



**THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW**

## From the Chair

One cannot turn on the news today without seeing stories related to animals. Whether it be animal rescue stories, long lost animals returning to their delighted human companions, or unfortunate animal abuse cases, our interest in animals is abundant and growing. Animals are an essential part of our lives, we rely on them to provide us faithful companionship, among many other things. Their significance to the family structure is evidenced by the fact that more than half of Americans share their households with animals. According to a recent Nielsen survey conducted by Harris Poll, of those households, 45 percent buy birthday presents for their animals and 64 percent buy holiday gifts for them. The same survey claims that Americans spent close to 20 billion dollars on their animals in 2014. As a society, we rely so heavily on animals and, as such, laws relating to their welfare have become increasingly more important.

The New York State Bar Association's Committee on Animals and the Law was created in 2002 by the then President of the Association, the late Lorraine Power Tharp and it is committed to educating legal professionals and members of the public on laws related to animals and their welfare. The Committee is made of up of a diverse group of people who volunteer their time, efforts, and expertise to further the Committee's mission of education and advocacy on animal-related legal matters.

***"THE GREATNESS OF A NATION AND ITS MORAL PROGRESS CAN BE JUDGED BY THE WAY ITS ANIMALS ARE TREATED." - Ghandi***

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## From the Chair (continued)

More information about the Committee's important work can be found at <http://www.nysba.org/animalsmission>

Laws & Paws is the Committee's official publication and it is a culmination of works on timely topics submitted by experts, law students, and practitioners. This volume includes pieces on such topics as breed-specific legislation, the Endangered Species Act, and the Animal Welfare Act.

Laws & Paws would not be possible without the efforts of the Publications Subcommittee and all of its work putting this together. I would also like to thank the contributors whose insightful works present unique lessons to us all. Last, but most assuredly not least, many thanks to the New York State Bar Association and all of its staff for its continued support, without it our passionate pursuit would not be possible.

We hope you find the information in this publication as interesting and useful as we do. Through education and advocacy, we will strive to continue the meaningful work of making a difference in the lives of animals and the people who share their world. Thank you for reading.

*All the best, Natalie A. Carraway, Esq. Chair*

### The Student Writing Competition

This issue of Laws and Paws includes the 2015 Student Writing winning articles, First Place: *Mens Rea and McKittrick: The Unraveling of the Endangered Species Act*, by Ann Linder and Second Place: *Punish the Deed, Not the Breed. Breed Specific Legislation: Punishing the Wrong Party*, by Sarah Lukas.

The Committee on Animals and the Law was established to provide information resources for the New York State Bar Association's members and the public about non-human, animal-related humane issues, which arise from and have an effect upon our legal system. The Student Writing competition seeks to foster legal scholarship among law students in the area of animals and the law. This competition provides law students with an incentive and opportunity to learn more about this area of law.



### How to enter the 2016 Committee on Animals and the Law Student Writing Competition

The Committee on Animals and the Law of the New York State Bar Association is very pleased to announce the Eighth Annual Student Writing Competition. The deadline for submission is **July 1, 2016**.

Law students (which include J.D., L.L.M., Ph.D., and S.J.D. candidates) are invited to submit to the Committee on Animals and the Law an article concerning any area of Animal Law. All submissions will be reviewed by a panel of attorneys and other professionals practicing or otherwise involved in animal law. The winner will be chosen in accordance with the competition rules. The first place winner will receive \$1,000 and a certificate of achievement. The second place winner will receive \$500 and a certificate of achievement.

Format: One hard copy of the written submission and one electronic copy in Microsoft Word format on a disk or CD must be submitted by mail, **postmarked no later than June 1, 2016**, and addressed to:

Linda McMahon, NYSBA Staff Liaison  
Committee on Animals and the Law  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

## Committee on Animals and the Law 2016 Annual Meeting

### The Death of Cecil the Lion: Local and International Implications Surrounding Sport Killing

On January 27, 2016 the Committee on Animals and the Law held its annual CLE program inspired by the tragic sport-killing of Cecil the Lion by an American dentist. The program, presented by experts in their fields, offered a detailed analysis of the exotic black market trade and sport killing.



## The Program

*Anna Frostic, Esq.*, from the Humane Society of the United States, Washington, D.C., presented an *Overview of Laws Impacting Trade in Exotic Animals and their Parts*. She presented an overview of the state, federal, and international legal frameworks relevant to the trade in exotic animals and their parts, including live animals for exhibition purposes, hunting trophies, and parts or products for commercial or recreational use will be provided. It included discussion of the Convention on International Trade in Endangered Species, Endangered Species Act, Rhinoceros and Tiger Conservation Act, African Elephant Conservation Act, Lacey Act, Animal Welfare Act, and state legislation and ballot initiatives.

*Marcus Asner, Esq.*, partner from Arnold & Porter LLP, NYC presented, *To Catch a Thief: The Nuts And Bolts of Investigating and Prosecuting a Wildlife Trafficking Scheme*. Mr. Asner, a former federal prosecutor who serves on President Obama's Advisory Council on Wildlife Trafficking, spoke about wildlife trafficking, and provided insight into how trafficking schemes work in the real world. He presented the relevant legal and enforcement landscape, while explaining how law

enforcement and NGOs go about trying to disrupt trafficking rings and bring the traffickers to justice. Mr. Asner used a real-world example of an investigation and prosecution of an international trafficking scheme that he handled as a federal prosecutor.

*Christopher J. McKenzie, Esq.*, from the Wildlife Conservation Society, Bronx, NY, addressed issues and drivers related to the international illegal trade in wildlife, and the multi-pronged global approach employed by the Wildlife Conservation Society to combat illegal trade in wildlife.

The program was moderated *James Gesualdi, Esq.*, Sole Practitioner and Professor at Hofstra University School of Law, Islip, NY. Mr. Gesualdi is also a member of the Committee on Animals and the Law and former Chair to the Committee.

This program was recorded and will be available on the NYSBA CLE page at

[http://www.nysba.org/CLE/  
Continuing Legal Education Home/](http://www.nysba.org/CLE/Continuing%20Legal%20Education%20Home/)

*Mens Rea* and McKittrick:  
The Unraveling of the Endangered Species Act

Ann Linder  
Stanford Law School  
Class of 2017

*“The case pending against the Department of Justice claims that the McKittrick Policy is ‘inconsistent with plainly expressed congressional intent, and eviscerates the protective mechanism of the ESA.’ Has that been your experience?”*

*“Yes, I would say so.”<sup>1</sup>*

Wolf Ten was a male wolf, originally brought in from Canada and fitted with a radio collar as part of the Yellowstone repatriation program in the winter of ninety-five (Dinger 2000). Biologists were intimately familiar with Wolf Number Ten at the time, regularly keeping logs of his weight (120 lb.) and other details surrounding the litter of pups that he had recently fathered (Newcomer, Marie Palladini & Leah Jones 2011). Four months after being released, Wolf Number Ten wandered outside of the park’s northern boundary, where he was shot and killed by Chad McKittrick (Newcomer, Marie Palladini & Leah Jones 2011). The wolf was taken near Red Lodge, Montana, where Mr. McKittrick was a longtime resident. That April, he and his friend loaded the animal into the back of the pickup and went home.

Tim Eicher, Special Agent with the U.S. Fish and Wildlife Service, was assigned the case and identified McKittrick, who was subsequently charged with taking and possessing a species listed as threatened, pursuant to the Endangered Species Act (“ESA”), as well as illegally transporting that animal under the Lacey Act (Newcomer, Marie Palladini & Leah Jones 2011).<sup>2</sup> After being convicted on all counts by a federal

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<sup>1</sup> Personal Interview with Tom Garrett, Special Agent with the U.S. Fish and Wildlife Service on January 27, 2014. Officer Garrett has been with the service for over twenty years, serving at a variety of locations. All subsequent quotes are taken from this interview unless otherwise stated.

Note: The officer’s name and information have been changed at his request.

<sup>2</sup> Specifically, McKittrick was charged under the ESA with taking a wolf in violation of 16 U.S.C. §§1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(3); possessing a wolf in violation of 16 U.S.C. §§ 1538(a)(1)(G), 1540(b)(1), and 50 C.F.R. § 17.84(i)(5); and transporting the wolf in violation of the Lacey Act, 16 U.S.C. §§ 3372(a)(1) and 3373(d)(2). *See United States v. McKittrick*, 142 F.3d 1170, 1172-73 (9<sup>th</sup> Cir. 1998).

jury, McKittrick appealed the decision. His case was heard by the Ninth Circuit Court of Appeals, where he argued several points. Of most interest to this paper is the issue of *mens rea*. McKittrick claimed that in order to show a violation of the ESA, the government should have been required to prove not only that he knew he was shooting an animal, but also that he was aware of the *biological identity* of that animal. In short, that the government had to show that he knew that he was shooting a wolf.<sup>3</sup> It is the curious and unexpected consequences of raising this point on appeal that has brought about the weakening of the Endangered Species Act, and lessened the statute's ability to curb the assault on our most fragile resources.

#### I. Endangered Species Act: A Legislative History.

As it was entered on the books in 1973, the Endangered Species Act required any violation by taking under the act be done "willingly." In 1978, Congress amended this statute with the specific purpose of broadening its application by reducing the intent required to prove a violation. They modified the language of the act from "willfully taking" to "knowingly taking."<sup>4</sup> While this amendment may seem relatively minor, it had vast implications. Congress effectively changed ESA violations from a specific intent to a general intent crime.<sup>5</sup> The new wording lowered the burden of proof needed in prosecuting the crimes. Previously, in order to show a violation, the government had to

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<sup>3</sup> As it happens, McKittrick did know he was shooting a grey wolf. The transcripts show that at the trial, he claimed he thought the animal to be a dog; however, his companion testified that this was not the case, and that McKittrick had identified the animal as a wolf prior to pulling the trigger. (Newcomer, Marie Palladini & Leah Jones 2011); *U.S. v. McKittrick*, 142 F.3d at 1178.

<sup>4</sup> An Act to Amend the Endangered Species Act of 1973, PL 95-632 (S2899), PL 95-632, Nov. 10, 1978, 92 Stat 3751.

<sup>5</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 n. 9 (1995). *U.S. v. Nguyen*, 916 F.2d 1016, 1018 (5<sup>th</sup> Cir. 1990)(The legislative history of the amendment makes clear that Congress specifically did "not intend to make knowledge of the law an element of either civil penalty or criminal violations of the act.").

prove that the individual had prior knowledge that the animal in question belonged to a specific species. After the reforms, agencies need only demonstrate that the individual knew they were shooting an animal. In McKittrick’s case, the government simply had to show that he intended to shoot an animal and that the animal turned out to be an endangered grey wolf.

## II. The McKittrick Policy

The Ninth Circuit recognized this change in the law and upheld its principles in affirming the McKittrick conviction. The court reasoned:

McKittrick need not have known he was shooting a wolf to “knowingly violate” the regulations protecting the experimental population. In 1978, Congress changed the wording of section 11 to “reduce the standard for criminal violations from ‘willfully’ to ‘knowingly.’” As the magistrate judge recognized, the District of Montana had already decided the intent issue in the government's favor, holding on similar facts that “[t]he critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting.”

*United States v. McKittrick*, 142 F.3d at 1177.

The Ninth Circuit, like many others before it, recognized the congressional ambition to make ESA violations a general intent crime. The court ruled that the trial judge was correct in providing jury instructions that stated that the prosecution need only demonstrate that McKittrick killed an animal and that the identity of that animal was a wolf. The ruling and language of the decision were in keeping with the unbroken precedent that had been established within the field.<sup>6 7</sup>

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<sup>6</sup> In 1975, the U.S. Supreme Court ruled on the definition of “knowingly” in *U.S. v. Feola*, 420 U.S. 617 (1975). The arguments of that case closely parallel those found in *McKittrick*. The defendant was charged with knowingly assaulting a federal officer; however, he argued that government needed to prove that he was aware that the victim was an officer at the time in order to be found guilty. The court ruled that, “Congress intended to require only an intent to assault, not an intent to assault a federal officer.” *U.S. v. Feola*, 420 U.S. at 684.

<sup>7</sup> In a similar case, a man who shot a panther filed a motion to dismiss stating that in order to convict him, the government must prove that he knew he was shooting an endangered Florida panther. *U.S. v. Billie*, 667

After the Ninth Circuit affirmed his convictions, McKittrick sought review by the United States Supreme Court, again asserting that the jury instructions were wrong because the government needed to show that he knew the animal was a wolf when he killed it.<sup>8</sup> In responding to that argument, the Solicitor General conceded the issue and stated that the “Department of Justice does not intend in the future to request the use of this instruction, because it does not adequately explicate the meaning of the term ‘knowingly’ in section 1540(b)(1)” of the ESA.”<sup>9</sup>

It is unclear why the Solicitor General made this concession. It was not in accordance with the way that the courts had interpreted the ESA after its amendment and was not justified by the statutory language.<sup>10</sup> Shortly after the Solicitor General’s brief was filed, a new directive was issued by the Department of Justice that ran directly counter to the Ninth Circuit’s findings in the McKittrick case.

The agency handed down an order to the U.S. Fish and Wildlife Service as well as the U.S. Attorneys offices that no case be brought to trial unless it can be definitively proven that the accused had knowledge of the biological identity of the species prior to taking the animal.<sup>11</sup> These regulations imposed a burden of proof on agencies that was

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F. Supp. 1485 (S.D. Fla. 1987). The District Court rejected this argument stating that, “The construction advanced by the defendant would eviscerate the [Endangered Species Act’s] purpose because it would be nearly impossible to prove that the average hunter recognized the particular subspecies protected under the act.” *Id.* at 1493. The court went on to say that the meaning of the term “knowingly” implies simply that “the act was done voluntarily and intentionally and not because of mistake or accident.” *Id.* at 1492. The same reasoning held true for a grizzly bear case in Montana where the court held that “the critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting.” *U.S. v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

<sup>8</sup> Although McKittrick applied for the Supreme Court to review his case, it denied certiorari and refused to review his conviction. *U.S. v. McKittrick*, 525 U.S. 1072 (1999).

<sup>9</sup> Brief for U.S. in Opposition, *McKittrick v. U.S.* (No. 98-5406, 525 U.S. 1072 (1999)) at 15-16.

<sup>10</sup> Journalists and legal scholars have since attempted to contact the attorneys who wrote the Solicitor General’s brief to understand why this language was inserted, but all attempts have been rebuffed. (Newcomer, Marie Palladini & Leah Jones 2011).

<sup>11</sup> The Department of Justice formalized its position on the “knowing” issue when it published an internal memorandum entitled “Knowing Instruction in Endangered Species Cases,” along with an attachment

higher than that written into the statute, and directly undermined the intent of Congress in revising the act. Under the “McKittrick policy”, as the directive came to be known, no Endangered Species Act case can be brought to trial unless it can be effectively shown that the individual had knowledge of the animal’s species and intended to take a member of the species in question.<sup>12</sup>

### III. The McKittrick Fallout

Confusion spread throughout the enforcement agencies when the order was handed down (Garret). The policy ran contrary not only to their understanding of the statute, but also to the way they had done business for the last twenty years<sup>13</sup>. The McKittrick case had been a strong affirmation of the power of the ESA, and, for many, the subsequent instructions from the DOJ seemed counterintuitive. “There wasn’t any

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entitled “Federal Prosecutors May Not Use Knowledge Instruction Upheld in United States v. McKittrick.” The attachment explained that the jury instruction used in the McKittrick case “stated . . . that the government was not required to prove the defendant knew the biological identity of the animal at the time he shot it.” According to the memorandum, “Department prosecutors are instructed not to request, and to object to, the use of the knowledge instruction at issue in McKittrick.”

<sup>12</sup> This policy was explained by the Department of Justice to its employees in the “United States Attorneys’ Bulletin” in an article entitled “Prosecuting Criminal Violations of the Endangered Species Act” as:

Knowing violations of the ESA are punishable criminally. 16 U.S.C. § 1540(b)(1)(2011). ESA criminal violations are thus general intent crimes; it is not necessary that the defendant knew the legal status of the animal (for example, that it was listed as endangered or threatened) or intend to violate a law. However, the position of the government is that the defendant must know the biological identity of the animal at issue. Prosecutors need to be aware of this Department of Justice requirement as it does not appear in the available case law . . . For more information, see the Department’s *McKittrick Policy*, available at [a URL which is no longer active on the Department of Justice’s website].

(Silverberg, M. and Ethan Eddy 2011). Although originally posed to the Department of Justice website, the McKittrick Policy was soon removed. Litigants have sought release of the policy by bringing Freedom of Information Act challenges all of which, to date, have been rebuffed. *WildEarth Guardians v. United States Department of Justice*, Case number 4:13-CV-00392-DCB, filed 08/22/2013, U.S. Dist. Ct. for the Dist. of Arizona – Tucson Div. complaint.

<sup>13</sup> “The DOJ’s McKittrick Policy is also directly contrary to the FWS’s own interpretation of the ESA which is that killing a wolf – even by mistake – constitutes a criminal violation of the ESA.” *WildEarth Guardians v. United States Department of Justice*, Case number 4:13-CV-00392-DCB, filed 08/22/2013, U.S. Dist. Ct. for the Dist. of Arizona – Tucson Div.

explanation as to why they issued that directive...” said Garret, “not that I recall anyway, and the DOJ never came to debrief us.” He ascribed the McKittrick policy to a political move—one ostensibly intended to prevent overzealous agents and prosecutors from pursuing cases against citizens for accidental offenses. “The thing is I wouldn’t have taken cases like that anyway,” explains Garrett. “From a law enforcement officer’s point of view, I would rather be given the discretion.”<sup>14</sup>

There was a case when I was working up in Idaho. A man was coyote hunting in the hills in an area where wolves had not previously been documented. He shot the animal over the ridge, and as he was walking up on it, immediately realized it was a wolf. He called the local game warden and then my office. The guy made a mistake and immediately reported it. I talked to my district attorney— and we both agreed that this case wasn’t something that we were interested in prosecuting.

McKittrick or no McKittrick we wouldn’t have taken that case.

There’s checks and balances along the way. Those prosecutors have a keen sense of right and wrong. In my opinion, that’s the way it should work.

As it is written, the McKittrick policy changes the way that agents operate and has posed new problems for the prosecution. “There is no field agent that likes the McKittrick instruction... It ties our hands,” Garrett explains. But it also weakens the legislation itself—creating loopholes where none existed before. Individuals who are aware of the limitations imposed on the legislation can exploit them, without fear of consequence. In the West especially, this has become problematic. In some places, it was common knowledge that if you shot a wolf, you could simply claim that you did not know the animal was a wolf and expect very little in way of punishment (Garrett).<sup>15</sup> As

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<sup>14</sup> Officer Tom Garrett gave an example from personal experience.

<sup>15</sup> The McKittrick policy does not affect species evenly across the board. It is primarily an issue for hunting or poaching cases (instances of direct take). It is especially problematic for animals with so-called “look alike species.” Wolves are among the hardest hit because of the intense dislike felt towards them by ranchers, but also because they are found alongside coyotes in many parts of the country. The same is true of grizzly bears in the territory where they overlap with black bears. In many of the cases, the problem is not confusion on the part of hunters, but rather that the McKittrick policy provides them an easy out:

word spread about the Fish and Wildlife's new policy, agents and prosecutors were forced to find new ways around the limitations in order to win convictions.<sup>16</sup>

In some cases, McKittrick has forced agents to rely on legislation other than the ESA.<sup>17</sup> <sup>18</sup> In others, they have found ways around it. Agents and prosecutors, while not always able to prove specific knowledge, can, on rare occasions, attempt to build a case for "should have known" as Officer Garrett explained:

There was a wolf case in Idaho, where a guy shot a wolf standing out in the middle of the road. When I interviewed him, he kind of smugly said "Oops I thought it was a coyote; joke's on me" and it was obvious that that was not the case— it seemed very rehearsed. I asked him some questions and what I was able to get from the interview is was that he lived in Idaho for a number of years. He was driving up in the mountains— prime wolf habitat— and he knew that wolves were reintroduced there. I asked him if he knew what a wolf looks like, and he said, "Yes, a wolf looks like this as opposed to a coyote." I talked to my prosecutor and I said, "If ever there was a case of should have known, this was certainly it." The prosecutor agreed and we got him that way.

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"Shoot a wolf and claim you saw a coyote; shoot a protected grizzly and claim you thought it was a black bear." (Garrett). Ironically, the more rare a species becomes, the more credible such an excuse may seem.<sup>16</sup> However, many cases have simply become intractable after McKittrick. Agents are forced to drop investigations and completed work goes unprosecuted. For example, in 2003 a California condor was shot and killed at Tejon Ranch, just north of Los Angeles. Special Agents with the FWS were able to identify the suspects, and after hours of interviews, one finally admitted to stopping and shooting the "buzzard" sitting at the top of the tree. The anatomical differences between a 5 lb vulture and a 20-30lb condor are comparable to those between a wolf and a coyote. Yet, despite the huge size differential between the birds, the agency was not able to pursue criminal sentencing under the ESA because they were not able to prove that the defendant had knowledge as to the specific biological identity of the bird when shooting it. *U.S. v. Britton Cole Lewis (E.D. Cal. Apr. 29, 2003)*. This case is in keeping with the pattern that many investigations follow post-McKittrick.

<sup>17</sup> When asked whether the McKittrick directive forced them to utilize other legislation more heavily, Officer Garrett responded:

Yes, sometimes we would rather prosecute the Lacey Act than the Endangered Species Act. When eagles were still ESA listed, if you couldn't prove the 'knowingly' for the ESA, you might still be able to prosecute them under the Eagle Act [which doesn't have that provision] or perhaps the Migratory Bird Treaty Act.

In that case, if you shoot an eagle you can't just say "I thought it was a red-tailed hawk." In any one situation we might have several bullets in our holster that we could use, but it is still a limitation that is put on us that is burdensome.

<sup>18</sup> The main point here is that the McKittrick instruction is undermining both the spirit of the ESA in theory as well as the application of it in practice. Through this evolution the ESA has become a less powerful and a less valuable resource for those seeking to protect animals from extinction.

Another approach used by agents to avoid McKittrick issues is to personally make individuals aware of the biological identity of the species. In the event that Fish and Wildlife representatives are able to meet with people in areas of critical habitat, they can educate them as to not only the presence of the species in that region, but also as to how to identify them. Because the agency itself provided the residents with the relevant information as to the biological identity of the species ahead of time, prosecutors are more often able to avoid McKittrick issues. However, this strategy is used primarily for cases of accidental and industrial take.<sup>19</sup>

#### IV. Current Challenges to the McKittrick Policy

Currently, a case is pending against the Department of Justice challenging the legality of the McKittrick policy (Cart 2013).<sup>20</sup> The lawsuit was filed by two NGOs—WildEarth Guardians and the New Mexican Wilderness Alliance—regarding the effects of the McKittrick policy on Mexican grey wolves. Their brief claims that the DOJ’s McKittrick Policy violates the ESA and constitutes an “action” which may adversely affect threatened and endangered species such as the Mexican grey wolf. Additionally, the suit alleges that the McKittrick Policy is “an abdication of DOJ’s statutory responsibilities to enforce the criminal penalties provision of the ESA as intended by

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<sup>19</sup> Officer Garrett gave the example of Indiana bats. In this case, the service was concerned with these endangered bats being killed by wind turbines. He, along with other members of U.S. Fish and Wildlife Service, met with the representatives of the wind power companies and informed them of the dangers that the turbines pose to bats. They offered photos of the animals and described the times of year that they migrate through the area. In addition, they offered several non-invasive solutions to mitigate the damage caused to bats (set turbines not to run at extremely low wind levels when the bats are most likely to be flying etc.). By meeting with these businesses, the FWS effectively made them aware of the biological identity of the species, and in cases where they refused to make any adjustments to prevent mortality, the agency could later prosecute them when they found dead bats underneath the turbines—doing so, without any fear of McKittrick problems.

<sup>20</sup> *WildEarth Guardians v. United States Department of Justice*, Case number 4:13-CV-00392-DCB, filed 08/22/2013, U.S. Dist. Ct. for the Dist. of Arizona – Tucson Div.

Congress.” This lawsuit requests that the McKittrick Policy be declared invalid and that the DOJ be enjoined from enforcing it.

Criticism of the policy is not limited to NGOs, however. A surprising number of government officials have also voiced objections to this policy. While serving as Director of the U.S. Fish and Wildlife Service, Ms. Jamie Rappaport Clark wrote to the Solicitor of the Department of the Interior, urging that the McKittrick policy be rescinded:

As feared, this “specific intent” *mens rea* requirement [required by the DOJ’s McKittrick Policy] has precluded criminal prosecution in direct taking (shooting) cases throughout the country. In many ways, the new *mens rea* instruction has rendered the species protection provisions in Section 9 of the ESA unenforceable. Service law enforcement personnel, as well as prosecuting attorneys working in States with grizzly bears and wolves, believe the new ‘specific intent’ jury instruction has “crippled” their efforts to protect the bears and wolves from careless hunters....

*WildEarth Guardians v. U.S.*, Case number 4:13-CV-00392-DCB, filed 08/22/2013, U.S. Dist. Ct. for the Dist. of Arizona – Tucson Div.

Even the Assistant Chief of the DOJ’s Environmental Crimes Section, Mr. John Webb, has outspokenly criticized the directive: “Perpetrators can and do escape any criminal punishment under the ESA when, for instance, they take an endangered species in violation of [ESA Section 9]”, claiming that the McKittrick directive provides hunters with a “ready defense” since they can easily claim that they mistook one species for another.<sup>21</sup> However, despite the outcry from the agencies charged with enforcing the ESA, the public, and even DOJ personnel, this policy remains in force today, two decades after the fact.

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<sup>21</sup> *WildEarth Guardians v. U.S.*, Case number 4:13-CV-00392-DCB, filed 08/22/2013, U.S. Dist. Ct. for the Dist. of Arizona – Tucson Div.

When the Endangered Species Act was conceived forty years ago, it was celebrated as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>22</sup> The McKittrick policy carved out a central portion of the statute. It tied the hands of agents; it gave poachers a way out. What remains of the Act today is hollow and weak by comparison. The future of the legislation remains uncertain and dependent largely on the efforts of those working to restore it. For now, the McKittrick policy remains, the unhappy legacy of Wolf Number Ten.

Earlier last year, almost twenty years from the day McKittrick shot his wolf, another was killed. Echo was a female grey wolf whose epic journey 450 miles from the Northern Rockies into Arizona captured national media attention. She was the first grey wolf to be seen near the Grand Canyon in 70 years (Ketcham 2014). Her howls from the Canyon’s northern rim were echoed by conservationists, who hailed her journey as a triumph— a portent of good things to come. She was killed by a hunter in Utah, near the first of the year. The Department of Justice announced this July that they will not press charges against the man, who told investigators he believed he was shooting a coyote (McCombs 2015).

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<sup>22</sup> This is the language the Supreme Court used to describe the Act in *Tennessee Valley Authority vs. Hill*, 437 U.S. 153, 180, 184 (1978). They went on to say, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *Id.*



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*United States v. Feola*, 420 U.S. 617 (1975).

*United States v. McKittrick*, 142 F.3d 1170 (9<sup>th</sup> Cir. 1998).

*United States v. Nguyen*, 916 F.2d 1016 (5<sup>th</sup> Cir. 1990).

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“Punish the Deed, Not the Breed”—  
Breed Specific Legislation: Punishing the Wrong Party

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“[I]n North Carolina police responded to a report of a Pit Bull and a Golden Retriever fighting. One of the dogs was found tied to a tree with his front leg broken and deep gashes to his muzzle from the bites of the other dog. There can be little doubt as to which dog was injured and how this attack came to be.”<sup>1</sup> This paper’s purpose is not to convince people that the pit bull is the best dog for their family, but that every dog is an individual and should be treated as such. Breed specific legislation (BSL), which bans a certain breed of dog—usually the pit bull, may seem like a quick fix for reducing dog attacks: however it has not produced the desired results. Instead, through owner responsibility and breed-neutral laws the number of dangerous dogs and dog bites can decrease.

Part I briefly introduces breed specific legislation. Part II examines how BSL has been challenged in the courts and the recent conflicts between BSL and the Americans with Disabilities Act (ADA). Part III will look at other, non-legal, problems arising out of BSL. Part IV examines alternatives to BSL and what should be included in breed-neutral laws to make communities safer. Part V compares the effects of breed-neutral laws and breed specific laws by looking at the dog bite statistics. The law should be focused on deterring irresponsible owners and banning dangerous dogs, regardless of breed, not targeting certain breeds.

## **I. Breed Specific Legislation—A Brief Introduction**

Breed specific legislation sends the message that “a dog’s behavior is dictated by its appearance, and therefore an owner’s treatment of the dog has no effect on the dog’s behavior at

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<sup>1</sup> KAREN DELISE, *THE PIT BULL PLACEBO- THE MEDIA, MYTHS AND POLITICS OF CANINE AGGRESSION*, 171 (Anubis Publishing) (2007), available at [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Pit\\_Bull\\_Placebo\\_download.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Pit_Bull_Placebo_download.pdf).

all.”<sup>2</sup> Following this logic, a well-trained service dog will behave the same as an abused guard dog, only because the two dogs are of the same breed. This logic is clearly flawed.

### **A. What is Breed Specific Legislation?**

Breed specific legislation, also referred to as breed discriminatory legislation (BDL), is “a law or ordinance that prohibits or restricts the keeping of dogs of specific breeds, dogs presumed to be specific breeds, mixes of specific breeds, and/or dogs presumed to be mixes of one or more of those breeds.”<sup>3</sup> Breed specific legislation can occur in two different contexts, bans and restrictions. While bans receive more attention and are usually thought of as the only form of BSL, restrictions are just as problematic and ineffective as bans.

#### **1. Breed Bans**

Breed specific legislation in the form of a breed ban is where the municipality, in which the ban has been enacted, targets and removes dogs of a certain appearance (i.e. the “target breed”).<sup>4</sup> After the effective date of the ban, dogs in the municipality identified as belonging to the target breed are confiscated by animal control and usually killed.<sup>5</sup> Some bans have grandfather clauses that allow dogs of the target breed to remain in the municipality, but those dogs and owners are often subject to incredibly strict restrictions.<sup>6</sup> Relocation may sometimes be an option for the dog.<sup>7</sup> However, this is difficult because it forces owners to move in a short span of time, which many cannot afford.

#### **2. Breed Restrictions**

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<sup>2</sup> APBT People, *What BSL Actually Does*, <http://apbtpeople.webs.com/whatbslactuallydoes.htm> (last visited April 13, 2015).

<sup>3</sup> NATIONAL CANINE RESEARCH COUNCIL, BREED SPECIFIC LEGISLATION FAQ 1 (2014), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/BSL%20FAQ%202014.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/BSL%20FAQ%202014.pdf).

<sup>4</sup> Pit Bull Advocates of the United States, *What is BSL?*, <https://www.pbauts.org/bsl/whatisbsl/> (last visited April 13, 2015).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Breed specific legislation can also occur in the form of breed restrictions. Breed restrictions often include: “muzzle the dog in public; spay or neuter the dog; contain the dog in a kennel with specific requirements; keep the dog on a leash of specific length or material; purchase liability insurance of a certain amount; place ‘vicious dog’ signs on the outside of the residence where the dog lives; make the dog wear a ‘vicious dog’ tag or other identifying marker.”<sup>8</sup> The most common requirement is deeming a pit bull ‘vicious’ and requiring the owner to purchase additional liability insurance.<sup>9</sup> This insurance requirement creates a problem because not all insurance companies will issue policies for owners of vicious dogs.<sup>10</sup> Since the insurance companies may not issue the policies, owners cannot follow and abide by all the requirements and the dog will be confiscated and euthanized.<sup>11</sup>

### **B. What Type of Dog is Usually the Target of Breed Specific Legislation?**

To better understand breed specific legislation it is important to understand the dog that is most commonly targeted today, the pit bull. The pit bull is not an actual breed, instead it is a term commonly used to describe the American Pit Bull Terrier, the Staffordshire Bull-Terrier, the American Staffordshire Terrier, and any other dog that may appear to resemble what people consider being a pit bull.<sup>12</sup>

#### **1. Origins**

The pit bull of today emerged in the 19th century when bull baiting became illegal and dog fighting emerged as the new “blood sport.”<sup>13</sup> To create a more agile dog, “bullenbeissers”

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> JANE BERKEY, DOG BREED SPECIFIC LEGISLATION THE COST TO PEOPLE, PETS AND VETERINARIANS, AND THE DAMAGE TO THE HUMAN-ANIMAL BOND 3 (2009), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Berkey%20AVMA%202009.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Berkey%20AVMA%202009.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Jon Bastian, *How Did Pit Bulls Get Such a Bad Rap?*, <http://www.cesarsway.com/dogbehavior/basics/How-Did-Pit-Bulls-Get-a-Bad-Rap> (last visited April 27, 2015).

were bred with terriers.<sup>14</sup> By combining the strength of the bullenbeissers with the intelligence and agility of the terrier, the modern day pit bull was created.<sup>15</sup>

## **2. America's Changing Perception**

Americans did not always perceive the pit bull as the demon of the dog world. Before the late 1900s, the pit bull seemed to be America's favorite dog. During World War I, America personified itself as a pit bull on Army recruitment posters and to sell war bonds.<sup>16</sup> The only dog promoted to the rank of Sergeant was a brindle pit bull named Stubby.<sup>17</sup> Pete the Pup from "Our Gang" was also a pit bull.<sup>18</sup> At the time, the pit bull seemed to be a family favorite and a beloved breed.

However, this all changed only a few decades later. By the late 1980s, there were over thirty communities considering breed specific legislation and bans on pit bulls.<sup>19</sup> Despite its illegality, dog fighting reappeared as the blood sport of choice.<sup>20</sup> The worst of society became attracted to these people pleasing dogs.<sup>21</sup> Pit bulls became a symbol of drug culture and violence by being the preferred guard dogs for gangs, drug dealers, and criminals.<sup>22</sup> Incidents involving dogs identified as pit bulls created a correlation in the public's mind that pit bulls were almost exclusively associated with criminal activity.<sup>23</sup> The few dogs used for negative purposes became

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<sup>14</sup> *Id.* ("bullenbeissers" translates as "bull biter" Bullenbeissers were large Mastiff type dogs used in bull baiting).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Anna John, *Pit Bulls: From America's Dog to Public Enemy #1*, <http://dcentric.wamu.org/2011/02/pit-bulls-from-americas-dog-to-public-enemy/> (last visited April 27, 2015).

<sup>18</sup> Bastian, *supra* note 13.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> John, *supra* note 17.

<sup>22</sup> Bastian, *supra* note 13.

<sup>23</sup> BERKEY, *supra* note 10 at 2.

the dogs that defined the breed, not the millions of loveable family pets.<sup>24</sup> This led to multiple communities enacting BSL with the target set firmly on pit bulls.

### **C. Why Does Breed Specific Legislation Occur?**

Breed specific legislation usually occurs in the wake of a vicious and often fatal dog attack.<sup>25</sup> Often it is before the investigation has been concluded, and the facts surrounding the attack are still speculated upon, that the call for BSL is made.

We would like to believe that our laws are passed based on scientific data, proven theories or the testimony and evidence provided by, if not the majority, at least a respectable number of experts or professionals. This has never been the case with breed specific legislation or the decision by officials to ban or restrict particular breeds of dogs. Experts are rarely consulted and even when they are invited to speak, their testimonies are more often than not discarded in favor of newspaper headlines or the emotional testimony of a few victims.<sup>26</sup>

Today, almost every report classifies the offending dog as a “family dog.”<sup>27</sup> However, a closer look at the incident will likely reveal that this “family dog” is usually “under-socialized, chained, used for breeding, guard dog use, and/or kept in isolation, and even in extremely abusive conditions...”<sup>28</sup> This is not a “family dog,” this is a “resident dog.”<sup>29</sup>

### **D. Where Does Breed Specific Legislation Occur?**

Breed specific legislation has been enacted in over 700 cities and towns across the United States, and in countries all over the world.<sup>30</sup> However, the tide is beginning to change.<sup>31</sup> Nearly

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<sup>24</sup> *Id.*

<sup>25</sup> Safia Gray Hussain, Note: *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 *Fordham L. Rev.* 2847, 2859 (April 2006).

<sup>26</sup> DELISE, *supra* note 1 at 102.

<sup>27</sup> *Id.* at 167.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Dogsbite.org, *Breed Specific Laws (BSL) State by State*, <http://www.dogsbite.org/legislating-dangerous-dogs-state-by-state.php> (last visited May 6, 2015).

<sup>31</sup> NATIONAL CANINE RESEARCH COUNCIL, BREED-SPECIFIC LEGISLATION ON THE DECLINE 1 (2014) [http://nationalcanineresearchcouncil.com/uploaded\\_files/tiny\\_mce/Breed%20specific%20legislation%20on%20the%](http://nationalcanineresearchcouncil.com/uploaded_files/tiny_mce/Breed%20specific%20legislation%20on%20the%20)

20 states have now enacted state-wide laws outlawing BSL. These states are: Massachusetts, Colorado, Florida, Illinois, Maine, Minnesota, New Jersey, New York, Oklahoma, Pennsylvania, Texas, Virginia, Nevada, Connecticut, Rhode Island, South Dakota, and Utah.<sup>32</sup> California also has anti-BSL laws, but allows for breed specific spay and neuter laws.<sup>33</sup>

### **E. Who Supports Breed Specific Legislation?**

Animal health and legal experts have spoken out against BSL and have advocated for behavior-based, non-breed specific animal control laws. Among these experts are: the Center for Disease Control (CDC), the American Bar Association (ABA), the American Veterinary Medical Association (AVMA), the American Kennel Club (AKC), the United Kennel Club (UKC), the American Society for Prevention of Cruelty to Animals (ASPCA), the Humane Society of the United States (HSUS), and the organization responsible for enforcing the laws, the National Animal Control Association (NACA).<sup>34</sup> The Obama Administration recently released a statement against BSL stating “research shows that bans on certain types of dogs are largely ineffective and often a waste of public resources.”<sup>35</sup>

## **II. Breed Specific Legislation in the Courts**

Constitutional challenges to breed specific legislation are often brought before the courts. This paper’s discussion on how BSL is challenged in the courts focuses on BSL’s collision with

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20decline.pdf (between January 2012 and May 2014 only 21 municipalities enacted BSL, while there was 163 repeals, rejections, or preemptions of BSL).

<sup>32</sup> STUBBYDOG.ORG, BREED DISCRIMINATION PACKET 2 n.2 (2014), <http://stubbydog.org/wp-content/uploads/2014/05/Breed-Discrimination-Packet-20140731.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> Pit Bulletin Legal News, *Animal Welfare & Professional Group Positions-Overwhelmingly Against Breed Specific Legislation*, <http://legal.pblnn.com/animal-welfare-positions/75-animal-welfare-group-positions> (last visited May 4, 2015) (lists the organizations against BSL and provides links to position statements).

<sup>35</sup> NATIONAL CANINE RESEARCH COUNCIL, OBAMA ADMINISTRATION OPPOSES BREED-SPECIFIC LEGISLATION 1 (2013), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Obama%20administration%20opposes%20breed%20specific%20legislation%20-%202013.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Obama%20administration%20opposes%20breed%20specific%20legislation%20-%202013.pdf).

the ADA. It will, however, briefly mention the traditional challenges to BSL: equal protection and due process.

It has long been accepted that the property interest in dogs is “imperfect or qualified in nature”<sup>36</sup> which allows the states to regulate dogs under its police power “without depriving their owners of a federal right.”<sup>37</sup> “Courts have uniformly held that dog owners do not compromise a suspect class, nor does dog ownership indicate a fundamental right or interest.”<sup>38</sup> Since there is no fundamental right or interest and no suspect classification, BSL is subject to minimal scrutiny.<sup>39</sup> There is a heavy burden of proof imposed upon parties challenging breed specific legislation. Legislation that is “enacted under the premise of protecting public health and safety has a strong presumption of constitutionality.”<sup>40</sup>

### **A. Equal Protection Challenges**

The Equal Protection Clause of the Fourteenth Amendment states that, “no State shall... deny to any person within its jurisdiction the equal protection of the laws.”<sup>41</sup> BSL has been challenged as violating equal protection by alleging that it is over-inclusive and/or under-inclusive.<sup>42</sup> Courts have repeatedly held, “the constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike, but that all dog owners of defined pit bulls will be treated alike.”<sup>43</sup>

#### **1. Over-inclusive**

An over-inclusive challenge to BSL is usually raised by arguing that subjecting all members of the targeted breed to regulation is unconstitutional because it regulates both

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<sup>36</sup> *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 701 (1897).

<sup>37</sup> *Nicchia v. New York*, 254 U.S. 228, 230 (1920).

<sup>38</sup> Hussain, *supra* note 25 at 2862.

<sup>39</sup> Dana Campbell, *Pit Bull Bans: The State of Breed-Specific Legislation*, 26 GP Solo 36 (2009).

<sup>40</sup> *Vanater v. Village of South Point*, 717 F. Supp. 1236, 1242 (S.D. Ohio 1989).

<sup>41</sup> U.S. Const. amend. XIV §1.

<sup>42</sup> See, e.g., *Vanater*, 717 F. Supp. at 1245-46; *Greenwood v. North Salt Lake*, 817 P.2d 816, 821 (Utah 1991).

<sup>43</sup> E.g., *Vanater*, 717 F. Supp. at 1245; *State v. Peters*, 534 So. 2d 760, 763 (Fla. 3DCA 1988).

dangerous and non-dangerous dogs; especially since there is proof that only certain dogs within the breed have been proven to be dangerous.<sup>44</sup> Some courts have accepted that viciousness is not a breed characteristic.<sup>45</sup> However, courts still find that evidence supports the conclusion that as a group, pit bulls are dangerous animals, and the classification, treating pit bulls differently than other breeds, reasonably furthers and is rationally related to public safety.<sup>46</sup>

## **2. Under-inclusive**

Plaintiffs argue that an ordinance or statute is under-inclusive by claiming that many other breeds of dogs have injured people and many other breeds of dogs have proven to be vicious; yet, the BSL does not include these breeds.<sup>47</sup> Courts have uniformly rejected this argument, stating that the legislature is “entitled to address threats in a piecemeal fashion, countering each threat as it arises.”<sup>48</sup> Courts have held, “pit bulls present a special threat to the safety of residents... over and above that presented by any other breed of dog.”<sup>49</sup> Given the type of threat pit bulls pose, courts have concluded that communities can take reasonable, preventative measures against the pit bull and not other breeds.<sup>50</sup>

### **B. Due Process Challenges**

In addition to Equal Protection under the law, the Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>51</sup>

There are three due process arguments raised with regards to BSL: that the ordinance or statute

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<sup>44</sup> *Greenwood*, 817 P.2d at 821.

<sup>45</sup> *Id.*

<sup>46</sup> *See, e.g., Vanater*, 717 F. Supp. at 1244; *Greenwood*, 817 P.2d at 821.

<sup>47</sup> *Vanater*, 717 F. Supp. at 1245.

<sup>48</sup> *Garcia v. Village of Tijeras*, 767 P.2d 355, 361 (N.M. Ct. App. 1988).

<sup>49</sup> *Vanater*, 717 F. Supp. at 1246.

<sup>50</sup> *See, e.g., Vanater*, 717 F. Supp. at 1245; *Peters*, 534 So.2d at 764; *Garcia*, 767 P.2d at 361; *Greenwood*, 817 P.2d at 821.

<sup>51</sup> U.S. Const. amend. XIV §1.

violates (1) substantive due process; (2) procedural due process, and (3) the void for vagueness doctrine.

### **1. Substantive Due Process**

When raising a substantive due process challenge, the plaintiff must show that a statute or ordinance does not bear a rational relationship to a legitimate legislative goal or purpose.<sup>52</sup>

These arguments, like equal protection arguments, are easily dismissed. The enactment of BSL usually follows a highly publicized or especially vicious or fatal attack, and therefore the courts can easily determine that the legislation is rationally related to the legitimate government interest of public safety.<sup>53</sup>

### **2. Procedural Due Process**

Procedural due process requires that the law in question provide adequate notice to the public of the regulated or prohibited conduct.<sup>54</sup> Plaintiffs often argue that the ordinance at issue violates procedural due process because it fails to provide pit bull owners notice and an opportunity to be heard prior to the destruction of their dogs.<sup>55</sup> The courts have uniformly rejected this argument because the “language was easily understood.”<sup>56</sup> Further the “clear statutory language alerts all owners of pit bulls that failure to abide by the laws related to vicious dogs and pit bulls is a crime.”<sup>57</sup>

### **3. Void for Vagueness**

The final way BSL is challenged as violating due process is the argument that the ordinance or statute is unconstitutionally vague. The void for vagueness argument has brought

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<sup>52</sup> Russell G. Donaldson, *Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as “Pit Bulls” or “Bull Terriers”*, 80 A.L.R. 4th 70 (1990).

<sup>53</sup> Hussain, *supra* note 25 at 2859

<sup>54</sup> *Id* at 2865.

<sup>55</sup> Donaldson, *supra* note 52.

<sup>56</sup> *McNeely v. United States*, 874 A.2d 371, 382-83 (D.C. 2005).

<sup>57</sup> *Toledo v. Tellings*, 871 N.E. 2d 1152, 1158 (Ohio 2007).

challengers mixed results. Courts have found that definitions may contain descriptions lacking “mathematical certainty.”<sup>58</sup> In other words, absolute certainty is not essential to constitutionality.

The most common way the void for vagueness doctrine is used with regards to BSL is when the plaintiffs challenge of the statutory definition of a “pit bull.”<sup>59</sup> When multiple definitions of pit bull is provided, courts often conclude the language is “sufficiently common to persons familiar with dogs to give a person adequate understanding of the ordinance that allows owners to determine if their dog falls within the ordinance.”<sup>60</sup> However, even when a definition of pit bull is not provided, courts often reject vagueness challenges, noting, “pit bull dogs possess unique and readily identifiable physical and behavioral traits which are capable of recognition by both dog owners... and by enforcement personnel.”<sup>61</sup>

Very few courts have held BSL to be unconstitutionally vague. The court in *American Dog Owners Association v. City of Lynn*<sup>62</sup> found the ordinance’s enforcement depended on the “subjective understanding of dog officers of the appearance of an ill-defined ‘breed’ ....”<sup>63</sup> Also, the ordinance failed to provide law enforcement officials with “ascertainable standards” by which to enforce the ordinance.<sup>64</sup> Therefore, it was the court’s opinion that the ordinance was unconstitutionally vague.<sup>65</sup>

### **C. Collision with the Americans with Disabilities Act**

BSL’s collision with the Americans with Disabilities Act (ADA or the Act) has only recently been challenged in the courts. As pit bulls become popular as service dogs, individuals

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<sup>58</sup> *Vanater*, 717 F. Supp. at 1244 (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

<sup>59</sup> *Hussain*, *supra* note 25 at 2866.

<sup>60</sup> *Peters*, 534 So.2d at 767-68.

<sup>61</sup> *State v. Anderson*, 566 N.E. 2d 1224, 1230 (Ohio 1991).

<sup>62</sup> 533 N.E. 2d 642 (Mass. 1989).

<sup>63</sup> *Am. Dog Owners Ass’n v. City of Lynn*, 533 N.E. 2d 642, 647 (Mass. 1989).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 646.

are finding themselves subject to a community's BSL. As demonstrated below, the claims brought focus specifically on Title II of the ADA. Title II states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>66</sup>

The United States Department of Justice (DOJ) addressed concerns raised with the use of pit bull service dogs and BSL, with the issuance of its "Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services" (herein after Guidance to Revisions). It addresses, in part, the argument of whether it should be permissible for a municipality to exclude certain breeds of dogs, even when used as service animals. The DOJ's opinion states:

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... State and local government entities 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>67</sup>

In *Sak v. City of Aurelia*,<sup>68</sup> the plaintiff sought an exception for Snickers, a pit bull mix, from the city's ordinance banning pit bulls and pit bull mixes.<sup>69</sup> In his claim, the plaintiff

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<sup>66</sup> The Americans with Disabilities Act, 42 U.S.C. § 12132 (2012).

<sup>67</sup> Department of Justice, *Americans with Disabilities Act Title II Regulations*, [http://www.ada.gov/regs2010/titleII\\_2010\\_regulations.htm](http://www.ada.gov/regs2010/titleII_2010_regulations.htm) (last visited March 30, 2015).

<sup>68</sup> 832 F. Supp. 2d 1026 (N.D. Iowa 2011).

asserted, “the City’s policies, regulations, practices, and conduct of interfering with Sak’s ability to utilize his service dog and its refusal to remove the breed restrictions for his service dog from its Ordinance are contrary to and in violation of the ADA.”<sup>70</sup> The court here decided that enforcing the ordinance against Snickers would cause irreparable harm to Sak and would violate Title II of the ADA.<sup>71</sup> The court, in its decision, followed the DOJ’s issued statement regarding banned breed service dogs. The judge voiced its opinion in the conclusion stating, “Finally, in my view, the public interest in allowing Sak to keep and use his certified and registered service dog, Snickers, substantially outweighs the City’s interest in banning Snickers. This is one small, but vital step for Sak, one giant leap for pit bull service dogs.”<sup>72</sup>

The city of San Francisco has enacted BSL in the form of a mandatory spay/neuter for all pit bulls and pit bull mixes unless one of six exceptions applies.<sup>73</sup> Being classified as a service dog is not one of the six listed exceptions. The plaintiff in *Coalition of Human Advocates for K9’s & Owners (CHAKO) v. City & County of San Francisco*<sup>74</sup> argued that the Ordinance violates Title II of the ADA because “many service dogs... should remain intact until after physical maturity... in order to allow the dog to safely and effectively fulfill its duties....”<sup>75</sup> The court noted, “with respect to disabled persons who currently use an intact service dog for mobility assistance, the Ordinance, as alleged, could impair the dog’s effectiveness for such

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<sup>69</sup> *Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1034 (N.D. Iowa 2011).

<sup>70</sup> *Id.* at 1035-36.

<sup>71</sup> *Id.* at 1048.

<sup>72</sup> *Id.*

<sup>73</sup> San Francisco, California Health Code SEC. 43.1 (2011). (The 6 exceptions to the mandatory spaying and neutering of pit bulls: (a) the pit bull is under eight weeks of age; (b) the pit bull cannot be spayed or neutered without a high likelihood of suffering serious bodily harm or death due to a physical abnormality; (c) the pit bull has been present in the City and County of San Francisco for less than thirty days; (d) the owner, guardian or keeper has obtained, or has submitted an application for a breed permit; (e) determination of breed is under appeal pursuant to Section 43(b); or (f) the pit bull is a show dog.)

<sup>74</sup> 2007 U.S. Dist. LEXIS 18820 (N.D. Cal. Feb. 27, 2007).

<sup>75</sup> *Coalition of Human Advocates for K9’s & Owners v. City & County of San Francisco*, 2007 U.S. Dist. LEXIS 18820, \*7 (N.D. Cal. Feb. 27, 2007).

purposes... in violation of the ADA.”<sup>76</sup> However, the plaintiff lacked standing because “none of the plaintiff’s members owns an intact pit bull service dog between the age of eight week and four years that is used for mobility service.”<sup>77</sup> The court here recognized the potential conflict with the ADA, however, it was unable to fully analyze the issue because the plaintiff lacked standing.

Courts have not unanimously held that BSL violates Title II of the ADA. In *Grider v. City & County of Denver*,<sup>78</sup> the court found no violation of the ADA.<sup>79</sup> In *Grider, Aurora Animal Control* seized Grider’s service dog and 5 months later sent a letter stating that he would be allowed to have his service dog in the city if he complied with numerous requirements.<sup>80</sup> The two requirements that Grider found issue with were the fencing requirement and the requirement that he place a warning sign on his entry gates.<sup>81</sup> With regards to the fencing requirement, the court noted that the plaintiff “does not allege any reason as to why he cannot comply with this requirement.”<sup>82</sup> As to the warning sign requirement, the court points to the statute, which states that the “requirement ‘shall be waived for a pit bull that is a service animal.’”<sup>83</sup> The court concluded that a license was available to Grider to avoid the threat of his dog being seized, and therefore the ADA was not violated.<sup>84</sup>

### **III. Problems with Breed Specific Legislation**

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<sup>76</sup> *Id.* at \*25.

<sup>77</sup> *Id.*

<sup>78</sup> 958 F. Supp. 2d 1262 (D. Colo. 2013).

<sup>79</sup> *Grider v. City & County of Denver*, 958 F. Supp. 2d 1262, 1270 (D. Colo. 2013).

<sup>80</sup> *Id.* at 1268.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1269.

<sup>84</sup> *Id.*

Multiple problems arise from the enactment of BSL. In particular, the problems that will be examined are: (1) the fact that BSL does not address the root of the problem and (2) concerns surrounding the misidentification of dogs.

### **A. BSL Does Not Address the Root of the Problem**

A large problem with BSL is that it does not address the root of the problem. BSL focuses on the breed of the offending dog and not the individuals creating the dog, therefore a false sense of security can occur in a community. BSL enactments and enforcement also drives dog fighters and dog fighting rings further underground.

#### **1. False Sense of Security**

Breed specific legislation does not address the real cause of dog bites: the irresponsible owner. It lulls a community into a “false sense of security.”<sup>85</sup> People tend to believe that there will be no more dog attacks since the “dangerous dogs” have been removed from the community. However, many fail to realize just because a particular breed is banned does not mean that individuals who exploit aggression in dogs, by fighting or abusing dogs, will stop their practice.<sup>86</sup> They instead will either continue to use the banned breeds or they will begin to use other unregulated breeds,<sup>87</sup> creating new dangerous dogs. It is important to note that there is “no documented case of a single, spayed/neutered pit bull or pit bull-type dog, maintained exclusively as a household pet, involved in a fatal attack on a human in the United States.”<sup>88</sup> This is a prime example that the conduct leading to dog bites and attacks does not lie in the breed of the dog. It lies in the individual attached to the other end of the proverbial leash.

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<sup>85</sup> ASPCA, *Breed-Specific Legislation*, <https://www.aspc.org/fight-cruelty/dog-fighting/breed-specific-legislation> (last visited April 13, 2015).

<sup>86</sup> ASPCA, *Position Statement on Breed-Specific Legislation*, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-on-breed-specific-legislation> (last visited April 13, 2015).

<sup>87</sup> *Id.*

<sup>88</sup> DELISE, *supra* note 1 at 168

## 2. Dog Fighting

Although a felony in all 50 states<sup>89</sup>, dog fighting occurs from “the backwoods of Louisiana to the urban streets of Chicago” and everywhere in between.<sup>90</sup> No town, city, county, or state is immune from this perverse “sport”.<sup>91</sup> BSL has not helped to combat dogfighting, and in many ways it has made it more difficult to stop. BSL has driven the world of dog fighting further underground. For example, in Miami-Dade County, before the ban was enacted, dog fighters would keep their prized dogs chained up in their yards, out in the open for the world to see.<sup>92</sup> This, in theory, made it easier for police, animal control, and neighbors to suspect dog fighting was occurring and report or stop it. Now, with Miami’s ban firmly in place, dog fighters do not want their prized fighters confiscated, so they hide the dogs.<sup>93</sup> Hidden dogs are difficult to discover, making dog-fighting rings even more difficult to bust.

Dog fighters intentionally create potentially vicious and dangerous dogs.<sup>94</sup> These dogs are not dangerous or vicious because they are pit bulls, but because they are un-social, neglected, and abused.<sup>95</sup> These dogs are pitted against one another night after night, fighting just to stay alive. Often, if the dogs are not “winners,” and somehow manage to make it out of the pit alive, they are tossed out onto the streets like trash.<sup>96</sup> Leaving highly un-socialized, severely injured, and potentially dangerous dogs, that have never known the kind touch of a human, on the streets, is a risk to both man and animal.

### B. Misidentification

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<sup>89</sup> ASPCA, *Pit Bull Cruelty Facts and FAQs*, <https://www.aspca.org/fight-cruelty/dog-fighting/pit-bull-cruelty> (last visited June 20, 2015).

<sup>90</sup> DELISE, *supra* note 1 at 135.

<sup>91</sup> *Id.*

<sup>92</sup> BEYOND THE MYTH: THE TRUTH ABOUT PIT BULLS (Cover Y’all Productions 2008).

<sup>93</sup> *Id.*

<sup>94</sup> DELISE, *supra* note 1 at 130-133 (describes various arrests for animal cruelty during January 2005- May 2005).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

America's dog population is 46% mixed breed and 75% of the dogs in shelters are mixed breeds.<sup>97</sup> Animal professionals regularly acknowledge the limitations of visual breed identification with regards to mixed breed dogs.<sup>98</sup> Despite this, articles are continuously published regarding dog bite related injuries or fatalities that draw ties between the perceived breed and bites.<sup>99</sup>

### **1. Shelter Labels**

Misidentification is a substantial concern with BSL and is a common occurrence. “Shelter dog breed assignments may be based on what the dog ‘looks like’ to someone at the shelter or because owners relinquishing their dog have misidentified the dog as a specific breed.”<sup>100</sup> Both of these identification methods are flawed. These misidentifications are often death sentences in shelters. Many potential adopters do not want to adopt a dog or puppy labeled as a “pit bull” or a “pit bull mix.” They do not want the stigmatization that often comes with owning a pit bull, or they cannot adopt one because of insurance or landlord restrictions.<sup>101</sup>

### **2. Higher Shelter Euthanasia Rates**

“Although we adopt them by the thousands, we abandon them by the millions.”<sup>102</sup> Approximately 3.9 million dogs enter animal shelters every year in the United States alone.<sup>103</sup> Every year, American shelters kill about 1.2 million dogs.<sup>104</sup> This means that 31% of the dogs

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<sup>97</sup> VICTORIA L. VOITH, ANIMAL PROFESSIONALS SHOWN TO DISAGREE WITH EACH OTHER WHEN ASSIGNING BREED(S) TO DOGS OF UNKNOWN PARENTAGE 3 (2013), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/NCRC%20Commentary\\_Voith%20et%20al%20Inter-observer%20Reliability.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/NCRC%20Commentary_Voith%20et%20al%20Inter-observer%20Reliability.pdf).

<sup>98</sup> *Id.* at 2.

<sup>99</sup> *Id.*

<sup>100</sup> VICTORIA L. VOITH, A COMPARISON OF VISUAL AND DNA IDENTIFICATION OF BREEDS OF DOGS 1 (2009), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Voith%20AVMA.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Voith%20AVMA.pdf).

<sup>101</sup> Larry Cunningham, Article: *The Case Against Dog Breed Discrimination by Homeowner's Insurance Companies*, 11 Conn. Ins. L.J. 1, 13 (2004) (some insurers have outright bans on specific breeds).

<sup>102</sup> Tom Junod, *The State of the American Dog*, ESQUIRE MAGAZINE, Aug. 1, 2014, at 64.

<sup>103</sup> ASPCA, *FAQ, Misc., Pet Statistics*, <https://www.aspc.org/about-us/faq> (last visited April 20, 2015).

<sup>104</sup> Junod, *supra* note 102.

that enter shelters every year do not make it out alive.<sup>105</sup> With the enactment of BSL comes an additional influx of dogs in shelters.

The BSL in Prince George's County, Maryland, for example, places a significant burden on the county's shelter.<sup>106</sup> The shelter, which has limited space to begin with, must hold the seized pit bulls during the lengthy legal proceedings.<sup>107</sup> As a result, the shelter must euthanize hundreds of otherwise adoptable dogs of many different breeds due to the lack of space.<sup>108</sup> This refutes the claim that BSL has no effect on other breeds.

### 3. Dog DNA Tests

Dog DNA tests may seem to be the ultimate solution to the misidentification problem. However, these tests are not very accurate either; laboratories have a limited number of breeds in their databases.<sup>109</sup> Further, if a dog has mixed breed parents, the laboratory may be unable to identify what breeds are present.<sup>110</sup>

Although not always accurate, DNA may be able to exonerate an imprisoned dog deemed a pit bull by proving that the dog is *not* a member of the breed.<sup>111</sup> However, that would require those in charge of enforcing BSL to view the tests as proof that a particular dog is not a pit bull. Many communities that have BSL enacted do not acknowledge the validity of dog DNA tests, and instead continue to use visual identification methods to determine if a particular dog in question is in fact a pit bull.<sup>112</sup> Visual identification is a flawed and deadly method.

## IV. Alternatives to Breed Specific Legislation

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<sup>105</sup> ASPCA, *supra* note 103.

<sup>106</sup> ASPCA, *supra* note 85.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Wisdom Panel, *FAQs*, [http://www.wisdompanel.com/why\\_test\\_your\\_dog/faqs/](http://www.wisdompanel.com/why_test_your_dog/faqs/) (last visited April 30, 2015) (Wisdom Panel 3.0 has a breed database of over 250 dog breeds).

<sup>110</sup> *Id.* (Wisdom Panel tests three generations back, it can be difficult to identify strong breed signals in a mixed breed portion, the results provide five possibilities).

<sup>111</sup> *Id.*

<sup>112</sup> Junod, *supra* note 102.

Multiple, often more valuable alternatives to BSL are available to communities. Among other options are: the stricter enforcement of existing dog laws; spay/neuter programs; affordable training, and educating both dog owners and non-dog owners. Effective laws hold all dog owners responsible for the “humane care, custody, and control of all dogs regardless of the breed.”<sup>113</sup>

### **A. Stricter Enforcement of Laws**

In (almost) every community that has enacted a form of BSL, there were already ample existing laws on the books that protected the community from dangerous dogs.<sup>114</sup> Strict enforcement of existing dog laws is necessary to create safer communities. To help with strict enforcement of existing laws, communities should enact breed-neutral dangerous dog laws that require every dog be licensed and enacts steep fines for noncompliance.

#### **1. License Requirements**

A license requirement allows animal control to keep track of pets living in its community; it also allows pets to be returned home quickly.<sup>115</sup> The proceeds of the licenses can go directly to the animal control and its shelter.<sup>116</sup> Calgary has one of the most comprehensive and effective breed-neutral laws: the “Responsible Pet Ownership Bylaws” (the Calgary Model). The Calgary Model requires that “every cat and dog over 3 months of age be licensed.”<sup>117</sup> A dog license costs \$31 per dog, per year, however if the dog is unaltered (not spayed or neutered) the cost is \$52.<sup>118</sup> The licenses must be renewed annually and non-renewals are followed up on by Animal Control

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<sup>113</sup> NATIONAL CANINE RESEARCH COUNCIL, *supra* note 3 at 4.

<sup>114</sup> MARYLAND DOG FEDERATION, FACT SHEET: PRINCE GEORGE’S COUNTY BREED BAN 1 (2013), [http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/pg\\_fact\\_sheet\\_cost.pdf](http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/pg_fact_sheet_cost.pdf).

<sup>115</sup> Hugabull, *Better Dog Legislation—What We Can Learn From Calgary*, <http://hugabull.com/resources/calgary> (last visited April 19, 2015).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Officers (ACOs).<sup>119</sup> The proceeds from licenses can go to fund Animal Control and, as discussed later, fund low cost spay/neuter programs for low-income families and affordable training programs.

## **2. Steep Fines for Non-Compliance**

Pinch an individual's wallet hard enough, they may begin to take the laws seriously. Steep fines, making it drastically more expensive to not obey the laws, are key to ensuring compliance.<sup>120</sup> Calgary, which requires mandatory licenses for all dogs and cats in the city, has a zero tolerance policy regarding licensing; if an owner is found to have an unlicensed pet, the owner receives a \$250 fine on the spot.<sup>121</sup> Calgary's law can boast a compliance rate of 90%, where most cities have a measly 10% to 20% compliance rate.<sup>122</sup> The steep fines owners face when found in violation of the laws is responsible for its compliance rate.

The flipside of expensive fines is that some owners, instead of abiding by the laws, may simply surrender/abandon their pet at a shelter. Communities should not refrain from enacting steep fines solely because some owners may simply surrender or abandon their pet. A community should strive to have only responsible pet owners and encourage responsibility in pet owners. The fines and license proceeds should go to improving the community's shelter and promoting adoption of the animals residing in the shelter.

## **B. Spay/Neuter Programs**

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (in Calgary it is ten times more expensive to be found in violation of the ordinances than it is to comply with the ordinances).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

Spaying and neutering a dog can be expensive.<sup>123</sup> Many families want to spay or neuter the family dog, but do not have the economic means to have the procedure done.<sup>124</sup> A possible solution for this problem, as previously mentioned, is to require pet owners to purchase a license for their dog or cat.<sup>125</sup> The local government could take the proceeds from the licenses and use it to provide low cost spay and neuter programs for low-income families that want to do the best thing for their dog.<sup>126</sup>

Another option is for shelters to include the price of spay/neuter in their adoption fees, or require the procedure to be done before the pet can be taken home. If an owner has already paid for the procedure, it may create an incentive to return to the shelter and have their dog fixed. Many shelters incorporate the spay/neuter price into the adoption fee or they require the pet to be spay/neuter before it can be adopted.<sup>127</sup> Local SPCAs often require that before the adopter can even take the animal home a cat or dog be fixed, ensuring compliance.<sup>128</sup> Creating incentives for pet owners to spay/neuter in the community will entice many to have the procedure done while preserving pet owner's rights to choose whether to spay or neuter.

### **C. Training**

Training is an important aspect of owning a dog. An obedient, well-behaved, manageable dog is much safer to the community than an out-of-control, un-socialized canine.<sup>129</sup>

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<sup>123</sup> SPCAFloida, *Affordable Spay/Neuter Fees*, <http://www.spcafloida.org/affordable-spayneuter-fees/> (last visited May 4, 2015) (for a dog, it can cost between \$83 and \$133 to spay, and between \$78 and \$125 to neuter, depending upon the weight of the dog, if the dog is pregnant or in heat there is an additional \$25 charge).

<sup>124</sup> *Id.*

<sup>125</sup> Hugabull, *supra* note 115 (Calgary offers low cost spay neuter using the proceeds of the licensing and fines to fund the surgeries).

<sup>126</sup> *Id.*

<sup>127</sup> St. Francis Care, *Adoptions*, <http://www.stfrancis-care.org/Adoptions.html> (last visited May 4, 2015) (adoption fees include the spay or neuter, microchip and vaccines).

<sup>128</sup> SPCAFloida, *Adoptions FAQ*, <http://www.spcafloida.org/frequently-asked-questions/> (last visited May 4, 2015) (all adopted dogs and cats are spayed or neutered, up to date on vaccinations, microchipped and come with a 30 day supply of heartworm and flea preventative).

<sup>129</sup> Stopbsl.org, *Alternatives- Low Cost Training*, <http://stopbsl.org/alternatives-to-bsl/low-cost-training/> (last visited April 13, 2015).

Attending basic obedience training classes allows owners to teach their dogs what is acceptable behavior and what is not; it also allows dogs to learn how to interact with others properly and safely.<sup>130</sup> Training also helps owners learn how to safely manage their dogs. However, not all dog owners can afford the high cost of dog training.<sup>131</sup> The cost becomes significantly higher if a dog has already exhibited potentially aggressive behaviors. If communities strictly enforce breed neutral laws and employ the licensing requirements and steep fines mentioned previously, communities could offer low cost training courses. These courses could range from basic obedience to the AKC Canine Good Citizen Certification course. As previously mentioned, training classes teach dogs what is acceptable behavior. These classes also teach owners how to manage their dog in difficult situations and should be a fundamental part of dog ownership.

#### **D. Education**

There is a saying that “knowledge is power.” This saying is true in the context of properly safeguarding against dog bites without the need for BSL. Educating both dog owners and non-dog owners is an important element in battling the dog bite epidemic. Humans and dogs communicate very differently.<sup>132</sup> Children are the most common victims of dog bites, due to their lack of knowledge concerning dog communication and body language.<sup>133</sup> To decrease these numbers, educating children about dog safety and behavior is vital.

A 2000 study in Sydney, Australia selected 197 children, age seven to eight, to complete a thirty-minute school lesson on how to recognize dog behavior and how to safely interact with

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<sup>130</sup> *Id.*

<sup>131</sup> Basic Adult Dog Obedience Training Classes (Level 1 and Level 2) at Petco is \$199.00, each course lasts 6 weeks. (on file with author)

<sup>132</sup> Cynthia A. McNeely & Sarah A. Lindquist, *Dangerous Dog Laws: Failing to Give Mans Best Friend a Fair Shake at Justice*, 3 J. Animal L. 99, 104 (2007).

<sup>133</sup> ASPCA, *Dog Bite Prevention*, <https://www.aspc.org/pet-care/virtual-pet-behaviorist/dog-behavior/dog-bite-prevention> (last visited May 10, 215).

dogs.<sup>134</sup> Ten days after the lesson, the children saw a dog tie up in their playground, sitting away from its owner.<sup>135</sup> “Of the 197 children who participated in the lesson, only about 9% attempted to pet or play with the dog, while 79% of the students in the control group, students who were not given the lesson, attempted to pet or play with the dog.”<sup>136</sup> Although this is only one small study, it shows that with basic information about dog safety children will be more careful around dogs.

Another educational tool available to both dog owners and non-dog owners is the Yellow Dog Project (the Project). The Yellow Dog Project is a global effort to help raise awareness and education around dogs that require a little extra space.<sup>137</sup> The concept of the Project is simple: if your dog requires more space, tie a yellow ribbon around your dog’s leash, collar, or harness.<sup>138</sup> This is a signal to others to use caution and ask permission before attempting to approach your dog. Every dog is different, just like every human is different, it is important for owners to be able to communicate whether or not their dogs are social. The Project also seeks to educate others about appropriate way to approach a strange dog, and to always ask permission from the owner before petting a dog.<sup>139</sup>

## **V. Practical Application—Breed Neutral versus Breed Specific**

Instead of looking at an outdated studies paired alongside faulty media reports, to determine if BSL is a valuable tool in combating a dog bite epidemic or dangerous dog problem,

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<sup>134</sup> Meagan Dziura, Comment: *Should We Beware of Dog or Beware of Breed? An Economic Comparison*, 10 J.L. Econ. & Pol’y 463, 486 (2014) (citing Simon Chapman, et. al., *Preventing Dog Bites in Children: Randomised Controlled Trial of an Educational Intervention*, 320 BRIT. MED. J. 1512 (2000).).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> The Yellow Dog Project, *About*, [http://theyellowdogproject.com/The\\_Yellow\\_Dog\\_Project/About.html](http://theyellowdogproject.com/The_Yellow_Dog_Project/About.html) (last visited April 17, 2015).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

one should look to see if the actual enactments of BSL have been successful. Unfortunately, for BSL supporters, no enactment has shown positive results.

Calgary is a city that has seen a drastic decrease in dog bites, while the human population continues to grow, due to breed neutral laws.<sup>140</sup> In 1985 there was 1,938 reported dog bites.<sup>141</sup> After the enactment of its progressive breed-neutral laws, the number of dog bites decreased dramatically.<sup>142</sup> In 2004, there were only 200 dog bites, and the number of bites has continued to decrease—in 2008, only 145 dog bites were reported.<sup>143</sup>

In Denver County, Colorado,<sup>144</sup> an estimated 367 dog-bite hospitalizations occurred between the years of 1995 and 2011.<sup>145</sup> During this same time-period, El Paso County, Colorado, reported 189 dog-bite hospitalizations.<sup>146</sup> El Paso, County, which has breed-neutral laws and about the same population,<sup>147</sup> had only one-third of the dog bite hospitalizations as breed specific Denver County.<sup>148</sup> This shows that BSL does not decrease dangerous dogs or dog bites in general.

BSL is not the reason that New York City can boast that dog bites were reduced from over 37,000 in 1971 to only 4,000 in 2005.<sup>149</sup> Nor can it be the cause of Baltimore's dramatic decrease in dog bites, from 6,809 in 1971 to 582 in 2005.<sup>150</sup> Breed-neutral laws focusing on

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<sup>140</sup> Hugabull, *supra* note 115.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> NATIONAL CANINE RESEARCH COUNCIL, DENVER'S BREED SPECIFIC LEGISLATION: BRUTAL, COSTLY, AND INEFFECTIVE 1 (2013), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Denver%20BSL%20Brutal,%20Costly,%20and%20Ineffective%20%20Aug%202013.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Denver%20BSL%20Brutal,%20Costly,%20and%20Ineffective%20%20Aug%202013.pdf) (Denver County has had BSL in place since 1989).

<sup>145</sup> *Id.* at 2. (Denver County's population in 2010 was: 600,158 people).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (El Paso County, Colorado, as of 2010 had a population of: 622,263 people).

<sup>148</sup> *Id.*

<sup>149</sup> KAREN DELISE, AMERICA'S BLAME GAME GOES TO THE DOGS 1 (2003), [http://nationalcanineresearchcouncil.com/uploaded\\_files/tinymce/Blame%20Delise.pdf](http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/Blame%20Delise.pdf).

<sup>150</sup> *Id.*

owner responsibility are the reason for New York City and Baltimore's sharp decrease in dog bites.<sup>151</sup>

These examples are more valuable than any scientific study, or any news report, in showing that BSL does not help reduce dog bites. Rather it goes to show that breed-neutral laws that focus on owner responsibility, leash laws, licenses, and protecting the community against dangerous dogs (regardless of breed) are the most comprehensive way to make a community safer.

## **VI. Conclusion**

Very few (if any) dogs are born dangerous. The owner, through his/her actions or inactions, molds a dog into a "dangerous dog." Breed specific legislation does nothing to stop the problem at its source—it does nothing to punish the owners who create dangerous dogs. BSL neither eliminates dangerous dogs nor even decreases the number of dangerous dogs in a community; yet, it does cause the death of hundreds of thousands of innocent dogs each year. If we disregard preconceived opinions and view dogs not by breed but as individuals, BSL will be seen for what it truly is: an ineffective, costly, knee-jerk reaction that does not increase the safety of the citizenry but does lead to deaths of thousands of dogs merely because of their appearance.

The introduction to this paper mentions an altercation between a pit bull and a Golden Retriever in North Carolina. The police arrived only to discover that it was the Golden Retriever, at the goading and urging of its owner, which had initiated the attack against the pit bull.<sup>152</sup> The pit bull received the fractured leg and severe bites.<sup>153</sup> BSL would not have prevented this situation from occurring. Laws should focus on punishing the deeds of the owner. By using the tools described above communities can become safer from dangerous dogs,

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<sup>151</sup> *Id.*

<sup>152</sup> DELISE, *supra* note 1 at 173-74.

<sup>153</sup> *Id.*

regardless of their breed. The pit bull may not be the dog for everyone, but dog owners (and potential dog owners) should be allowed to choose the dog they want, and not be prohibited from choosing (or keeping) a dog just because some legislators ignorantly deem a breed “dangerous.”

*Selections from:*

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# EXCELLENCE BEYOND COMPLIANCE

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ENHANCING ANIMAL WELFARE THROUGH THE CONSTRUCTIVE USE OF THE ANIMAL  
WELFARE ACT

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JAMES F. GESUALDI



MAURICE BASSETT

EXCELLENCE BEYOND COMPLIANCE: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act.

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### ***Disclaimer***

EXCELLENCE BEYOND COMPLIANCE is not, nor is it meant to be, legal advice, and it is certainly not a substitute for current law and agency guidance, or for zoological organizations and zoological professionals being knowledgeable about the Animal Welfare Act (AWA) and the animals in their care. Neither should it replace good legal counsel when such is needed. The opinions expressed herein are solely those of the author.

## ***Preface***

*Life is full of beginnings. They are presented every day and every hour to every person. Most beginnings are small and appear trivial and insignificant, but in reality they are the most important things in life.*

***James Allen***

People are passionate about animals. This fact is reflected in the many spirited discussions about animal issues taking place today, especially those relating to animals in zoos, aquariums, and marine and wildlife parks (all of which are referred to as “zoological organizations” in this book). These discussions also extend to the subject of how the care and treatment of animals in such organizations should be addressed under the United States Animal Welfare Act (AWA). The discourse involves great ethical and practical concerns, as well as a multitude of stakeholders, many of whom hold strong positions.

Deeper examination shows that within each of the varied perspectives of the regulatory agency, zoological organizations, the public, critics, other animal-related organizations and stakeholders there is an underlying genuine and shared interest in helping animals. Every one of us wants to make a difference. People who care for and about animals are especially motivated to have a positive impact on their lives.

### *What is EXCELLENCE BEYOND COMPLIANCE?*

EXCELLENCE BEYOND COMPLIANCE is a constructive approach to tap our passion and compassion for animals in order to enhance their well-being every day. It is a model, non-regulatory program for zoological organizations seeking to demonstrate an extraordinary commitment to enhancing animal welfare above and beyond the AWA’s requirements.

EXCELLENCE BEYOND COMPLIANCE presents a philosophy and plan of action to help achieve this goal for zoological organizations and others responsible for the well-being and safety of animals. The principles and best practices contained in these pages are informed by the AWA and are designed to inspire caregivers and zoological organizations to promote a policy of EXCELLENCE BEYOND COMPLIANCE in their care of animals.

The essential elements of the EXCELLENCE BEYOND COMPLIANCE program include:

- Proactive use of the AWA to enhance animal welfare and promote organizational excellence.
- A philosophy of continuous improvement.
- A top-down/bottom-up commitment.
- A team approach and shared responsibility.
- Use of best practices, procedures, and tools.

EXCELLENCE BEYOND COMPLIANCE strives to consistently focus individual and organizational processes on animal welfare enhancements. It will also serve to make zoological

organizations more effective in handling day-to-day regulatory requirements and more adept at preparing for, responding to, and benefiting from the inspection process.<sup>1</sup>

In essence, the practice of EXCELLENCE BEYOND COMPLIANCE involves a paradigm shift. On the one hand it incorporates the AWA's minimum standards and the overlay of self-regulation via accreditation. At the same time it encourages individuals and organizations to go beyond these requirements, to adopt a mindset of continuous improvement and heightened awareness regarding the welfare of the animals in their care. It inspires them to act appropriately and effectively as champions of those animals.

Even outstanding zoological organizations and zoological professionals can benefit from adopting EXCELLENCE BEYOND COMPLIANCE as a tool to encourage continued enhancements in animal welfare.

### *How to Use This Book*

This book can be read constructively by anyone engaged with zoological or other regulated communities involving animals, including leadership, staff, volunteers, consultants, supporters, guests/visitors, regulators—even critics. But it is first and foremost intended to serve as a guide for zoological organization board and executive leadership, staff and volunteers. It should be read as supplementing and enhancing, but by no means replacing, federal regulations, agency guidance, and other substantive informational resources. (These latter could include, for example, the standards and guidelines of accrediting associations and Taxon Advisory Group [TAG] recommendations.)

Organizations and professionals applying the principles and best practices detailed in EXCELLENCE BEYOND COMPLIANCE will seamlessly integrate regulations, guidance and additional helpful practices into their daily activities. They will be better prepared to engage with inspections, investigations, serious incidents, and the myriad other challenges and opportunities their work brings them into contact with every day. Most importantly, they will be empowered to take on a greater role not only in ensuring AWA compliance, but in going beyond it to enhance the well-being of the animals in their care.

The EXCELLENCE BEYOND COMPLIANCE approach is designed to be constructive, positive, voluntary, empowering, and even inspirational. It can be adopted gradually or wholesale, depending on need and available resources; a zoological organization can aspire to adopt every aspect of the EXCELLENCE BEYOND COMPLIANCE approach, but it can *start* wherever it makes the most sense.

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<sup>1</sup> Although EXCELLENCE BEYOND COMPLIANCE is designed specifically for use by accredited zoological organizations and other licensed exhibitors operating under the AWA, the principles and approach have much broader application. These tools are likely to be similarly effective when utilized by other regulated entities committed to enhancing animal welfare and promoting organizational excellence. They could also be adapted to other regulatory systems outside the United States, especially those that approximate the AWA.

*You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete.*

***R. Buckminster Fuller***



*The best way to predict the future is to create it.*

***Peter Drucker***

**Selections from:**

***I: THE ANIMAL WELFARE ACT AND EXCELLENCE BEYOND COMPLIANCE***

*If you are going to achieve excellence in big things, you develop the habit in little matters. Excellence is not an exception, it is a prevailing attitude.*

***Charles R. Swindoll***

***A Brief Overview of the AWA***

The implementation, administration and enforcement of the AWA<sup>2</sup> and its regulations<sup>3</sup> matter. The AWA provides “minimum requirements”<sup>4</sup> for the humane handling, care, treatment and transportation of regulated animal species involved in certain activities, including public exhibition at licensed entities like zoological organizations. The AWA was enacted, and has periodically been amended, by the United States Congress. It is implemented, administered and enforced by the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) Animal Care (AC). APHIS’ policy is to promote “continuous compliance” with the AWA through its use of unannounced inspections, the ongoing education of regulated entities and, as needed, its enforcement authority.

The administrative portion of the AWA regulations contains requirements relating to licensing, inspections, and recordkeeping. The substantive regulations include generally applicable standards for veterinary care and animal handling, and specific standards for each of several classes of covered species including: dogs and cats; guinea pigs and hamsters; rabbits; nonhuman primates; marine mammals; and other warm-blooded animals, which of course includes many zoo animals.

Within each category of species and the overall catch-all (“other warm-blooded animals”) the regulations refer to indoor and outdoor facilities, space, feeding, sanitation, staffing, a few species-specific elements (e.g., “environmental enhancement to promote psychological well-being” of nonhuman primates<sup>5</sup>), and transport.

These requirements include a mix of engineering and performance-based standards. Engineering standards quantify or specify a requirement—for example, the minimum dimensional measurements for an enclosure. These are more typically “minimum” due to their specificity. Other regulations contain performance standards as requirements; for example, an animal must be handled safely so as to avoid a certain condition. The generalized, outcome-oriented nature of the performance standards makes them more elastic and subject to discretion and interpretation. The broader performance-based standards also create room for creativity and flexibility, which can foster animal welfare-enhancing innovation.

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<sup>2</sup> 7 U.S.C. § 2131, et seq.

<sup>3</sup> 9 C.F.R. § 1.1, et seq.

<sup>4</sup> 7 U.S.C. § 2143(a)(2)(1).

<sup>5</sup> 9 C.F.R. § 3.81.

Animal Care works with APHIS Investigative and Enforcement Services (IES) and the USDA Office of General Counsel (OGC) as necessary to enforce the AWA. In the event of serious and/or repeated noncompliances, Animal Care refers a case to IES for investigation and resolution.<sup>6</sup> Animal Care has also created both online and hard copy complaint forms for the public to submit concerns about animals that are covered under the AWA.<sup>7</sup>

Compliance with the AWA regulations is manifested by an inspection report which, in the event of a successful inspection, notes: “No noncompliant items identified during this inspection.”<sup>8</sup> Continuous compliance is evidenced by multiple consecutive, fully compliant inspection reports. Such documentation of “continuous compliance” is laudable as it demonstrates that on those particular dates the “animal care inspector” or “veterinary medical officer” (hereinafter “inspector”) determined the facility to be fully compliant. As the AWA provides “minimum standards,” full and continuous compliance should be a facility’s starting point.

### EXCELLENCE BEYOND COMPLIANCE

The above overview is intended as a cursory primer or refresher on the process and the substance of the AWA. As noted, the AWA is a “minimum standards” statute and the AWA regulations are often just that: “minimum.” The AWA’s minimum standards are important, as are the standards and guidelines of accrediting associations, but EXCELLENCE BEYOND COMPLIANCE goes much further in striving to enhance the well-being of animals. It also provides a means whereby organizations can take straightforward, practical steps to maintain compliance with AWA regulations and prepare for inspections and accreditation on an ongoing basis.

### Elevating AWA Compliance and Animal Welfare

Zoological organizations, licensed as exhibitors under the AWA, have long proclaimed their missions to include animal welfare, animal or wildlife conservation, research in furtherance of animal welfare and wildlife conservation, associated conservation education and, in some cases, wildlife rescue. Consistent with these commitments, compliance with the AWA is vitally important. Those organizations which seek to harmonize and reinforce their mission and public messaging should broaden their efforts to incorporate EXCELLENCE BEYOND COMPLIANCE. This may provide for a participating organization to make a much stronger presentation during regulatory reviews of a facility but, more importantly, it is essential for enhancing animal welfare.

Simply put, better organizations commit daily to enhanced animal welfare, and by so doing live their mission in a most compelling manner. Most importantly, the animals which zoological organizations exist to serve benefit. As Terry L. Maple and Bonnie M. Perdue write in *Zoo Animal Welfare*:

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<sup>6</sup> See Chapter VII: *Investigations and Enforcement*, and *Appendix F: Enforcement Information*. Note that noncompliances can be resolved via no further action, letter of warning, proposed stipulation of settlement, formal prosecution, consent decree, or full administrative adjudication culminating in sanctions (including fines and license suspension or revocation).

<sup>7</sup> For the hard copy form, see the USDA, APHIS, Animal Care, *Animal Welfare Inspection Guide* (2013) (hereinafter “*Animal Welfare Inspection Guide*”), p A-43, available at: [http://www.aphis.usda.gov/animal\\_welfare/downloads/Animal%20Care%20Inspection%20Guide.pdf](http://www.aphis.usda.gov/animal_welfare/downloads/Animal%20Care%20Inspection%20Guide.pdf). For the online form, see *USDA, APHIS, Animal Care Animal Welfare Complaint*, available at: <http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalwelfare/complaint-form>

<sup>8</sup> See *Appendix B: Inspection Report Notice*, for a concise explanation of inspection reports, available at: [http://www.aphis.usda.gov/animal\\_welfare/downloads/IR\\_Explanation.pdf](http://www.aphis.usda.gov/animal_welfare/downloads/IR_Explanation.pdf) Note, “[a] ‘Direct’ noncompliance is a noncompliance that is currently adversely affecting the health and well-being of the animal, or has the high potential to adversely affect the health and well-being of the animal in the near or immediate future.” *Animal Welfare Inspection Guide*, at 2-5.

If we elevate its visibility and its priority, the welfare of zoo animals is bound to improve. The institutional mission statement must articulate and affirm core values that support animal care and welfare.<sup>9</sup>

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<sup>9</sup> Terry L. Maple & Bonnie M. Perdue, *Zoo Animal Welfare* (Heidelberg: Springer, 2013). Maple and Perdue provide an indispensable resource for zoological organizations committed to enhancing animal welfare. The book contains a comprehensive review of animal welfare and the associated scientific literature, as well as relevant considerations and factors contributing to animal welfare; e.g., welfare metrics, psychology, environmental enrichment, behavior and design. For additional resources, see also Center for Zoo Animal Welfare, available at: <http://czaw.org/> and Chicago Zoological Society, Centers of Excellence, Center for Animal Welfare, available at: <https://czs.org/czs/csaw>

**Selections from:**

***II: ORGANIZATIONAL FRAMEWORK***

*1. Every individual can make a difference*

Everyone is a member of the “AWA Compliance Team” and the EXCELLENCE BEYOND COMPLIANCE effort. AWA compliance, animal welfare, and EXCELLENCE BEYOND COMPLIANCE are everyone’s responsibility, every day. Everyone, every day. A lapse in nearly any area or department can potentially impact AWA compliance and animal welfare. Everyone should be aware of this and of the importance of “little things” they can do every day. For example, anyone working at a zoological organization can pick up stray litter or debris which could wind up in an animal enclosure (or notify someone who can). Staff can flag inappropriate guest behavior or alert others as to observations about animals or facilities needing attention. In addition to staff training, providing staff (as well as volunteers) with laminated checklists or cards to carry can improve both the quality and quantity of observations. Such checklists could indicate the types of appearances, behaviors or conditions warranting a closer look by appropriate staff.

*2. Everyone shares responsibility for animal welfare*

Collaboration is a key element in ensuring animal welfare. Even across animal-related departments and different units, every person must understand that individually and together they are all part of the zoological organization team, and that they all share responsibility for AWA compliance, animal welfare, and EXCELLENCE BEYOND COMPLIANCE. For example, it is not uncommon to read an inspection report where a noncompliance is as much related to a construction or maintenance issue as it is to an animal caregiving one. Zoological organization leadership should therefore constantly encourage, recognize and reward individuals and groups of staff who work well with others, including different units, to reinforce the importance of the EXCELLENCE BEYOND COMPLIANCE effort.

Leadership

*3. Compliance Officer*

Every zoological organization should have a designated “Compliance Officer” to ensure that shared responsibility for AWA compliance, animal welfare, and EXCELLENCE BEYOND COMPLIANCE does not evolve into a situation where no one is ultimately responsible. It is probably best if this individual is the organization’s point of contact for APHIS inspections. In addition, this Compliance Officer must be extremely knowledgeable about the AWA regulations and animal welfare. Significantly, the Compliance Officer must have an appropriate degree of organizational authority that allows them to carry out their responsibilities and ensure AWA compliance and EXCELLENCE BEYOND COMPLIANCE. Part of this individual’s responsibility will include organizing training,

maintaining compliance between inspections and communicating as appropriate to follow up internally and with the agency.

#### 4. *Animal Welfare Officer*

Every zoological organization should have a designated, executive level “Animal Welfare Officer.” The Animal Welfare Officer is responsible for monitoring, promoting and enhancing animal welfare and related management and planning in coordination with the Compliance Officer and the Animal Welfare Leadership Group (see below). The Compliance Officer and the Animal Welfare Officer can be the same person, and that person may hold another title, but these are two distinct but overlapping and mutually reinforcing positions. The Animal Welfare Officer must be knowledgeable about animal welfare and skilled in interpersonal relations such that they are both respected and approachable by other staff. While the Compliance Officer focuses on the AWA, its regulations and related processes (which have animal welfare components), the Animal Welfare Officer focuses entirely on animals and their welfare. To maximize and validate effectiveness, the Animal Welfare Officer should also help coordinate the organization’s animal welfare-centered research efforts, whether conducted by in-house staff or in cooperation with outside researchers.

#### 5. *Animal Welfare Leadership Group*

Even the most knowledgeable and talented Compliance Officer and Animal Welfare Officer are going to have limited expertise or understanding of certain zoological areas, activities or operations. Therefore, every zoological organization should have a designated “Animal Welfare Leadership Group”. (Some zoological organizations may already have an Animal Welfare Committee that could be modified or expanded to serve as the Animal Welfare Leadership Group.) The functioning of the Animal Welfare Leadership Group is somewhat similar to the Institutional Animal Care and Use Committee (IACUC) required for registered research facilities, but it is voluntary, less formal and has a broader role with respect to AWA compliance and enhancing animal welfare generally.<sup>10</sup> For zoological organizations with an IACUC, the Animal Welfare Leadership Group can be an adjunct or supplement to the IACUC’s role with regard to regulated research activities.

The Animal Welfare Leadership Group is intended to include a cross section of high level staff in order to facilitate collaborative action on animal welfare and AWA matters. It oversees the EXCELLENCE BEYOND COMPLIANCE program and should have broad authority to review and shape all animal-related activities. An Animal Welfare Leadership Group should, to the extent possible given the nature and size of the organization, include:

- Caregivers, including behavioral/husbandry/training staff.
- An attending veterinarian.
- Buildings and grounds staff.
- Maintenance staff.
- Researchers.
- Other staff or even volunteers, as appropriate.

Other staff should be incorporated if helpful at a given facility, perhaps including, but not limited to, the Safety Officer, who is typically responsible for risk management and the safety program. Such broad representation underscores the depth of this effort and ensures that relevant management and staff are fully invested in making the organization function at a level beyond simple compliance. Where a zoological organization is open to other perspectives, consideration should be given to including

<sup>10</sup> For more information on IACUCs see 9 C.F.R. § 2.31 and *Animal Welfare Inspection Guide* at 7-1 to 7-60.

representatives from outside the organization, possibly including consultants, recognized experts and independent members.

One of the simplest and most effective activities for the Animal Welfare Leadership Group is having regularly scheduled meetings and rounds to review the animals and facilities. Having a set schedule, established well in advance, makes it easier for all staff to prepare and participate. It also empowers front line staff to be ready for rounds. In short, this is a foundational building block that can offer broad benefits to the organization and the animals in its care.

**Selections from:**

***VI: AFTER AN INSPECTION***

*16. ZIPs, AIPs, PIPs and Animal Welfare Enhancement Plans*

Zoological organizations should always be working off of an intermediate or long range strategic plan (including an Animal Welfare Plan). However, in the event of serious incidents and/or compliance challenges, or simply to jumpstart an animal welfare initiative, Zoo, Aquarium or Park Improvement Plans (ZIPs, AIPs or PIPs) or Animal Welfare Enhancement Plans (for a specific species) should also be developed. EXCELLENCE BEYOND COMPLIANCE requires more than simply fixing problems and moving on. Problem resolution is the starting point. Challenges are constructively examined for the lessons they bring, with the goals of continuous improvement, animal welfare enhancements and advancement of organizational excellence. Consideration should therefore be given to remedying and preventing recurrence of noncompliances as well as to promoting additional animal welfare-related enhancements.

*17. Key elements of effective improvement and enhancement plans*

Effective and successful ZIPs, AIPs, PIPs and Animal Welfare Enhancement Plans generally contain certain foundational elements. Part of the process involved in creating such plans might include doing a needs assessment based on current conditions. All plans should evaluate and consider improvements relating to: staffing (numbers, allocation, experience and expertise); training (staff and animal training levels and programs); veterinary care; facilities (condition, maintenance, surface renewal, monitoring, and, longer-term, how well they serve animal needs, including in some instances recognizing the need for expanded or new facilities); and communication (including inter-departmental cooperation and instructions to the public); recordkeeping and research.

The best improvement and enhancement plans are “living documents” which establish a new baseline and are continuously improved upon and periodically updated. Preparation and implementation of improvement and enhancement plans can be a tremendous force for good. Improving and updating them is truly EXCELLENCE BEYOND COMPLIANCE.

**Selections from:**

***XI: OTHER STAKEHOLDERS: MEDIA, CRITICS, ANIMAL-RELATED ORGANIZATIONS AND THE PUBLIC***

3. *The role of critics, other animal-related organizations and stakeholders*

There are criticisms of zoological organizations, some of which include important ethical considerations worthy of further discussion, but most of which are beyond the scope of this book (even though many have contributed to and helped inspire the constructive approach of EXCELLENCE BEYOND COMPLIANCE towards improving animal well-being). The current reality is that zoological organizations exist lawfully and require regulation. The AWA responds to this need, and EXCELLENCE BEYOND COMPLIANCE is designed to support and enhance both AWA regulations and animal welfare *today* so as to make an immediate and ongoing difference in the lives of animals. Consequently, critics, other animal-related organizations and stakeholders should support the constructive EXCELLENCE BEYOND COMPLIANCE approach as a means of fostering animal welfare enhancements and continuous improvement above and beyond the AWA's minimum standards (and even accreditation standards). When properly administered, EXCELLENCE BEYOND COMPLIANCE will enhance animal lives.

4. *Learning from critics, other animal-related organizations and stakeholders*

Zoological organizations should learn from critics, other animal-related organizations and stakeholders, in appropriate situations, in order to advance animal welfare. Zoological organizations operate in a complex environment within which they are one of various types of stakeholder organizations. Although they serve other stakeholders like the public, the media, and sometimes various government agencies and other animal-related organizations, they also have their critics. Some criticisms may be counterproductive; others can be constructive (even if they do not appear to be "helpful"). The best zoological organizations committed to EXCELLENCE BEYOND COMPLIANCE will work hard to find ways to learn from criticism. In such a constructive spirit, criticism is a means for accelerating organizational advancement and excellence. In many cases, the more constructive the criticism the more likely the critic may help foster and positively reinforce AWA compliance, animal welfare, and EXCELLENCE BEYOND COMPLIANCE.

Zoological organizations need not always acknowledge or directly engage critics to learn and grow from any external challenge. Likewise, more constructively-framed criticisms, as well as acknowledgements of good work and progress, would further reinforce zoological advances, all in the name of enhancing animal welfare.

5. *Reframing the conversation about animal welfare*

The potential benefits of an ongoing dialogue between all stakeholders involved in AWA and animal welfare-related activities cannot be overstated. The EXCELLENCE BEYOND COMPLIANCE approach can serve as a framework for carrying on such conversations and for building consensus

between APHIS, zoological organizations, accrediting associations, critics, other animal-related organizations and stakeholders. The constructive approach to AWA compliance and animal welfare put forth by EXCELLENCE BEYOND COMPLIANCE can also inform public discourse on the subject. The ultimate goal of these ongoing conversations, and of EXCELLENCE BEYOND COMPLIANCE as a whole, is to bring more people and resources together for the welfare of animals.

## ***XII: THE WAY FORWARD***

*Every day do something that will inch you  
closer to a better tomorrow.*

***Doug Firebaugh***

AWA Compliance and EXCELLENCE BEYOND COMPLIANCE start with the animals and are intended to enhance animal welfare, which should be the core focus of every zoological organization. EXCELLENCE BEYOND COMPLIANCE requires ongoing commitment and ensures sustainable and lasting impact. It is designed to work synergistically with the objective of AWA compliance and to bring people together through their common love of animals and commitment to animal welfare.

There is a simple but powerful tale that begins with a man walking along a beach at low tide.<sup>11</sup> He encounters an individual—sometimes it’s a boy or an old man, sometimes a young girl—who is picking up stranded starfish and throwing them back into the ocean. The “star-thrower” is asked why he bothers; after all, there are so many stranded starfish he could spend a year hurling them back into the ocean without making a difference. The star-thrower listens to the question as he tosses another starfish back into the water, then replies: “It makes a difference to that one.”

This is what EXCELLENCE BEYOND COMPLIANCE is all about: making an even greater positive difference in the lives of animals. Though it should be initiated and reinforced by the zoological organization—and is designed to help even the most outstanding of these get better—EXCELLENCE BEYOND COMPLIANCE ultimately operates at the level of the individual. It is fueled by the passion that all of us have for animals, whether we are specifically their caregivers or are simply aware of them as fellow beings with whom we share the planet.

EXCELLENCE BEYOND COMPLIANCE was created to help transform the universal compassion people feel for animals into a commitment to constructive and collaborative action for their benefit on a daily basis. In the end, everyone can make a difference by giving of themselves in the service of animals.

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<sup>11</sup> The original of the story, which has been adapted over the years, can be found in the science writer Loren Eiseley’s essay, “The Star Thrower,” originally published in *The Unexpected Universe* in 1969 (New York: Harcourt).

*Good intentions may be an appropriate starting point for achievement, but they will go nowhere unless you follow through with action.*

***Napoleon Hill***



*Start where you are. Use what you have.  
Do what you can.*

***Arthur Ashe***



*It does not matter how slowly you go up,  
so long as you don't stop.*

***Confucius***

## ***ABOUT THE AUTHOR***

James F. Gesualdi has dedicated himself to his work on legal, regulatory and strategic matters regarding animal welfare and wildlife conservation. He works extensively with the U.S. Animal Welfare Act and champions ways to improve its administration and enforcement, as well as engaging in consensus building on related policy matters.

Gesualdi's leadership experience includes serving as chair of the New York State Bar Association Committee on Animals and the Law; founding co-chair of the Suffolk County Bar Association Animal Law Committee; vice chair of the American Bar Association Young Lawyers Division Animal Protection Committee; and as a vice chair of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee. He has also been a member of the Section of Administrative Law and Regulatory Practice. He has served as special professor of law at Hofstra University School of Law, where he has taught Animal Law. He has also served on the faculty of the Association of Zoos and Aquariums' "Zoo School" for zoological professionals, where he taught courses on ethical considerations relating to animals.

He was special counsel to the marine mammal community's Working Group on the Reintroduction of Marine Mammals to the Wild and participated in the U.S. Department of Agriculture Animal Plant and Health Inspection Service's Marine Mammal Negotiated Rulemaking, completing a voluminous "Analysis and Commentary" on this subject.

He earned his B.A. degree from St. Lawrence University where he graduated magna cum laude, Phi Beta Kappa, with highest honors in Government; his M.A. in Political Science (Public Affairs) from the State University of New York at Stony Brook; and his J.D. degree from the Hofstra University School of Law from which he graduated with Distinction and where he served as a Notes and Comments Editor of the Law Review. His work has been profiled in the *American Bar Association Journal*, the *New York Times*, the *New York Law Journal*, *Newsday*, *Long Island Business News* and in Yolanda Eisenstein's *Careers in Animal Law*.

***Connecting with  
EXCELLENCE BEYOND COMPLIANCE***

To learn more about incorporating EXCELLENCE BEYOND COMPLIANCE into your organization through seminars and training opportunities, please email us at:

[info@excellencebeyondcompliance.com](mailto:info@excellencebeyondcompliance.com)

Additionally, whether you are a professional or volunteer dedicated to your work with animals, a visitor at a zoological organization, or someone committed to enhancing animal welfare or making a difference through the Animal Welfare Act, your thoughts are welcome. Please email us at the above address. We would also welcome mention of outstanding individuals and organizations committed to excellence in enhancing animal welfare.

Laws, regulations and interpretations change constantly. Check the agency webpages noted in the Online Resources section of this book for current information. For updates to EXCELLENCE BEYOND COMPLIANCE, please visit:

<http://excellencebeyondcompliance.com/>

Thank you!



*Not the maker of plans and promises, but rather the one who offers faithful service in small matters. This is the person who is most likely to achieve what is good and lasting.*

***Johann Wolfgang von Goethe***



## The Best for All Concerned

Amy M. Pontillo<sup>i</sup>

Courts have been more open to recognize the value of a pet as something greater than mere property. The standard, “best for all concerned”, originated in the First Department in 1999 in Raymond v. Lachmann<sup>1</sup>. The case involved a custody dispute over a cat. In Raymond, when the humans parted ways, the plaintiff sued for “custody” of Lovey, the cat. As with most human and pet relationships, the cat’s name was apropos of the emotions involved. The trial court awarded custody to plaintiff conditioned on plaintiff paying defendant money that defendant paid for Lovey’s veterinary bills. On appeal, the First Department reversed the decision of the trial court and granted custody of Lovey to the Defendant, holding:

*Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it **best for all concerned** that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.*

After its origination in 1999, the “best for all concerned” standard, as applied to pet custody disputes, is slowly developed into its current iteration through a very thoughtful 2013 trial court decision issued by Judge Matthew F. Cooper, in Travis v. Murray<sup>2</sup>. In 2015, however, this standard is first accepted and then rejected in favor of a property analysis by not one, but two courts, in Szubski v. Conrad and Gellenbeck v. Whitton.

Long before Lovey, the cat, there was “Five Months Old Fox Terrier” whose human took him to 179<sup>th</sup> Street in Manhattan near the construction of the George Washington Bridge. There, without a lead, the dog ran and played<sup>3</sup>. “Five Months Old Fox Terrier” likely had a name, but due to the way the law viewed pets as property, it may have been of little importance to mention in the 1931 decision of Smith v. Palace Transp. Co. There, in a negligence case seeking damages for loss of property, the court states with simplicity, “A live dog is personal property<sup>4</sup>.” As such, when the little dog was struck and killed by a taxi, the court was forced to calculate his worth in terms of the dog’s “type and traits and pedigree” with the price the owner paid as one factor affecting the value, but not determinative.

What is interesting in Smith, as in many of the subsequent cases that involve pets, is that the court, even in 1931, acknowledged that dogs have value beyond that of personal

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<sup>1</sup> 264 A.D.2d 340; 695 NYS2d 308, 309 (App. Div. First Dept. 1999).

<sup>2</sup> 42 Misc. 3d 447 (N.Y. Sup. Ct. 2013).

<sup>3</sup> Smith v. Palace Transp. Co., 142 Misc. 93, 253 NYS 87 (Municipal Court of New York, Borough of Manhattan, Seventh District October 19, 1931).

<sup>4</sup> Id, at 94.

property: a value that is based on our feelings for them. "... [O]ne's feelings for a dog constitute a sentiment which we are inclined to value<sup>5</sup>..." But, almost with regret, the court in Smith declined to include this sentimental factor in the valuation as "it is not recognized as an element of damage<sup>6</sup>."

### ***A pet occupies a special place***

Almost fifty years later, in a tort action, the New York City Civil Court in Queens rejected the standard set forth in Smith that held a dog is an object of personal property, and somewhat poetically proclaims, "... [A] pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."<sup>7</sup>

Ms. Corso brought a claim against the dog and cat hospital for negligent infliction of emotional distress for substituting the body of her beloved deceased poodle for that of a deceased cat. Ms. Corso had brought her ailing 15-year old poodle to the hospital for treatment. The hospital determined that Ms. Corso's poodle was gravely ill and due to his age the appropriate course of treatment was to put the poodle to sleep. As such, the poodle was euthanized. Ms. Corso had planned a funeral for her beloved companion complete with headstone and fellow mourners. The hospital agreed to transfer the body of the dog to an animal organization in preparation for the funeral. When Ms. Corso opened the casket, likely to say one last goodbye, to her shock she found a dead cat.

The court in Corso overruled the precedent from Smith and held that Ms. Corso had testified to suffering mental distress and anguish at seeing the cat in place of her dog and, as such, she was entitled to "damages beyond the market value of the dog." The court distinguished a dog from a family heirloom- a family heirloom does not have emotions which trigger a human response. "To say [a dog] is a piece of personal property and no more is a repudiation of our humaneness." The court also discussed the reciprocal love the pet has for his human<sup>8</sup>. "A pet is not an inanimate thing that just receives affection; it also returns it."

While there have been many detours from Corso over the years, particularly in these kinds of tort claims for damages due to emotional injuries such as mental shock, anxiety, distress, loss of companionship, etc., New York courts, in the area of pet custody disputes, have lately been embracing the idea that pets are not just mere things. The fact that courts are actually hearing pet custody disputes is evolutionary in and of itself; but courts are analyzing the dispute beyond ownership, property and who paid for what, and are looking for a showing of where the pet is most likely to be loved, love, and prosper.

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<sup>5</sup> Id, at 94.

<sup>6</sup> Id.

<sup>7</sup> Corso v. Crawford Dog & Cat Hospital, Inc., 97 Misc. 2d 530,531; 415 NYS2d 182, 183 (Civil Court Queens County 1979).

<sup>8</sup>Id, at 531. Discussing why Ms. Corso is entitled to damages beyond the market value of her poodle.

***If judicial resources can be devoted to such matters as which party gets to use the Escalade as opposed to the Ferrari... there is certainly room to give real consideration to a case involving a treasured pet*** Travis v. Murray.

While very artfully attempting to balance judicial economy<sup>9</sup> with the emotional relationship between human animal and animal, the court in Travis uses the “best for all concerned” standard when determining whom from the broken relationship should have custody of the pet. Each side must show why he or she will benefit from having custody of the pet, but also show that the pet will have “a better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other.”

*To this end, the parties may need to address questions like: Who bore the major responsibility for meeting Joey’s needs (i.e., feeding, walking, grooming and taking him to the veterinarian) when the parties lived together? Who spent more time with Joey on a regular basis? Why did plaintiff leave Joey with defendant, as defendant alleges, at the time the couple separated? And perhaps most importantly, why has defendant chosen to have Joey live with her mother in Maine, rather than with her, or with plaintiff for that matter, in New York?<sup>10</sup>*

The court made it clear that this standard, as it evolved from Raymond, is not the same as the *best interests of the child* analysis used in child custody cases.

*The subjective factors that are key to a best interests analysis in child custody - particularly those concerning a child’s feelings or perceptions as evidenced by statements, conduct and forensic evaluations - are, for the most part, unascertainable when the subject is an animal rather than a human<sup>11</sup>.*

***“Oh my God, I got her, I got her!”***

In the wake of Travis, came Ramseur v. Askins<sup>12</sup>. “It would have been like losing one of my kids,” Yvette Askins told the New York Daily News when they notified her that she had won custody of Deva<sup>13</sup>. Deva is a Shih Tzu, who was the focus of a custody dispute between Ms. Askins and her nephew, Daniel Ramseur. Ms. Askins considered Deva part of her family, which also included four human children.

Shortly after Mr. Ramseur purchased Deva, in 2012, he left the little dog with his mother. One day in 2012, Mr. Ramseur’s mother asked her sister, Ms. Askins, to give Deva a bath. Ms. Askins obliged and Mr. Ramseur’s mother dropped the dog at her sister’s house. Neither Mr. Ramseur nor his mother attempted to retrieve Deva until 2014, two years later,

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<sup>9</sup>“As has been stated, our judicial system cannot extend to dog owners the same time and resources that parents are entitled to in child custody proceedings.” Travis, supra at 460.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 459.

<sup>12</sup> Ramseur v. Askins, 44 Misc. 3d 1209(A), 2014 N.Y. Misc. LEXIS 3108 (N.Y. Civ. Ct. 2014).

<sup>13</sup> “Harlem woman wins custody of dear dog in family feud”, by Rikki Reyna, Dareh Gregorian, New York Daily News online edition, published July 18, 2014. <http://www.nydailynews.com>, last visited August 6, 2014.

when Mr. Ramseur decided he wanted Deva back so he could breed her and make money off of the sale of her puppies.

Between 2012 and 2014, the formative years in Deva's life (as she was only three months old when Mr. Ramseur bought her), Ms. Askins and her family took care of her. They fed her, sheltered her, groomed her, walked her and loved her. The court noted how Deva and the family bonded with one another. By all appearances, Deva loved them back. When Ms. Askins went on vacation, the decision describes how Deva presented symptoms of separation anxiety, wherein Deva would not eat unless she was hand-fed by Ms. Askins' children. In addition, Deva had important responsibilities in the Askins' home- including alerting Ms. Askins when someone was at the door, as Ms. Askins was deaf in one ear.

The court in Ramseur adopted the standard introduced in Raymond and followed in Travis, and applied the "best for all concerned" standard. Citing the "clear direction" offered by Travis, the Court looked at: 1) who bore the major responsibility for meeting Deva's needs and 2) who spent more time with Deva on a regular basis<sup>14</sup>.

The court found that the Askins family had been caring for Deva for "nearly her entire life". Furthermore, while Mr. Ramseur had initially arranged for Deva's care, Ms. Askins clearly bore the major responsibility for taking care of Deva. In its analysis, the court emphasized the mutual love between Deva and the Askins family noting the family pictures which included Deva. The Court also considered how stressful a move to a new home would be for Deva after living with Ms. Askins for the past two years. The Court referred to the credible testimony that Deva showed signs of separation anxiety while Ms. Askins was away. As such, the court held, "that it is best for all concerned Deva remain in Defendant's "possession." The decision itself included quotation marks around the word possession, again perhaps denoting the court's reluctance to view pets merely as property.

Then Szubski<sup>15</sup> and Gellenbeck<sup>16</sup> were decided. Gellenbeck involved a custody dispute between domestic partners, Roger Gellenbeck and Michael Whitton over Stevie, a female Basenji mix. In the decision, in a giant leap from Travis, the court states it must first find that animals have rights before the court can determine whether it is obligated to take into account what is best for them. The court curiously found that "animals do not have rights."

For authority, Gellenbeck refers to Matter of Nonhuman Rights Project Inc. v Stanley<sup>17</sup>. The Nonhuman Rights Project attempted to relocate Hercules and Leo, two chimpanzees held at Stony Brook for research purposes, to a chimpanzee refuge, by using the common-law writ of habeas corpus. The court was charged with determining whether Hercules and Leo were considered "legal persons" under the law and if so, whether they were being illegally detained at Stony Brook. Nonhuman Rights did not hold that "non-humans do not [have rights]", as posited by Gellenbeck. In fact, Judge Jaffe, notes that "chimpanzees and other

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<sup>14</sup> Ramseur, *supra*.

<sup>15</sup> Szubski v. Conrad, 151930/15 2015 WL 1278153 (NY Sup) (Trial Order) March 13, 2015.

<sup>16</sup> Gellenbeck v. Whitton, 154365/2014, 2015 WL 6607458 (N.Y.Sup.) (Trial Order decided October 26, 2015).

<sup>17</sup> 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015).

highly intelligent mammals,” although considered property under the law, have the right to “be free from physical abuse and other mistreatment (see eg Agriculture and Markets Law Article 26, §§ 353, 353-a, 362), and the right to humane living conditions (id. §§ 353-b, 353-d, 356).” Judge Jaffe goes further, citing Travis, Raymond, Corso, and others, noting that New York courts have acknowledged that pets and companion animals are “... more than property, if not quite as persons, in part because legislatures and courts recognize the close relationships that exist between people and their pets, who are often viewed and treated by their owners as family members”.

The Plaintiff in Gellenbeck moved to renew on the ground that there had been a change in the law based on a July decision by Justice Wright in the case, Szubski v. Conrad. The July Szubski decision rejected the “best interests of the pet” and the “best interest of all” (sic) standards, stating they are not, “a valid line[s] of inquiry,” in the analysis of who should have custody of the couple’s dog, Cash. However, a previous decision by Justice Wright from March concerning the same custody issue between Szubski and Conrad, quotes Raymond v. Lachmann and analyzes custody using the “best for all concerned” standard even though it does not expressly state that is the standard being used. The July Szubski decision referenced in Gellenbeck is unreported and the docket is sealed, possibly because of allegations of intimate partner violence.<sup>18</sup>

Tellingly, laws concerning animal rights were created to protect their lives, health, and welfare. Similar laws are not available in New York protecting the rights of other forms of “property.” When there is a clear intention by the legislature to offer protections to animals through the enactment of animal cruelty statutes<sup>19</sup>, laws that allow for pet trusts,<sup>20</sup> education laws that require schools to provide instruction on the humane treatment of animals and the use of non-animal dissection alternatives in schools<sup>21</sup>, isn’t there also an implicit acknowledgment that animals do, in fact, *occup[y] a special place somewhere in between a person and a piece of personal property*<sup>22</sup>? And if they do, is a strict property analysis still appropriate?

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<sup>18</sup>“Chelsea Conrad wins custody of pooch after battle with ex”, by Julia Marsh. New York Post online edition, published July 15, 2015. <http://nypost.com/2015/07/15/chelsea-conrad-wins-custody-of-pooch-after-battle-with-ex/> last visited, December 3, 2015.

<sup>19</sup> NY CLS Agr & M § 353, *et seq.*

<sup>20</sup> NY CLS EPTL § 7-8.1.

<sup>21</sup> NY CLS Educ § 809.

<sup>22</sup> Corso, *supra*.



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