C. § 3602(h). Many of the cases in this area of the law use the terms "handicap" and "disability" interchangeably. *See, e.g.,* Giebler v. M & B Assocs., 343 F.3d 1143, 1146 (9th Cir. 2003) (discussing the use of the terms "handicap" and "disability").

99. *See* U.S. DEP'T JUST. & U.S. DEP'T HOUSING & URB. DEV., JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 1 (2004), <http://www.hud.gov/offices/fheo/library/huddojstatement.pdf>.

100. 42 U.S.C. § 3608(a). The Attorney General or private persons may enforce the FHA. 42 U.S.C. §§ 3613-14.

101. Although many of the cases discussing the applicability of the FHA deal with multifamily dwellings, under many circumstances single-family homes are also included under the purview of the statute. 42 U.S.C. § 3603(b)(1).

102. 42 U.S.C. § 3604(f)(3)(B).

to afford such person equal opportunity to use and enjoy a dwelling.”<sup>103</sup>

Case law and language in federal regulations<sup>104</sup> have established that a reasonable accommodation may include a waiver of a no-pet rule to allow for an assistance animal.<sup>105</sup> There is no definition of assistance animal in the regulations; however, HUD has provided guidance.<sup>106</sup> HUD included the following definition of “assistance animals” in one of its handbooks:

Assistance animals are not pets. They are animals that work, provide assistance, or perform tasks for the benefit of a person with a disability, or animals that provide emotional support that alleviates one or more identified symptoms or effects of a person’s disability. . . .

. . . Some, but not all, animals that assist persons with disabilities are professionally trained. Other assistance animals are trained by the owners themselves and, in some cases, no special training is required. The question is whether or not the animal performs the disability-related assistance or provides the disability-related benefit needed [as a reasonable accommodation] by the person with the disability.<sup>107</sup>

HUD’s position on assistance animals was also established in rulemaking in connection with the law that applies to pet ownership in HUD-assisted housing for the elderly and persons with disabilities.<sup>108</sup> In the guidance on that rulemaking, HUD referenced its position in the handbook set forth above<sup>109</sup> and reiterated its longstanding position, under the FHA, on the use of assistive animals—also referred to as “service animals,” “support animals,”

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103. *Id.* There are differences between the coverage of the ADA and FHA. For example, the FHA requires that the public and common use portions of multifamily dwellings constructed after January 1, 1991, must be handicapped accessible; however, any reasonable modifications within the unit are at the expense of the disabled person. 24 C.F.R. § 100.203 (2014). This is in contrast to the Americans with Disabilities Act provision that requires the person with the public accommodation to pay for any reasonable accommodations. 42 U.S.C. §§ 12111(9), 12111(10)(B).

104. 24 C.F.R. § 100.204(b) (providing an example of a blind applicant with a seeing-eye dog).

105. See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 75-88 (2005) [hereinafter Huss, *No Pets Allowed*] (analyzing cases discussing waivers of no-pet rules).

106. See 24 C.F.R. § 100.201.

107. U.S. DEP’T OF HOUSING & URB. DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 2-41 (2013), <http://portal.hud.gov/hudportal/documents/huddoc?id=43503HSGH.pdf>.

108. Huss, *Aging*, *supra* note 13, at 513-17 (2014) (analyzing the law applying to assisted rental housing for the elderly or disabled).

109. See *supra* note 107 and accompanying text (defining assistance animal).

“assistance animals,” or “therapy animals.”<sup>110</sup> HUD articulated reasons why the FHA must cover “emotional support animals” and other animals that may not need training, stating “the needs of persons with disabilities in the housing arena are distinct from other settings.”<sup>111</sup>

HUD’s administrative decisions support an expansive definition of assistance animal.<sup>112</sup> Although courts interpreting the FHA have not always been consistent in defining assistance animal,<sup>113</sup> it is clear at this point in time that the definition of assistance animal under the FHA is broader than that of service animal under the ADA and clearly covers emotional support animals.<sup>114</sup>

A person requesting a reasonable accommodation under the FHA may be required by the housing provider to supply medical records to support the status of the individual as a person with a disability and to demonstrate that the animal is needed for the

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110. Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63835 (Oct. 27, 2008) [hereinafter *Pet Ownership for the Elderly and Disabled*].

111. *Id.* at 63837. Although the focus in this Article is on dogs, there is no species limitation in the FHA definition of assistance animals; although, it is likely that a housing provider could limit its accommodation to common household domesticated animals. Rebecca J. Huss, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417, 439-40 (2012) (discussing the lack of a species restriction under the FHA definition of assistance animal).

112. In many situations, tenants have been successful in arguing that there should be a waiver of a no-pet rule in order for the tenant to be able to retain an assistance animal. See Huss, *No Pets Allowed*, *supra* note 105, at 81 n.112 and accompanying text (discussing HUD consent orders). In states that have laws that are at least as protective as the federal law protecting against discrimination, at HUD’s discretion, the cases are referred to the applicable state division of human rights. 42 U.S.C. § 3610(f) (2012).

113. See Huss, *No Pets Allowed*, *supra* note 105, at 74-85 (analyzing FHA cases).

114. *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011) (stating that “the FHA encompasses all types of assistance animals regardless of training, including those that ameliorate a physical disability and those that ameliorate a mental disability”); *Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App’x. 617, 622-23 (6th Cir. 2011) (discussing the definition of assistance dogs under the FHA and acknowledging that it was somewhat unclear at the time the litigation was initiated, but emphasizing that rather than utilizing the court process, housing providers should cooperate with residents over reasonable accommodation disputes).

individual to use and enjoy the premises.<sup>115</sup> It is not uncommon for individuals to have to educate housing providers and others subject to the FHA as to the ability to keep an assistance animal in housing that would otherwise ban such animal.<sup>116</sup>

A recent example of the application of the FHA in the context of an individual with a pit-bull-terrier-like dog is the case of *Warren v. Del Vista Towers Condominium Ass'n, Inc.*<sup>117</sup> To prevail on a FHA failure-to-accommodate claim, the plaintiff must show (a) that he or she is disabled within the meaning of the FHA; (b) the individual requested a reasonable accommodation; (c) such accommodation is necessary to use and enjoy the individual's dwelling; and (d) the defendant refused to make the accommodation requested.<sup>118</sup> In the *Warren* case, the condominium association conceded, for purposes of a motion for summary judgment, that Mr. Warren had met all the requirements for making a reasonable accommodation request.<sup>119</sup> The only challenge that the condominium association asserted was that the requested accommodation was unreasonable.<sup>120</sup> Specifically, the condominium association argued that allowing for an emotional support dog that allegedly fell within the terms of local breed ban would be *per se* unreasonable.<sup>121</sup>

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115. Huss, *No Pets Allowed*, *supra* note 105, at 74-82 (discussing the nexus between the disability and the assistance animal and the provision of medical records to support the request). A HUD consent order limited a housing provider's ability to require medical records beyond a statement from a medical provider that the individual has a disability, and the designated animal provides emotional support or other assistance that alleviates one or more symptoms or effects of the person's disability. HUD v. Carter, No. 11-F-077-FH-36, 2011 WL 7064545, at \*4, \*8, (H.U.D.A.L.J. Dec. 13, 2011).

116. See, e.g., Susan Marschalk Green, *Marley Comes Home*, TAMPA BAY TIMES, Feb. 3, 2012, at 1 (discussing a case where a sixty-five-year-old woman with cancer and depression was not allowed to have her seventy-pound emotional support animal in her condominium due to a weight restriction and the condominium board's eventual agreement to allow the dog after an attorney was hired to raise the FHA issue); Pilar Ulibarri, *Dog Owner Files Lawsuit to Keep Canine in Condo*, PALM BEACH POST, June 19, 2004, at 3C (reporting on case of a seventy-six-year-old man who successfully sued to keep his dog in his condominium and an eighty-five-year-old woman who filed a lawsuit to allow her to keep her dog in her condominium).

117. 49 F. Supp. 3d 1082, 1084 (S.D. Fla. 2014).

118. *Id.* at 1085-86; see also Huss, *No Pets Allowed*, *supra* note 105, at 74-82 (discussing the nexus between the disability and assistance animal).

119. *Warren*, 49 F. Supp. 3d at 1086.

120. *Id.*

121. *Id.* at 1088. The court initially established that emotional support dogs are reasonable accommodations under the FHA. *Id.* at 1087. In this case, the condominium association did not allege that allowing Mr. Warren to have an



The *Warren* court reiterated it was not important that the dog (Amir) was not individually trained, but instead focused on the ability to deny a reasonable accommodation request for an assistance animal if the “animal’s behavior poses a direct threat and its owner takes no effective action to control the animal’s behavior so that the threat is mitigated or eliminated.”<sup>122</sup> The *Warren* court found the presumption in favor of a reasonable accommodation under the FHA “requires the existence of a significant risk—not a remote or speculative risk.”<sup>123</sup> The *Warren* court further cited to a HUD notice that allowed for a request for accommodation of an assistance animal to be denied if

“(1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by *another* reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by *another* reasonable accommodation.”<sup>124</sup>

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assistance animal would “(1) impose an undue burden on the housing provider nor (2) fundamentally alter the nature of the provider’s operations.” *Id.* at 1086. The *Warren* court acknowledged that there was a dispute over Amir’s breed but stated it was immaterial to the case due to the FHA’s preemption of the ordinance. *Id.* at 1089.

122. *Id.* (quoting *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1220 (11th Cir. 2008)). The *Schwartz* case analyzed issues relating to the application of a zoning ordinance to halfway houses for individuals recovering from substance abuse. *Schwartz*, 544 F.3d at 1205.

123. *Warren*, 49 F. Supp. 3d at 1087 (quoting *Pet Ownership for the Elderly and Disabled*, 73 Fed. Reg. 63834, 63837 (Oct. 27, 2008)). Those rules continue with the following language:

The determination of whether an assistance animal poses a direct threat must rely on an individualized assessment that is based on objective evidence about the specific animal in question, such as the animal’s current conduct or a recent history of overt acts. The assessment must consider the nature, duration, and severity of the risk of injury; the probability that the potential injury will actually occur; and whether reasonable modifications of rules, policies, practices, procedures, or services will reduce the risk. In evaluating a recent history of overt acts, a provider must take into account whether the assistance animal’s owner has taken any action that has reduced or eliminated the risk. Examples would include obtaining specific training, medication, or equipment for the animal.

*Pet Ownership for the Elderly and Disabled*, 73 Fed. Reg. at 63837.

124. *Warren*, 49 F. Supp. 3d at 1087-88 (quoting U.S. DEP’T OF HOUSING & URB. DEV., *SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 3* (2013), [https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals\\_ntcftheo2013-01.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcftheo2013-01.pdf)).

Because the issue of whether Amir posed a direct threat that could not be mitigated by another reasonable accommodation is a question of fact, the court declined to decide the issue of whether allowing Mr. Warren to keep Amir was a reasonable accommodation.<sup>125</sup>

The *Warren* court did consider whether the local ordinance banning pit bulls would make Mr. Warren's request unreasonable per se.<sup>126</sup> The *Warren* court considered the issue of whether the FHA preempted the local ordinance.<sup>127</sup> The *Warren* court cited to a First Circuit Court of Appeals case, finding that "Section 3615 of the FHA preempts any law which permits a discriminatory housing practice."<sup>128</sup> Thus, the court held that as a matter of law, in this context, the local breed-discriminatory ordinance would be preempted by the FHA.<sup>129</sup> The remaining issue was whether the dog "poses a direct threat to members of the condominium association, and whether that threat can be reduced by other reasonable accommodations."<sup>130</sup>

After the summary judgment motion was denied, the parties in the *Warren* case agreed to a settlement providing that all the claims would be released if Mr. Warren would maintain a liability insurance policy for any injury or property damage caused by his dog Amir, and in exchange, Mr. Warren would be permitted to keep Amir at his residence and would receive \$100,000 from the condominium association.<sup>131</sup>

In August 2015, a district court in Texas cited to the *Warren* case and a HUD Notice dated April 25, 2013 that states that "[b]reed, size, and weight limitations may not be applied to an assistance animal" in denying a motion to dismiss a claim based on the FHA.<sup>132</sup> The landlord in the *Chavez v. Aber* case asserted that because the dog being utilized as an emotional support animal (Chato) was part pit bull "[a]s a matter of law, it is not a reasonable accommodation to keep [such] a dangerous dog on the premises."<sup>133</sup> The *Chavez* court

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125. *Id.* at 1088.

126. *Id.*

127. *Id.*

128. *Id.* at 1089.

129. *Id.*

130. *Id.*

131. E-mail from Marcy LaHart, Attorney for Paul Warren, to author (Jan. 16, 2015, 5:10 PM CST) (on file with author).

132. *Chavez v. Aber*, No. EP-15-CV-00068-KC, 2015 WL 4724807, at \*11 n.7 (W.D. Tex. Aug. 8, 2015) (quoting Reply to Plaintiffs' Response to Defendants' First Amended Motion to Dismiss at 4).

133. *Id.* at \*11.

utilized an analysis similar to the *Warren* court to determine whether Chato was a direct threat and found that the plaintiffs had alleged sufficient facts to show that Chato did not pose such a threat and could be a potentially reasonable accommodation.<sup>134</sup> These two recent cases and supporting HUD materials make it clear that the breed of a dog should not be a factor in determining whether an assistance animal is able to be excluded from housing.

#### IV. CONSIDERATIONS FOR ANIMAL ADVOCATES

##### A. Practical Concerns—Appropriate Use of the Laws

Just as with any other legal action, an advocate must be cautious in his or her use of the laws protecting persons with disabilities to ensure that the laws are utilized appropriately. This Section of the Article discusses some of the issues that should be considered.

###### 1. *Perception of Widespread Misrepresentation of Status of Animals*

In connection with the revision of the ADA regulations, several commentators raised concerns with public accommodations being unable to distinguish between the use of service animals (covered by the ADA) and emotional support animals or pets.<sup>135</sup> As discussed above, entities cannot require that service dogs be certified,<sup>136</sup> and the ADA regulations limit entities from inquiring about the use of the service dog other than asking whether “the animal is required because of a disability and what work or tasks the animal has been

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134. *Id.*

135. Huss, *Context*, *supra* note 22, at 1179.

136. See *supra* note 83 and accompanying text. Note that this does not mean that entities do not sell “registration” or “certification” materials for service and assistance animals. See SERVICEDOGVEST.COM, <http://www.servicedogvest.com/vestaccessories.html> (last visited Oct. 25, 2015) (selling a service dog ID badge and tags with language stating that “access required”); Patches, WORKINGSERVICEDOG.COM, [http://www.workingservicedog.com/service\\_dog\\_patches.aspx](http://www.workingservicedog.com/service_dog_patches.aspx) (last visited Oct. 25, 2015) (selling service dog vests and patches, including patches that identify the type of disability such as PTSD or autism the service dog is being used to alleviate).

trained to perform.”<sup>137</sup> Entities are specifically not allowed to inquire about the “nature or extent of a person’s disability.”<sup>138</sup>

Though it is impossible to quantify, concerns have been raised in the media and elsewhere that there may be a growing problem with some people misrepresenting the status of their pets as service or assistance animals.<sup>139</sup> Businesses are concerned about persons using “fake” service dogs to obtain access to premises.<sup>140</sup> In addition, persons with disabilities are reporting that they are having more problems when utilizing their service animals, and some attribute this to persons without disabilities who are trying to “pass off” their untrained companion animals as service animals.<sup>141</sup>

There is no specific language in the ADA or its regulations specifying a penalty for misrepresentation of an animal as a service animal.<sup>142</sup> This is consistent with the legislative history of the ADA focusing on providing access for individuals with disabilities.<sup>143</sup>

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137. 28 C.F.R. § 35.136(f) (2014); 28 C.F.R. § 36.302(c)(6).

138. 28 C.F.R. § 35.136(f); 28 C.F.R. § 36.302(c)(6).

139. See, e.g., *Illegal Fake Service Dogs Post Dangers to Many*, CBS NEWS, (Oct. 11, 2013, 11:13 AM), <http://www.cbsnews.com/news/illegal-fake-service-dogs-pose-dangers-to-many/>; Ian Parker, *Fake Service Animals Is “Very Frustrating” Issue, Store Says*, KATU.COM, (May 2, 2014, 10:19 AM), <http://www.katu.com/news/local/Pushing-back-against-fake-service-animals-257595691.html>; Rachel Swan, *Loopholes in ADA Law Make “No Pets” Clauses Nearly Impossible to Enforce*, EAST BAY EXPRESS, (Aug. 1, 2012), <http://www.eastbayexpress.com/oakland/loopholes-in-ada-law-make-no-pets-clauses-nearly-impossible-to-enforce/Content?oid=3301049>; Scott Thistle, *Increase in Registered Service Dogs in Maine, but Are Some Impostors?*, BDN MAINE (Oct. 20, 2013, 6:16 AM), <http://bangordailynews.com/2013/10/20/news/increase-in-registered-service-dogs-in-maine-but-are-some-impostors/>; CAL. SENATE BUS., PROFESSIONS & ECON. DEV. COMMITTEE, *FAKE SERVICE DOGS, REAL PROBLEM OR NOT?: HEARING ON THE POSSIBLE USE OF FAKE SERVICE DOGS AND FAKE IDENTIFICATION BY INDIVIDUALS TO OBTAIN SPECIAL ACCESS TO HOUSING, PUBLIC PLACES OR AIRPORTS/AIRLINES FOR THEIR ANIMAL BACKGROUND PAPER 1* (2014), [http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/Background%20Paper%20for%20Fake%20Service%20Dog%20Hearing%20\(2-14-14\).pdf](http://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/Background%20Paper%20for%20Fake%20Service%20Dog%20Hearing%20(2-14-14).pdf) [hereinafter California Senate Hearing Background Paper].

140. California Senate Hearing Background Paper, *supra* note 139, at 12. Businesses are also concerned about possible liability if a fake service animal causes harm because of a lack of training, increased costs, and the loss of business due to multiple animals on the premises. *Id.* at 13.

141. *Id.* at 12.

142. Although in theory the general fraud provisions, such as the language found in 18 U.S.C. § 1001 (2012) providing for up to five years in prison for misrepresentation on matters within the jurisdiction of the United States could be applied, the legislative history of that provision does not support that use, and as of the writing of this Article in October 2014, electronic searches did not locate any

In the absence of a clear federal remedy, several states have enacted legislative provisions that make it a criminal offense to misrepresent the status of an animal as a service animal.<sup>144</sup> Some of these statutes focus on the outward appearance of the purported service animal.<sup>145</sup> Language in these statutes focus on the use of a

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federal case utilizing this provision relating to the misrepresentation of a service animal.

143. See generally NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (2010), [https://web.archive.org/web/20150716015124/http://www.ncd.gov/rawmedia\\_repository/3c924b70\\_595f\\_4d70\\_b3cc\\_b3b584503a92?document.pdf](https://web.archive.org/web/20150716015124/http://www.ncd.gov/rawmedia_repository/3c924b70_595f_4d70_b3cc_b3b584503a92?document.pdf); Chai R. Feldblum et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 187-91 (2008).

144. See, e.g., CAL. PENAL CODE § 365.7 (West 2015) (providing it is a misdemeanor to knowingly and fraudulently misrepresent yourself as the owner or trainer of a guide, signal, or service dog); IDAHO CODE ANN. § 18-5811A (West 2015) (providing that “[a]ny person, not being a disabled person or being trained to assist disabled persons . . . us[ing] an assistance device or assistance dog in an attempt to gain treatment or benefits as a disabled person, is guilty of a misdemeanor”); NEB. REV. STAT. ANN. § 28-1313 (West 2015) (providing that the unlawful use of a guide dog by an individual who is not blind as defined by law is a Class III misdemeanor); NEV. REV. STAT. ANN. § 426-805 (West 2015) (providing “[i]t is unlawful for a person to fraudulently misrepresent an animal as a service animal or service animal in training”); WASH. REV. CODE ANN. § 70.84.060 (West 2015) (providing it is unlawful for an individual not disabled to use a service animal “for the purpose of securing the rights and privileges” provided by law allowing for access for persons with disabilities). The language in the New York Code is not as clear, providing that it is unlawful to “affix to any dog any false or improper identification tag, special identification tag for identifying guide, service or hearing dogs or purebred license tag.” N.Y. AGRIC. & MKTS. LAW § 118 (McKinney 2015). There are also other laws that provide for sanctions if a person falsely impersonates himself or herself as an individual with a disability. See, e.g., COLO. REV. STAT. ANN. § 18-13-107 (West 2015) (stating that “[a] person shall not falsely impersonate an individual with a disability” and providing that doing so is a Petty 1 offense).

145. See, e.g., ME. REV. STAT. ANN. tit. 17, § 1314-A (2015) (providing it is a civil violation to fit “a dog with a harness, collar, vest or sign of the type commonly used by blind person in order to represent that the dog is a service dog”); N.H. REV. STAT. ANN. § 167-D:8 (2015) (providing it is unlawful to fit an animal with a collar, harness, or a tag representing an animal is a service animal if the animal is not and thus using the animal to misrepresent the physical status of the handler); N.J. STAT. ANN. § 10:5-29.5 (West 2015) (providing a fine if an individual “fits a dog with a harness of the type commonly used by blind persons in order to represent that such dog is a guide dog when training of the type that guide dogs normally receive has not in fact, been provided”); N.C. GEN. STAT. ANN. § 168-4.5 (West 2015) (providing “[i]t is unlawful to disguise an animal as a service animal or service animal in training” with violation of the section being a Class 3 misdemeanor); TEX. HUM. RES. CODE ANN. § 121.006 (West 2015) (providing for a fine and community service if a “person who uses a service animal with a harness or leash of the type commonly used by persons with disabilities who use trained animals, in order to

harness, collar, or vest commonly used to designate that a dog is acting as a service animal.<sup>146</sup> For example, Michigan law provides that persons who are not deaf, audibly impaired, or otherwise physically limited “shall not use or be in possession of a dog that is wearing a blaze orange leash and collar or harness in any public place.”<sup>147</sup>

Other state laws focus on misrepresentations by the individuals by word or action.<sup>148</sup> An example is legislation enacted by the State of Kansas that provides that it is unlawful for any person to “represent that such person has a disability for the purpose of acquiring an assistance dog unless such person has such disability.”<sup>149</sup> Due to the limitations on the inquiries that can be made, it would seem unlikely that an entity would question an individual’s use of a purported service animal unless there are serious concerns over behavior of the animal or the human.<sup>150</sup>

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represent that his or her animal is a specially trained service animal when training has not in fact been provided”).

146. See sources cited *supra* note 145. This type of gear is readily available online and there are no restrictions on its purchase. See, e.g., SERVICEDOGVEST.COM, <http://www.servicedogvest.com/?gclid=C1rC59j3mMECFWqCMgodciUAZw> (last visited Oct. 25, 2015) (providing for service dog vests and gear).

147. MICH. COMP. LAWS ANN. § 752.62 (West 2015) (knowing violation of this Act is a misdemeanor offense). Note that presumably an individual in public with his or her animal in a blaze orange collar (because of its reflective qualities) would not be charged unless there were facts indicating a knowing violation of the law—this language is still problematic. While perhaps the legislatures using this type of language are well-meaning, designating a specific colored collar, harness, or leash as indicating an animal is a service animal is not required by the regulations implementing the Americans with Disabilities Act.

148. See, e.g., MO. ANN. STAT. § 209.204 (West 2015) (providing that the definition of “impersonates a person with a disability” includes “representation of a dog by word or action as a service dog”); UTAH CODE ANN. § 62A-5b-106 (West 2015) (providing that an individual is guilty of a Class B misdemeanor if the person intentionally falsely represents to another person that an animal is a service animal or “intentionally misrepresents a material fact to a health care provider for the purpose of obtaining documentation from the health care provider necessary to designate an animal as a service animal”).

149. KAN. STAT. ANN. § 39-1112 (West 2015). The Kansas statute also provides it is a class A nonperson misdemeanor for a person to represent that “such person has the right to be accompanied by an assistance dog . . . unless such person has the right to be accompanied in or upon such place by such dog.” *Id.*

150. At the time of the writing of this Article in October 2014, searches on Westlaw only resulted in one case that referenced a state provision regarding the misrepresentation of a service animal being utilized. In a California case, an officer at water park prepared a crime report that charged a woman under California Penal

The use of service animals by individuals who do not have apparent disabilities also can lead to a perception of misuse of statutes. An example is the use of service dogs by individuals who have had a traumatic brain injury or are currently suffering from PTSD.<sup>151</sup> In the recent ADA rulemaking, the DOJ acknowledged the challenge that entities face in determining whether a dog fits within the service animal definition but retained language to reflect the inclusive nature of the services provided to disabled individuals by service animals.<sup>152</sup>

Entities do have a remedy if a purported service animal is disruptive. The ADA regulations specifically provide that an individual can be asked to remove a service animal from the

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Code provision § 365.7. *Jerma v. Cal. Exposition & State Fair Police*, No. 2:12-cv-1363, 2014 WL 28810, at \*4 (E.D. Cal. 2014). In the *Jerma* case, Ms. Jerma brought a puppy to a water park, and an officer at the park directed her to remove it because he could not determine whether the puppy was a service animal. *Id.* During her deposition, Ms. Jerma admitted that the dog was not individually trained to perform any task for her. *Id.* at \*5. The court found that the defendants were permitted to deny access to Ms. Jerma's dog and granted the defendants' summary judgment motion. *Id.* The relevant public safety offices were contacted to determine the status of the charge against Ms. Jerma, and based on the Sacramento county court database, there is no disposition indicated for the criminal misdemeanor cited in the case, which typically means the police "declined to file" allowing the misdemeanor to drop after the passage of 364 days. E-mail from Debra Denslaw, Faculty Servs. Librarian & Assoc. Professor of Law Librarianship, Valparaiso Univ. Law Sch., to author (Mar. 10, 2015, 12:33 PM CST).

151. Froling, *supra* note 79 (listing tasks that a service dog may perform for an individual with a psychiatric disability including PTSD). The use of service dogs for disabilities such as PTSD is growing. Alma Nunley, *Service Dogs for (Some) Veterans: Inequality in the Treatment of Disabilities by the Department of Veterans Affairs*, 17 QUINNIPIAC HEALTH L.J. 261 (2014) (discussing Veterans Affairs regulations that allow for reimbursement for expenses for service animals utilized for visual, hearing, or substantial mobility impairment but not if a service animal is used for an individual with PTSD or other mental health conditions). The Department of Veterans Affairs has been hesitant to adopt the theory that service dogs should be paired with individuals with PTSD and continues to study the issue. *Dogs and PTSD*, U.S. DEP'T VETERANS AFF., [http://www.ptsd.va.gov/public/treatment/cope/dogs\\_and\\_ptsd.asp](http://www.ptsd.va.gov/public/treatment/cope/dogs_and_ptsd.asp) (last visited Oct. 25, 2015) (reporting that as of March 2014, the agency had initiated a study to determine what a dog could do for a veteran with PTSD that would qualify the dog as a service animal). Many organizations are not waiting for the results of the study and are actively placing dogs with veterans. See e.g., Elissa Koehl, *Watch Service Dog Calm War Vet's PTSD Reaction*, USA TODAY (Jan. 22, 2015), <http://www.thv11.com/story/news/nation-now/2014/09/16/inspiration-nation-service-dog-calms-ptsd/15729181/> (discussing the K9s for Warriors program placing service dogs with individuals with PTSD).

152. Huss, *Context*, *supra* note 22, at 1177.

premises if the “animal is out of control and the animal’s handler does not take effective action to control it.”<sup>153</sup> Although this section has focused on public access for service animals, the same issues apply in housing accommodation under the FHA. Even though the same level of individual training is not required under the FHA, it has clearly been established that only a reasonable accommodation must be made; thus, a dog that is displaying behavior that is out of control would likely be able to be excluded from a premises.<sup>154</sup>

Again, although it is impossible to quantify whether there truly has been an increase in the number of people misrepresenting the status of their animals, advocates will be forced to deal with this perception. Using a pit-bull-terrier-like dog, rather than a breed that may be more readily viewed as a service animal, such as a Labrador Retriever, may lead to a person with a disability being questioned more frequently (even just using the inquiries that the ADA allows in addition to others that violate the ADA).<sup>155</sup> From the perspective of an attorney who is concerned both with ensuring that individuals with disabilities using service animals have access and dispelling problematic myths relating to pit-bull-terrier-like dogs, it is especially important to make certain that any dog involved has the necessary training and behavior to meet the standards set by the ADA and FHA.

A common theme among pit-bull-terrier-like dog advocates is the importance of having each individual dog be an “ambassador” for the breed in order to dispel negative perceptions about the breed as a whole.<sup>156</sup> Because of the likely extra attention an individual

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153. 28 C.F.R. § 35.136(b)(1) (2014); 28 C.F.R. § 36.302(c)(2).

154. See, e.g., *Woodside Village v. Hertzmark*, No. SPH9204-65092, 1993 WL 268293, at \*5-6 (Conn. Super. Ct., June 22, 1993) (providing that a housing provider could evict a mentally disabled tenant when the housing provider showed it had made reasonable efforts to accommodate the tenant but the tenant did not comply with the pet policy).

155. For example, a former police officer with PTSD utilizing a pit-bull-terrier-like dog as a service animal was recently asked to leave a restaurant in California. Whitney Filloon, *Former Cop and His Service Dog Kicked Out of Restaurant*, EATER (Feb. 23, 2015, 9:48 AM), <http://www.eater.com/2015/2/23/8089837/former-cop-and-his-service-dog-kicked-out-of-restaurant>; Linda Mumma, *Former Police Officer, Service Dog Asked to Leave Old Sac Restaurant*, KCRA NEWS (Feb. 22, 2015, 2:46 PM), <http://www.kcra.com/news/local-news/news-sacramento/former-police-officer-service-dog-asked-to-leave-old-sac-restaurant/31413216>.

156. See, e.g., *The Art of Being a Breed Ambassador*, PIT BULL RESCUE CENT., <http://www.pbrc.net/breedambassador.html> (last visited Oct. 25, 2015) (“It is important for dog and owner to be a great ambassador team; doing so, will not only



using a pit-bull-terrier-like dog as a service or assistance animal will receive, it is imperative that an attorney is confident that all the factors (status of the individual and dog) support the claim. It seems unlikely that if a person misrepresents the status of a Labrador Retriever as a service animal (either because of the person's status or the dog's lack of training), it will reflect on the Labrador Retriever breed as a whole. Unfortunately for pit-bull-terrier-like dogs and their advocates, any bad behavior (again of the person or the dog), can (and likely will) be used by persons who support breed-discriminatory ordinances to reinforce myths about the breed.

## *2. Limitation of Coverage—Service Animals in Training*

The ADA does not cover service animals in training.<sup>157</sup> However, all but a few states have enacted legislation to provide for individuals with service animals in training to be accommodated in a similar manner as service animals being used by a person with a disability under at least some circumstances.<sup>158</sup>

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improve your relationship with your dog, but also display to the public how wonderful this breed truly is.”); Micaela Myers, *How to Be a Pit Bull Ambassador*, STUBBYDOG (Jan. 16, 2011), <http://stubbydog.org/2011/01/on-being-an-ambassador/> (listing ways to be a breed ambassador, including cultivating a well-behaved dog).

157. See *supra* note 66 and accompanying text (discussing the definition of service animal as a dog that has been individually trained); see also *Proffer v. Columbia Tower*, No. 98–CV–1404–K (AJB), 1999 WL 33798637, at \*5-7 (S.D. Cal. Mar. 4, 1999) (holding that neither the ADA nor FHA apply to service animals in training).

158. See *infra* notes 158-62 and accompanying text (describing ways states allow for trainers of service animals to have access to public accommodations). The Alaska Code does not include specific language regarding access for service animals in training in public accommodations, but it does provide for a violation of criminal law if an individual intentionally prevents a person training a service animal from access in a public facility under certain circumstances. ALASKA STAT. ANN. § 11.76.133(a) (West 2015). The Kentucky Code provides that a “person” with an assistance dog entitled to access “also includes a trainer of an assistance dog,” and referencing trainers of assistance dogs should have in their possession identification verifying their status as trainers, but there is no other language relating to the trainers of assistance dogs having access to public accommodations. KY. REV. STAT. ANN. § 258.500(1)-(3), (7) (West 2015). Similarly, the language of the Wyoming Code provides that the definition of “service dog” means “a dog which has been or is being specially trained to the requirements of a person with a disability,” but the Code does not otherwise designate access for a trainer of a service animal. WYO. STAT. ANN. § 35-13-205(a)(i) (West 2015). At the time of the writing of this Article, the Hawaii, South Dakota, and Washington state codes do not appear to contain language affording a right of access to public accommodations for trainers of service animals. See HAW. REV. STAT. § 347-13(b) (West 2015) (providing general

States approach the issue in different ways. Some states have provided for access by including service animals in training in the definition of service animal,<sup>159</sup> or in the provision setting forth the right of individuals with disabilities utilizing service animals to gain access to public accommodations.<sup>160</sup> A state may have a separate

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accommodation language); S.D. CODIFIED LAWS § 20-13-23.2 (2015) (providing language regarding access for persons with disabilities generally); WASH. REV. CODE ANN. § 70.84.010 (West 2015) (providing public access for persons with disabilities); *see generally* Darcie Magnuson, Note, *Service Animals in Training and the Law: An Imperfect System*, 14 SCHOLAR 987 (2012) (discussing the general issue and proposing amendments to federal laws to support access for service animals in training and uniformity to the laws).

159. *See, e.g.*, MO. ANN. STAT. § 209.200(2) (West 2015) (defining service dog as “a dog that is being or has been specially trained”); UTAH CODE ANN. § 62A-5b-102(3)(a) (West 2015) (including in the definition of service animal any dog that “is trained, or is in training”).

160. ALA. CODE § 21-7-4(d) (2015) (providing for persons training service animals to have the same rights as persons with disabilities to be accompanied by a service animal); ARIZ. REV. STAT. ANN. § 11-1024(E) (2015) (providing “[a]ny trainer or individual with a disability may take an animal being trained as a service animal to a public place” to the same extent as individuals with disabilities who use service animals); ARK. CODE ANN. § 20-14-308(a) (West 2015) (providing that “[a]n individual with visual, hearing, or other physical disabilities and his or her guide, signal, or service dog or a dog trainer in the act of training a guide, signal, or service dog shall not be denied admittance to or refused access to [list of public accommodations]”); CONN. GEN. STAT. ANN. § 46a-44 (West 2015) (allowing access for guide and assistance dog trainers); DEL. CODE ANN. tit. 6, § 4504(a) (West 2015) (including trainers and their support animals within the definition of persons who cannot be denied access to public accommodations); FLA. STAT. ANN. § 413.08(8) (West 2015) (providing trainers of service animals while engaged in the training of such animals have the same right of access); 720 ILL. COMP. STAT. ANN. § 5/48-8 (West 2015) (providing for “a trainer of a service animal is accompanied by a service animal” to have “the right of entry and use” of public accommodations); IND. CODE ANN. § 16-32-3-2(d) (West 2015) (providing for service animal trainers to be granted access to public accommodations); IOWA CODE ANN. § 216C.11(2) (West 2015) (including “person[s] training a service dog or an assistive animal” in categories of persons who are not to be denied access); ME. REV. STAT. tit. 17, § 1312(4) (2015) (granting “[a]n especially trained service dog trainer” access “while engaged in the actual training process”); MD. CODE ANN., HUM. SERVS. §§ 7-704(a)-(b), 7-705(c)(2) (West 2015) (including “service animal trainers who are accompanied by an animal being trained or raised as a service animal” to have the same right of access, but allowing for the exclusion of animals being trained as service animals “if admitting the animal would create a clear danger of a disturbance or physical harm to an individual in the place”); MINN. STAT. ANN. § 256C.02 (West 2015) (including person training a service dog); MISS. CODE ANN. § 43-6-155(2) (West 2015) (providing “[t]rainers of support dogs” with “the same rights of accommodation[ ]”); NEB. REV. STAT. ANN. § 20-127(3) (West 2015) (providing that “a bona fide trainer of a service animal” has the same right of access as an individual with a disability); NEV. REV. STAT. ANN. § 651.075(1)(b) (West 2015) (making it unlawful to “[r]efuse admittance . . . to a

statutory section that provides for trainers to have the same rights and privileges with respect to access as persons with disabilities.<sup>161</sup> In

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person training a service animal”); N.M. STAT. ANN. § 28-11-2(B), (C) (West 2015) (providing in the definition of “qualified service animal” and “qualified service dog” an animal “being trained”); N.Y. CIV. RIGHTS LAW § 47-b(3) (McKinney 2015) (including persons training a dog “while engaged in such training activities”); OHIO REV. CODE ANN. § 955.43(A) (West 2015) (including trainers of assistance dogs); OKLA. STAT. ANN. tit. 7, § 19.1(A), (B) (West 2014) (including “dog trainer from a recognized training center”); OR. REV. STAT. ANN. § 659A.143(1), (6)(a) (West 2015) (defining “assistance animal trainee” and trainer and allowing for access to public accommodations); 18 PA. CONS. STAT. ANN. § 7325 (West 2015) (including a person “who is training a [service] dog or other aid animal” in the general provision prohibiting discrimination on the basis of the use of a service dog); S.C. CODE ANN. § 43-33-20(d) (2015) (including trainers in the general provision relating to right of use of public facilities and public accommodations); TEX. HUM. RES. CODE ANN. § 121.003(i) (West 2015) (providing that “[a] service animal in training shall not be denied admittance to any public facility when accompanied by an approved trainer”); VT. STAT. ANN. tit. 9, § 4502(b) (2015) (providing same access for a service animal trainer); VA. CODE ANN. § 51.5-44(E) (West 2015) (providing for a person with a dog that is in training that is at least six months old to have access so long as the dog and trainer are utilizing identifying material, such as a blaze orange leash, harness, or vest); W. VA. CODE ANN. § 5-15-4(d) (West 2015) (including “any person who is certified as a trainer of a service animal while he or she is engaged in the training”); WIS. STAT. ANN. § 106.52(3)(am)(1)(a) (West 2015) (including “service animal trainer” in provision). Montana provides for service animals in training to have access only if such animals are wearing written identification legible from a distance of at least twenty feet that identifies that the animal is a service animal in training. MONT. CODE ANN. § 49-4-214(4) (West 2015). Michigan’s statute includes similar language requiring the dog in training to be wearing something that identifies the dog as a service animal and the individual training the dog to have identification. MICH. COMP. LAWS ANN. § 750.502c(2) (West 2015); *see also* N.C. GEN. STAT. ANN. § 168-4.2(b) (West 2015) (allowing access for animal in training if the animal is identified, such as through a harness or cape, as service animal in training); TENN. CODE ANN. § 62-7-112(2) (West 2015) (providing for access for a dog guide trainer if the trainer provides credentials for inspection, the dog is wearing apparel that identifies the dog with the school, and the training includes the socialization process).

161. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-803(2) (West 2015) (providing a parallel section allowing for access by “[a] trainer of a service animal[] or an individual with a disability accompanied by an animal that is being trained to be a service animal”); IDAHO CODE ANN. § 56-704A (West 2015) (providing for access for a person who is specially training or socializing a dog for the purpose of being an assistance dog; however, the person must carry an identification card from a recognized organization serving disabled persons); KAN. STAT. ANN. § 39-1109 (West 2015) (providing “[a]ny professional trainer[] from a recognized training center . . . while engaged in the training of such dog” to “have the right to be accompanied by such dog”); LA. REV. STAT. ANN. § 46:1955 (2015) (providing “trainer or puppy raiser” of a service dog to have access); MASS. GEN. LAWS ANN. ch. 129, § 39F (West 2015) (providing “[a] person accompanied by and engaged in the raising or training of a service dog . . . shall have the same rights, privileges and responsibilities as those

some jurisdictions, the ability to gain public access with a service dog in training may be conditional on the handler's status (such as being associated with an accredited school for training service animals) and identification of the dog as being from an accredited school.<sup>162</sup>

Similar to the issue relating to misrepresentation of a service animal, an individual who attempts to gain access to a business with a service animal in training, without appropriately relying on a state law that allows such access, creates problems for all individuals using service animals. Even if the individual training the dog is merely mistaken in his or her understanding of the limitations of the law, such incidents are unacceptable as they can lead to more difficulties for individuals with disabilities using service animals in the future.<sup>163</sup>

Without such state law coverage, an individual with a disability going through training with a service dog may be restricted in his or her access to public accommodations and entities. However, such individuals still may be able to successfully argue that the animal is covered under the FHA because the focus under that statute is

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afforded to an individual with a disability"); N.H. REV. STAT. ANN. § 167-D:6 (2015) (providing "[a] service animal trainer[] while engaged in the actual training process and activities of such animals" to have rights of access); N.J. STAT. ANN. § 10:5-29.3 (West 2015) (providing that the trainer must be "engaged in the actual training process and activities of service dogs" and has "the same responsibilities as are applicable to a person with a disability"); R.I. GEN. LAWS ANN. § 40-9.1-2.1 (West 2015) (allowing for a "trainer or puppy raiser" to have the same access as persons with disabilities using a personal assistance animal).

162. CAL. CIV. CODE § 54.2(b) (West 2015) (providing for persons "licensed" or "authorized" to train guide, signal, and service dogs to have the same access to public accommodations with the dogs that are being trained as individuals with disabilities who use service animals); GA. CODE ANN. § 30-4-2(b)(3) (West 2015) (providing that trainers of service animals must have credentials from an accredited school available for inspection among other requirements); N.D. CENT. CODE ANN. § 25-13-02.1(1) (West 2015) (providing trainers with service animals the right to enter public accommodations if the trainer notifies the manager of the premises of the status of the animal and "[t]he trainer wears a photo identification card issued by a nationally recognized service animal training program").

163. *E.g.*, *Davis v. Ma*, 848 F. Supp. 2d 1105 (C.D. Cal. 2012), *aff'd*, 568 F. App'x 488 (9th Cir. 2014). In the *Ma* case, an individual with a back injury brought an action against a fast food restaurant for denial of service when the individual brought a thirteen-week-old puppy into the establishment and stated that the dog was being trained as a service animal. *Id.* at 1109-10. The *Ma* court analyzed the training of the dog and found it was not a triable issue of fact whether the dog met the definition of service animal because it was an uncontroverted fact that the dog was not "fully trained as a service animal, and only had some 'basic obedience' training." *Id.* at 1115 (quoting Declaration of Sally Montrucchio at ¶¶ 10, 23).

whether the animal alleviates a disability rather than whether the animal performs work or tasks in order to assist an individual with a disability.<sup>164</sup>

### 3. Results of Concerns

Any time an attorney represents an individual, the attorney must do his or her research to ensure that the client has a valid cause of action. In the case of service and assistance animals, an attorney must ensure that the individual fits within the definition of an individual with a disability and that the animal fits within the definition of service or assistance animal and is required because of the disability. Without careful consideration of these factors, an attorney does a disservice to both the disability community and animals. An attorney will want to confirm that there is adequate documentation as to an individual's disability and need for a service or assistance animal, even if such disability is readily apparent.<sup>165</sup> The attorney should also perform his or her due diligence to ensure that the dog meets the relevant standard of behavior training given the risk that bringing a case in which an individual pit-bull-terrier-like dog's inappropriate behavior could be imputed upon the breed as a whole.

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164. See *supra* notes 106-13 and accompanying text (discussing the definition of assistance animal under the FHA).

165. HUD has issued a notice that states that housing providers "may not ask a tenant or applicant to provide documentation showing the disability or disability-related need for an assistance animal if the disability or disability-related need is readily apparent or already known to the provider"; however, case law illustrates housing providers sometimes do ask for such documentation. U.S. DEP'T OF HOUSING & URB. DEV., SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 4 (2013), [https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals\\_ntcfheo2013-01.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf); e.g., *Sabal Palm Condo. of Pine Island Ridge Ass'n, Inc. v. Fischer*, 6 F. Supp. 3d 1272 (S.D. Fla. 2014). In this case, a woman with multiple sclerosis and confined to a wheelchair was asked to "produce copies of her medical records from all of her healthcare providers who diagnosed or treated the disability that she claimed made a service dog necessary" and provide "all documents relating to the nature, size and species of dog, as well as all documents regarding any training it received." *Id.* at 1276 (quoting Electronic Case Files No. 82-2 at 2). The *Sabal Palm* court did not appear impressed with the response of the condominium association stating that the fact that the condominium association "turned to the courts to resolve what should have been an easy decision is a sad commentary on the litigious nature of our society." *Id.* at 1275.

## B. Theoretical Concerns

It is now clear that advocates *can* utilize the protections provided by the ADA and FHA to address access issues for individuals with disabilities who utilize pit-bull-terrier-like dogs as service or assistance animals. However, animal advocates need to consider whether this is the best use of their efforts or if, in fact, this will actually work to the long-term detriment of animals.

An abolitionist approach would view this type of campaign as reinforcing the property status of animals because of the necessary focus on the role the dog plays in the life of the person with the disability. Essentially, it is only because of the status of the individual as a person with a disability that the dog is treated any differently. A welfarist would consider whether the animal is actually being treated humanely. A welfarist might focus on the possible benefits to other pit-bull-terrier-like dogs if persons using these animals are given access. Specifically, does the use of pit-bull-terrier-like dogs as service or assistance animals assist in dispelling the negative myths associated with breed?

## CONCLUSION

The reality is that persons with disabilities are already using pit-bull-terrier-like dogs as service and assistance animals. Supporting the appropriate use of pit-bull-terrier-like dogs as service and assistance animals, while working to combat the inappropriate use of laws protecting persons with disabilities can, at a minimum, improve the lives of those individuals and their dogs. In the author's opinion, animal advocates should not abandon the goal of changing the status of animals as just another form of personal property. In the interim period, it is important to use the tools available to change the lives of individual animals and their human companions, while ensuring that any dog utilized as a service or assistance animal is being treated in a way consistent with the dog's best interests. In addition, for persons who have yet to be educated about the necessity of judging a dog based on the dog's individual behavior rather than appearance, the careful use of "good facts" cases could assist in improving the perception of pit-bull-terrier-like dogs. This is another step that can be taken to confront the problem of breed-discriminatory legislation.