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**NYSBA Committee on Animals and the Law  
2019 Annual Meeting in NYC**

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<b>Inside this issue:</b>	
Live Fast, Die Young: Drugs, Overbreeding, and Slaughter in the Horseracing Industry by Nima D. Shull	<b>2</b>
The Hallelujah Horses Find A Home by Jim D. Sarlis	<b>28</b>
The Failure of Breed-Specific Legislation and How To Fix It by Robert Denzer	<b>33</b>

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Live Fast, Die Young:  
Drugs, Overbreeding, and Slaughter in the Horseracing Industry

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## **I. Introduction & History:**

Horseracing is an equestrian performance sport ancient in its history and pervasive in its practice across various human civilizations.<sup>1</sup> While the mechanics of the sport have varied over time, its basic premise – identifying the fastest among two or more horses over a defined distance or course – has remained largely unchanged.<sup>2</sup> Modern horseracing traces much of its origin back to 12<sup>th</sup> century England, where knights returning from the Crusades brought back Arabian horses from the Middle East.<sup>3</sup> The English crossed these exotic horses with native ones to produce horses with impressive speed and endurance and the sport of racing quickly gained popularity with the nobility who would wager on races held between the fastest of these hybrids.<sup>4</sup> During the 18<sup>th</sup> century, horseracing developed into a professional English sport.<sup>5</sup> Racecourses arose throughout the country, where spectators gathered to watch multi-horse match races that offered increasingly greater purses to lure the best horses for racing.<sup>6</sup> The result was a profitable horse breeding and racing market. Increasing popularity led to the establishment of a central governing body for the sport in 1750, the Jockey Club, which continues to regulate English horseracing today.<sup>7</sup> An important task of this organization was the regulation of horse breeding and the careful tracing of English racehorses' pedigrees. The Weatherby family was tasked with this assignment, and from 1793 until today, members of the family have recorded the pedigree of each descendent of the original race horses in successive volumes of a General Stud

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<sup>1</sup>See 11 Encyclopedia Britannica. 714-15. (1967)

<sup>2</sup>See Melvin Bradley, *Horses: A Practical and Scientific Approach*. 36. (1981)

<sup>3</sup>See Encyclopedia Britannica. 714-15. (1967)

<sup>4</sup>See *Horse Sense and the UCC: The Purchase of Racehorses* (1991)

<sup>5</sup>See Encyclopedia Britannica. 714-15. (1967)

<sup>6</sup>Id.

<sup>7</sup>Id.

Book.<sup>8</sup> By the early 19<sup>th</sup> century, only racehorses descended from those listed in the General Stud Book were permitted to race.<sup>9</sup> These horses came to be known as “Thoroughbreds” and to this day each thoroughbred can be traced back to one of three stallions – known as the “foundation sires” – born between 1679 and 1724.<sup>10</sup> British settlers introduced horseracing to New York in 1665, though the sport did not achieve substantial organization and popularity until after the Civil War in 1868, with the establishment of the American Stud Book, followed shortly by the formation of the American Jockey Club in 1894, which modeled American horseracing after the English sport.<sup>11</sup> The sport became immensely popular and by 1890, there were 314 racetracks across the United States.<sup>12</sup> Throughout U.S. history, horseracing has experienced fluctuations in popularity.<sup>13</sup> During the early 20<sup>th</sup> century, the sport experienced a significant decline due to anti-gambling sentiment, and by 1908, there were only twenty-five racetracks still in operation.<sup>14</sup> That same year, the Kentucky Derby introduced pari-mutual betting<sup>15</sup> which led to a resurgence for the sport, as several state legislatures legalized pari-mutual betting in exchange for receiving a portion of the wagered funds.<sup>16</sup> A central tenet of modern horseracing pertains to the gambling aspect associated with the sport, a lucrative enterprise which in 2008 generated a global market valued at approximately U.S. \$115 billion.<sup>17</sup> In 1933, California voters

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> See Melvin Bradley, *Horses: A Practical and Scientific Approach*. 40, 42-43. (1981)

<sup>12</sup> See *Encyclopedia Britannica*. 714-15. (1967)

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Pari-mutual betting is a betting system where every bet of a certain type is placed together in a pool where taxes and venue/facility dues are first removed, and then payoff odds are calculated by sharing the remaining amount in the pool between all winning bets. This system of betting helped saved the sport of American horseracing during the early twentieth century since it provided a source of revenue to states in which horseracing took place. See Steven A. Reiss, *City Games: The Evolution of American Urban Society and the Rise of Sports*. 188. (1991)

<sup>16</sup> Id.

<sup>17</sup> See [Horseracingintfed.com](http://Horseracingintfed.com), "Global betting stable, but some countries suffer recession". (2009)

approved Proposition 5, legalizing pari-mutuel wagering on horseracing.<sup>18</sup> Since that time, horseracing has been and continues to be a popular performance sport in the state. California horseracing laws can be found under the California Business and Professional Code. Various Code provisions pertaining to horseracing entail laws regarding administration and enforcement of the horseracing laws, labor laws, racing licensing requirements, racing timeframes, rules concerning revenue, wagering, commissions, purses, and other financial topics, as well as penalties imposed for violating these provisions.<sup>19</sup> Apart from §§ 19580-19583, which deal with equine medication, the California Code does not contain provisions that address or concern the welfare of the horses themselves.<sup>20</sup> This lack of statutory attention to the horses involved is mirrored in the case law relating to horseracing of California, to that of other states, and to federal law. There is essentially no reported case law concerning animal welfare or cruelty in horseracing.<sup>21</sup> Instead, legal controversies regarding this industry usually pertain to gambling fraud and performance-related cheating achieved using steroids and other performance-enhancing drugs.<sup>22</sup> Courts have also had to resolve business disputes among racehorse owners, trainers, breeders, and racing facilities, which rarely involve the welfare and treatment of the animals.<sup>23</sup> This lack of legal attention to animal welfare is unfortunate, as the sport of horseracing raises many potential welfare concerns. Problems inherent in the sport include injury, neglect and abuse, policing prohibited practices, overbreeding and eventual slaughter of many horses involved in the industry, use of performance-enhancing drugs in racehorses, and the general lack of uniformity in the laws and provisions intended to regulate the industry.

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<sup>18</sup>See California Racing History, [http://www.calracing.com/wp-content/uploads/2011/12/CMC\\_California-Racing-History.pdf](http://www.calracing.com/wp-content/uploads/2011/12/CMC_California-Racing-History.pdf) (2010)

<sup>19</sup>See generally, Cal. Bus. & Prof. Code §§ 19400-19668

<sup>20</sup> Id.

<sup>21</sup>See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 124. (2014)

<sup>22</sup> Id.

<sup>23</sup> Id.

Understanding these complex and often-interrelated issues and proposing adequate reform in turn requires a thorough understanding of the legal treatment of horses in California and in the United States. Major areas of the law that pertain to these animals include the property schemes used to classify horses and the different legal protections afforded to horses under these classifications, criminal and tort liability associated with horses and particularly the slaughter of horses, and commercial use of horses, particularly racehorses. In each of these major legal subjects, various subtopics can be identified that illustrate the impact the law has on horses, and highlight possibilities for reform. Understanding parallel issues in current property law, tort and criminal liability, and commercial use law associated with horses will assist in identifying potential reform in each of these areas of the law which in turn will support a comprehensive proposal of reform concerning the welfare of racehorses in California and the United States.

## **II. Legal Property Schemes Used to Classify Horses:**

As with other animals, the law has defined horses as personal property under a variety of different classification schemes based on use of the animal, location, history, relation to other animals and their respective classification schemes, and other considerations.<sup>24</sup> Classifications include companion animals, livestock or agricultural animals, and feral or wild animals.<sup>25</sup> These classification schemes carry with them different implications and protections.<sup>26</sup> As with other animals, horses are generally afforded the most individual protection when classified as companion animals.<sup>27</sup> Such a classification likens horses to dogs, cats, and other pets, thereby extending legal protections to horses typically associated with household pets.<sup>28</sup> In California and in the United States, companion animals are usually afforded greater legal protection than

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<sup>24</sup>See Gary L. Francione, *Animals as Property*. (1996)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup>See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 92. (2014)

<sup>28</sup>See Cal. Bus. & Prof. Code § 4825.1(d)

livestock or other animals.<sup>29</sup> One would therefore expect that a property classification as companion animals would afford domestic horses increased protection from many of the harms for which racing puts them at risk, including eventual slaughter. This solution has, however, not proved as effective as might be expected. In California, horses are expressly classified as companion animals under the California Business and Professions Code § 4825.1(d)<sup>30</sup> which likens horses to dogs, cats, pet birds, and other companion animals.<sup>31</sup> This is in accordance with the laws of some other states such as Illinois and in contrast to the laws of others, such as Virginia, which specifically excludes horses from its statutory definition of companion animals, instead classifying them as livestock or agricultural animals.<sup>32</sup> Under § 4825.1 of the California statute, horses are not included under the statute as food animals, which are defined as “any animal that is raised for the production of an edible product intended for consumption by humans” including but not limited to cattle, pigs, sheep, poultry, fish, and amphibians.<sup>33</sup> The definitions under this section are somewhat misleading, however, and may not be mutually exclusive as § 4825.1(d) also defines “livestock” to include “all animals, poultry, aquatic and amphibian species that are raised, kept, or used for profit.”<sup>34</sup> Therefore, based on a textualist interpretation, the statute implies that horses kept as commodities for profit-seeking purposes, such as racehorses, and not strictly as companion animals, may be legally classified as livestock or agricultural animals, thereby reducing their protection. Furthermore, not all of California’s statutory definitions treat horses as companion animals. For example, §§ 14205 and 18663 of the California Food and Agricultural Code include horses in their definitions of “livestock.”<sup>35</sup> These

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<sup>29</sup>See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 92. (2014)

<sup>30</sup> Cal. Bus. & Prof. Code § 4825.1(d)

<sup>31</sup> *Id.*

<sup>32</sup>See 510 Ill. Comp. Stat. Ann. 70/2.01a (2013); see also VA. Code Ann. §3.2-6500 (2013)

<sup>33</sup> Cal. Bus. & Prof. Code § 4825.1(c)

<sup>34</sup> Cal. Bus. & Prof. Code § 4825.1(d)

<sup>35</sup> Cal. Food & Agric. Code §§ 14205, 18663

statutory definitions regarding the property classification of horses and their interpretation are important because they effect horses' legal protection. Legally and culturally, people in the United States do not eat nor condone the slaughter of animals considered to be companion animals.<sup>36</sup> Traditionally in the United States, including under federal law, horses have been classified as livestock rather than companion animals.<sup>37</sup> This definition is not without its economic ramifications. The horse industry in the United States is a major business enterprise, conferring a \$14.3 billion contribution to the U.S. economy, generating over 1.4 million full-time occupations, and generating approximately \$1.9 billion in tax revenue.<sup>38</sup> While changing this pervasive property classification of horses from a livestock designation to a companion animal designation may seem to afford horses greater protection, there are several benefits associated with the livestock designation used to classify horses under federal law and some California statutes. First, unlike other animals ubiquitously considered to be pets, such as dogs and cats, horses are particularly expensive to maintain and the space required to keep them is subject to the legal property concepts of zoning and other ordinances.<sup>39</sup> A single horse may cost up to \$50,000 year to maintain.<sup>40</sup> To that end, the federal government and the Internal Revenue Service (IRS) provide horse owners, trainers, breeders, and those who manage stables various tax exemptions and other tax advantages to help offset the cost associated with keeping horses.<sup>41</sup> These tax advantages are connected to the agricultural endeavor of the owner and therefore dependent on the horses' status as livestock animals, rather than companion animals, as these provisions, while applicable to other livestock such as cattle, do not apply to companion animals

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<sup>36</sup>See Tom R. Lenz, *The Unwanted Horse: An Overview of Acceptable Euthanasia Procedures, Carcass Disposal Options, and Equine Legislation.* (2004)

<sup>37</sup>See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials.* 19. (2014)

<sup>38</sup> *Id.*

<sup>39</sup>See Jessie M. Peck, *Horses: Livestock or Companion Animals?* (2007)

<sup>40</sup> *Id.*

<sup>41</sup>See 26 U.S. Code § 168(e)(3) – Accelerated cost recovery system



like dogs, cats, and other household pets.<sup>42</sup> Furthermore, the federal government funds a large research effort for the treatment of equine diseases and healthcare, in contrast to analogous efforts for companion animals, which are largely private-funded ventures.<sup>43</sup> In addition, specific laws pertaining to husbandry and to humane treatment were drafted with the horse's designation as a livestock animal in mind as were corresponding laws geared towards specific companion animals.<sup>44</sup> A sudden change in the property scheme under which horses are currently classified might have the undesired effect of stripping horses of legal protections specifically designed for the livestock scheme, but which are absent or lacking in specificity or applicability under comparable companion animal statutes. Additionally, many states, including California have relatively complicated laws regarding the living conditions required for companion animals and if horses were to suddenly come under these laws, those who keep horses would likely face great difficulty in complying with these laws.<sup>45</sup> The underlying issue is that these various laws were carefully drafted in order to protect particular species and so horse owners faced with sudden changes in the applicable statutory scheme might find it overly-arduous to comply, and laws would need to be rewritten or replaced with novel legislation in order to accommodate horse-keeping under a new statutory property scheme. Though this could theoretically be done, it would necessitate a great deal of time and expense and might also have the unfortunate ramification of horse owners surrendering or otherwise disposing of their horses, a problem already quite apparent in the United States.<sup>46</sup> Anti-cruelty laws specific to household pets would also need to be amended considering this shift in the legal property classification scheme.<sup>47</sup>

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<sup>42</sup>See Jessie M. Peck, *Horses: Livestock or Companion Animals?* (2007)

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup>See e.g., County of San Diego, Planning & Development Zoning Ordinance Summary, Zoning Division <http://www.sandiegocounty.gov/pds/zoning/formfields/PDS-444.pdf>

<sup>46</sup>See Jessie M. Peck, *Horses: Livestock or Companion Animals?* (2007)

<sup>47</sup> Id.

Also of concern are laws addressing liability associated with horses, as many states recognize limited liability laws designed to protect owners of livestock from legal liability incurred from individuals injured by their horses, as these animals are large and potentially dangerous.<sup>48</sup> This sort of limited liability does not extend to companion animals such as dogs, whose owners may be subject to strict liability when their pets inflict harm upon others. California is one of many states that recognize strict liability associated with dog bites.<sup>49</sup> One court asked to consider the subject and the distinction between liability associated with horses as opposed to companion animals such as dogs declined to extend strict liability to horse owners and keepers.<sup>50</sup> The court stated that unlike dogs, horses lack the predatory nature that would endanger people or other animals.<sup>51</sup> In addition, the court noted that unlike dogs, which may be free to roam around, horses are generally confined to enclosed areas.<sup>52</sup> Many states have also sought to encourage “equine activities” by enacting statutes that limit the liability of horse owners and facilities for injuries resulting from risks considered to be inherent in equine sports and related activities.<sup>53</sup> California does not currently possess any equine limited liability statutes.<sup>54</sup> Nevertheless, equine limited liability statutes in several other states shield horse owners from a great deal of potential liability associated with their horses and a sudden property scheme shift designating horses as companion animals could cause many horse owners, fearful of their increased risk of liability, to dispose of their horses. While at first glance, uniformly classifying horses as companion animals rather than livestock seems to be a beneficial pathway of reform, it does not recognize the complexity of the current legal framework which affords

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<sup>48</sup> Id.

<sup>49</sup> Cal. Civil Code § 3342

<sup>50</sup> See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 281. (2014)

<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id. at 282

<sup>54</sup> See American Equestrian Alliance, *Equine Liability Statutes by State*. (2016)

horses and their owners legal protections not sufficiently supplied by current companion animal laws. Reform in the horseracing industry need not require an entire uprooting of the current legal property schemes utilized to classify horses. Instead, the current legal property scheme may be used to assist in the wide-ranging reform needed in the horseracing industry. This solution requires a comprehensive treatment of the interrelated problems inherent in this industry. The livestock property designation can be used to solve some of the more pressing concerns, including the slaughter of horses and the rampant administration of various performance-related drugs.

### **III. Horse Slaughter & Associated Liability:**

Under § 598c of the California Penal Code, “it is unlawful for any person to possess, [...] import [...] or export from the state, [...] sell, buy, give away, hold, or accept any horse with the intent of killing, or having another kill, that horse, if that person knows or should have known that any part of that horse will be used for human consumption.”<sup>55</sup> Violation of this statute is a felony punishable by imprisonment for a period of up to three years.<sup>56</sup> The statute does not prohibit slaughtering of horses for other purposes, such as manufacturing of goods made from horse products, including glue, leather, and pet food.<sup>57</sup> In 2005, the federal meat inspection laws were amended to the benefit of horses, when a prohibition on use of federal funds to conduct inspections of slaughterhouses for horse meat was passed.<sup>58</sup> As meat inspection was nevertheless required by federal law<sup>59</sup>, this made the horse-slaughterhouse business and auction model impracticable, until in 2006, when the USDA issued a regulation allowing slaughterhouses to

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<sup>55</sup> Cal. Penal Code § 598c(a)

<sup>56</sup> Cal. Penal Code § 598c(c)

<sup>57</sup> *Id.*

<sup>58</sup> See Leslie Potter, A Timeline of Horse Slaughter in the United States. (2012)

<sup>59</sup> *Id.*

pay for their own inspectors.<sup>60</sup> This loophole led to several new horse-slaughterhouses and the auction market for horses to be slaughtered grew due to the combination of lax regulations, the need of the racehorse industry and others to dispose of surplus horses, and a thriving overseas market for horse meat.<sup>61</sup> A blanket prohibition on horse slaughter for human consumption and prohibition of federal inspection was passed by Congress and signed into law by President Obama in 2014.<sup>62</sup> While this law represents a triumphant step in the fight against horse slaughter, it is not without its limitations. The ban (unlike the comparable California statute) does not prevent the shipment of horses from the U.S. to other countries for slaughter.<sup>63</sup> A measure to address this, the Safeguard American Food Exports (SAFE) Act was introduced to the Senate in 2013.<sup>64</sup> This bill rests on the notion that horses, particularly racehorses, are not raised for slaughter and are regularly given 379 different drugs and other medications prohibited for use in livestock used for meat due to known risks these substances pose to human health.<sup>65</sup> Since that time, this bill has been referred to committee and no further action has been taken on it since the spring of 2013.<sup>66</sup> The successful implementation of the SAFE Act, in conjunction with prohibition of federal inspection for horse meat contained in the 2014 federal budget would go a long way to garnering substantial legal protection for horses against slaughter for human consumption by labeling the slaughter of horses as a felony and effectively banning both the slaughter of horses within and outside of the United States. Though the SAFE Act is largely aimed at protecting people from consuming unhealthy horse meat and does not prevent horse slaughter for other purposes, these efforts would still provide nationwide protection against a

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<sup>60</sup>See 9 CFR 352.19 – Ante-mortem inspection and applicable requirements. (2006)

<sup>61</sup>See Horse Channel, Horse Slaughter Ban Reinstated Under New Federal Budget. (2014)

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup>See Animal Welfare Institute, Safeguard American Food Exports (SAFE) Act. (2016)

<sup>65</sup> Id.

<sup>66</sup> Id.

great deal of horse slaughter and would greatly contribute to comprehensive legal reform of the horseracing industry.

#### **IV. Commercial Use of Horses & Horseracing:**

Horseracing and exhibition represent a big industry and enjoy nationwide public acceptance coupled with an equally wide lack of awareness of the various practices involved in the sport, including some that entail mistreatment of horses.<sup>67</sup> One such widespread horseracing practice that captured the attention of animal rights activists and subsequently, the general public, is “soring.”<sup>68</sup> Soring involves intentionally inflicting pain and discomfort on a horse’s hooves and legs through the use of a sharp blade to cut the horse and smearing corrosive and burning chemicals to the legs and hooves.<sup>69</sup> The result is that the horse is forced to perform an artificial and exaggerated gait while running, thereby lengthening its stride.<sup>70</sup> Soring results in extraordinary pain for the horse, especially when it places its weight on the treated hoof.<sup>71</sup> Prior to prohibition, this practice was enlisted because those involved in the horseracing and other horse performance industries viewed the exaggerated gait as a signal of exceptional competitive performance.<sup>72</sup> In 1970, this practice was banned under the Horse Protection Act (“HPA”), PL 91-540, 15 U.S.C. §§ 1821-1831, which prohibits the auction, sale, showing, exhibition, or transport of sored horses.<sup>73</sup> While initially a step in the right direction, this law was amended in 1976 in order to permit horse industry organizations to train and subsequently license their own inspectors, or “Designated Qualified Persons,” to examine horses for signs of soring.<sup>74</sup> This creation of a strong and evident conflict of interest has been widely criticized by animal welfare

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<sup>67</sup> See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 125. (2014)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

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

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

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

groups, policy makers, and others since the inspectors are entirely dependent on the organizations for their very occupations.<sup>75</sup> Animal activists became frustrated with this approach as well as with the subsequent lack of official intervention against individuals and organizations who partook in soring their horses and resolved to gather evidence against these individuals themselves.<sup>76</sup> The activists have achieved some success, and in 2013, a Tennessee horse trainer pled guilty to twenty-two counts of animal cruelty stemming from his practice of soring his horses, and was subsequently sentenced to a year of house arrest, fined \$25,000, and barred from training or owning horses for a period of twenty years.<sup>77</sup> Aside from soring, many ongoing horseracing industry practices and indirect impacts generate criticism from animal activists but are relatively unknown to the general public. Three primary issues of concern related to horseracing are the risk of injury and death of racehorses, administration of both permitted and banned performance-enhancing substances, and the standard practice of diminishing the useful life of racehorses through overbreeding, racing immature horses, prompt retirement, and the incidental slaughter of industry horses. Overlaying these central problems and burdening attempts at reform are a general lack of sufficient standards and regulation, the absence of nationwide uniform policies, and a gross deficiency in industry transparency since regulatory control of the horseracing industry is largely internalized within the industry itself and not vested in an independent authority. These problems are deeply interrelated and apart from the use of performance-enhancing substances, both California and U.S. federal statutory and case law are virtually silent in regard to these problems.

Horseracing is an inherently dangerous sport for both horse and jockey. Between 1950 and 1987, over 100 jockeys were killed while racing. Horses also face a significant amount of

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<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id.

danger from racing, with a reported 600 racehorse fatalities in 2006 in the United States.<sup>78</sup> The U.S. Jockey Club stated that between one and two horses die out of every 1,000 starts, a higher percentage than is reported by Jockey Clubs in other nations, such as the Hong Kong Jockey Club, which estimated an average figure of 0.58 horse fatalities per 1,000 starts. It is speculated that the use of various performance-enhancing drugs in horse races in the U.S. that are prohibited in other nations are to blame for the higher racehorse death rate in the U.S..<sup>79</sup> The practice of drugging, or doping, racehorses with performance-enhancing drugs may be almost as ancient as the sport itself though currently, it is primarily an issue associated with American horseracing, as horseracing drug violations in other countries are much less common.<sup>80</sup> In fact, many of the drugs and other substances administered in an almost routine fashion to racehorses in the U.S., both legal and illegal, are strictly prohibited in the United Kingdom, most of Europe, Japan, and most of the other major horseracing jurisdictions around the globe.<sup>81</sup> Certain drugs provide racehorses with a competitive advantage but are often addictive and riddled with adverse side effects.<sup>82</sup> The modern practice of doping racehorses began in the United States during the 1800's, with the introduction of purified drugs such as cocaine and morphine. Initially, the legal and uncontrolled availability of these drugs allowed many people to dope their horses with these substances in order to garner a competitive advantage.<sup>83</sup> Cocaine and morphine were often use in conjunction, resulting in increased speed and endurance, elevated alertness, and acute pain relief.<sup>84</sup> While cocaine and morphine were later banned, their use persisted for some time and even after these drugs were replaced with alternative substances, the combination of increased

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<sup>78</sup>See Willem Marx, "Danger Out of the Gate What's Behind the High Rate of Deaths Among U.S. Racehorses?". [Abcnews.go.com](http://abcnews.go.com). (2007)

<sup>79</sup> Id.

<sup>80</sup>See A.J. Higgins, From ancient Greece to modern Athens: 3000 years of doping in competition horses. 29. (2006)

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id. at 30

<sup>84</sup> Id.

speed and endurance, alertness, and the masking of acute pain served as a template for the desired effect of performance-enhancing drugs and remains the driving motivator behind the practice.<sup>85</sup> Drug testing began in the early 1900's but was haphazard due to the lack of definitive established drug assessment methods. Enforcement was based not on systematic testing, but on an "honor" system in which rules mandating racing without the advantage of performance-enhancing drugs were adopted and trainers and owners simply agreed to comply.<sup>86</sup> By the 1930's, the general public was largely aware of the extensive drug use in the horseracing industry.<sup>87</sup> In response, the Federal Bureau of Narcotics investigated the allegations and subsequently convicted over 100 owners, trainers, and other people involved in the drug trade within the horseracing industry.<sup>88</sup> These actions prompted those involved in the horseracing industry to adopt more rigid practices in order to improve the image, integrity, and continued survival of horseracing.<sup>89</sup> To those ends, the National Association of State Racing Commissioners was created with the goal of implementing uniform drug-testing policies and regulation for the sport.<sup>90</sup> Unfortunately, increasingly sophisticated techniques for drug-testing and control were met with increasingly cunning methods of introducing drugs that were difficult to detect and gave horses who received them a competitive advantage.<sup>91</sup> By the end of the 1940's, narcotics had been replaced with amphetamine-class drugs, anesthetics, anti-inflammatory drugs, and anabolic steroids.<sup>92</sup> Additionally, during the 1960's and 1970's, a policy of permissive medication, marketed as therapeutic treatment for racehorses but banned in other

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<sup>85</sup> Id. at 29

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. at 31

<sup>89</sup> Id.

<sup>90</sup> Id.

<sup>91</sup> Id.

<sup>92</sup> Id. at 30



horseracing jurisdictions, was adopted in the U.S..<sup>93</sup> Industry drug-testing methods reached their peak in the late 1980's with the advent and use of technologies such as thin-layer chromatography (currently the least effective and least expensive testing method), ELISA (Enzyme Linked Immuno Sorbent Assay) – a variation of technology used in the home-pregnancy test – and Mass Spectrometry (the most expensive and the most sensitive and effective testing method).<sup>94</sup> These technologies were able to detect even trace amounts of various drugs within a horse's system.<sup>95</sup> The extreme sensitivity of these methods has led to a divergence on their implementation and practice in different states, with some jurisdictions, including California, opting instead for “threshold levels” for different drug and medication classes.<sup>96</sup> Determinations for these thresholds may be arbitrary and they condone the continued use of various drugs, albeit in limited quantities below the threshold, within the horseracing industry.<sup>97</sup> In addition, while many of these drugs are classified as “therapeutic” medications, many racehorses receive these drugs whether or not they are suffering from any particular ailments.<sup>98</sup> This chronic use creates drug tolerance and dependence (as in humans) which in turn may lead to protracted and enervating issues, including the eventual breakdown of the affected horse.<sup>99</sup> Officially, opiates and amphetamines are not accepted for therapeutic use in the horseracing industry, though corticosteroids, relaxants, NSAIDS, and other drugs are allowed for this purpose.<sup>100</sup> Industry organizations and officials remain undecided on the permissibility of the use of bronchodilators, anabolic steroids, high-level diuretics, and sedatives though many of these

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<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id. at 29

<sup>97</sup> Id.

<sup>98</sup> Id.

<sup>99</sup> Id.

<sup>100</sup> Id.

substances are indeed administered to racehorses.<sup>101</sup> To make matters worse, regulation of these drugs and their use on racehorses is relatively lax in the United States, and only major drug positives obtained from testing tend to result in punishment, which is usually inconsequential.<sup>102</sup> Regulation is also quite variable by state and is largely industry-controlled.<sup>103</sup> The lack of regulation and oversight by federal agencies such as the FDA and/or USDA coupled with the high number of industry horses which end up being slaughtered for human consumption is particularly troubling given that there are 379 different drugs administered to racehorses that are specifically deemed as unsafe for use in food animals by the FDA.<sup>104</sup> The horseracing industry needs a nationwide uniform policy of drug regulation, testing, and control governed by an independent horseracing regulatory authority. This reform has been proposed in the Thoroughbred Horseracing Integrity Act of 2015, a bill recently introduced into Congress.<sup>105</sup> While certainly a step in the right direction, the latest action on the bill occurred on July 17, 2015, when it was referred to the Subcommittee on Commerce, Manufacturing, and Trade for further deliberation.<sup>106</sup> The Act, if passed, would hopefully lead to improvements regarding the regulation of drug-use in the horseracing industry, though it does not address other problems, most notably, the industry practices of diminishing the useful life of a racehorse through overbreeding, racing of immature horses, premature retirement, and incidental slaughter. These practices create a high turnover rate within the horseracing industry focused on profit-maximization rather than animal welfare.<sup>107</sup> Contrary to popular belief, most of the money associated with the horseracing industry is obtained through breeding and auctioning of

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<sup>101</sup> Id. at 30

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> See Animal Welfare Institute, Safeguard American Food Exports (SAFE) Act. (2016)

<sup>105</sup> See 114th Congress, H.R.3084 - Thoroughbred Horseracing Integrity Act of 2015. (2015-2016)

<sup>106</sup> Id.

<sup>107</sup> See Deb Bennet, Ph.D., Timing and Rate of Skeletal Maturation in Horses, with Comments on Starting Young Horses and the State of the Industry. (2008)

racehorses, rather than gambling.<sup>108</sup> Racehorses begin their careers early, usually when they are only two-years-old, despite the fact that domestic horses do not obtain their full adult size until they reach an age of four to six years.<sup>109</sup> By that time, the very best horses are facing the end of their racing career while the vast majority of racehorses have already been retired.<sup>110</sup> The value of a racehorse is primarily established in the first three years of its life.<sup>111</sup> The threat to animal welfare is readily apparent in a practice that only places value on the first three to six years of the life of an animal that can live over thirty years and costs as much as \$50,000 a year to maintain.<sup>112</sup> Breeding incentives from racehorse breeding associations and sizable tax advantages and write-offs from the IRS further promote overbreeding inconsistent with demand in the racehorse industry.<sup>113</sup> Two-year-old horses are raced in order to prepare for the widely-celebrated and anticipated three-year-old stakes races, and afterward, most racehorses are retired to breeding or sold at auction.<sup>114</sup> It is well established that a racehorse reaches its peak earning potential at three years of age, and on average, provides diminishing returns between the ages of four and beyond.<sup>115</sup> Racing at the age of two years allows owners a cost-effective strategy compared to withholding horses until their third year.<sup>116</sup> Advocates of this practice claim that intensive training is required to prepare young horses for the vigorous physical challenges of their racing careers.<sup>117</sup> While proper development and strength-training of young horses is crucial to providing reliability and structural support during intensive training and racing, routine

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<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Id.

<sup>113</sup> See 26 U.S. Code § 168(e)(3) – Accelerated cost recovery system

<sup>114</sup> See Deb Bennet, Ph.D., *Timing and Rate of Skeletal Maturation in Horses, with Comments on Starting Young Horses and the State of the Industry.* (2008)

<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

and rigorous training for racing at age two begins when the horse is only fifteen to eighteen months of age, resulting in an extreme level of stress on their still-developing skeletal and muscular systems.<sup>118</sup> The result of this overloading and excessive training is an increased level of risk of injury. As many as 85% of two-year-old racehorses experience injury or disease as a result of their intense training and racing schedules.<sup>119</sup> Injuries range from relatively minor though chronic ailments such as stress fractures (which in turn are treated with various “therapeutic” drugs) to serious injury and death, as has been observed in several high-profile incidents, including the breakdown of the racehorse Barbaro in 2006 and the nationally-televised euthanizing of the injured female racehorse, Eight Bells, in 2008.<sup>120</sup> As tragic as these events are, they only represent a minuscule picture of the grim outcome of several thousand racehorses that are euthanized or slaughtered without garnering nearly as much public attention.<sup>121</sup>

Coupled with racing of immature horses, irresponsible breeding tactics such as overbreeding are partially to blame for the system that treats these animals as disposable commodities.<sup>122</sup> Racehorses are “mass-produced” on a scale that resembles factory-farming of domestic livestock intended for slaughter and this too is the fate of many racehorses due to the stiff competition and overabundance of horses in the industry.<sup>123</sup> The majority of these slaughtered horses are young and healthy animals, perhaps with only minor injuries.<sup>124</sup> While the overabundance of racehorses provides the supply for slaughter, it is the voracious demand for horse meat in various European and Asian nations, in addition to the market for horse products such as leather and glue in other countries as well as the U.S. that provides the demand for

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<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> See Laura A. Mullane, *Beasts of Burden: What Happens to Thoroughbred Racehorses After Retirement*. (2010)

<sup>123</sup> Id.

<sup>124</sup> Id.

slaughter.<sup>125</sup> This process has persisted over the decades despite the taboo associated with the consumption of horse meat in several countries, especially those that represent major horseracing jurisdictions, including the United States.<sup>126</sup> There are over 100,000 thoroughbred racehorses bred each year around the world, almost 32,000 of whom (almost 30%) are born in the United States.<sup>127</sup> On average, only 30% of these horses will go on to race and less than 1% of these animals will go on to have very successful racing careers.<sup>128</sup> The remainder of the horses often represent unwanted expenses in the eyes of their owners and are subsequently sold at auction.<sup>129</sup> Many of these sales are made to kill-buyers or even directly to slaughterhouses.<sup>130</sup> The same is true for many racehorses that are retired or that become injured as a result of their training or racing.<sup>131</sup> This practice of overbreeding and subsequent disposal of unneeded horses also impacts horses not directly involved in racing. Broodmares, female horses used to raise young racehorses, must first be impregnated and give birth in order to lactate.<sup>132</sup> Once the broodmare has given birth, her original foal is exchanged for the racehorse foal (so that its own racehorse mother may resume training or further breeding) and the original unwanted foal is sold, often to slaughterhouses.<sup>133</sup> The thoroughbred industry produces as many as 50,000 of these unwanted foals each year.<sup>134</sup> Slaughter of racehorses also presents potential risks to those who consume them as their flesh often contains high levels of various drugs used for “therapeutic” purposes

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<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> See The Jockey Club, 2016 Fact Book. (2016)

<sup>128</sup> Id.

<sup>129</sup> See Laura A. Mullane, *Beasts of Burden: What Happens to Thoroughbred Racehorses After Retirement*. (2010)

<sup>130</sup> Id.

<sup>131</sup> Id.

<sup>132</sup> See Jane Allin, *Milk of Death: The Dark Side of the Nurse Mare Industry*. (2010)

<sup>133</sup> Id.

<sup>134</sup> Id.

and to enhance performance.<sup>135</sup> In 2010 alone, over 112,000 horses were slaughtered in North America in order to satisfy the markets for horse meat in Europe and Asia and of these horses, at least 30,000 (or 30%) were discarded racehorses.<sup>136</sup> What is startling about this number is not only its sheer magnitude but the fact that it is almost identical to the number of racehorses bred each year in the United States.<sup>137</sup> The attrition rate of the horseracing industry is practically identical to the industry's birthrate. The problem of overbreeding in the horseracing industry is "solved" through the disposal and subsequent slaughter of an equal number of horses.<sup>138</sup> In short, overbreeding and high turnover rates in horseracing due to high levels of injury, rampant drug-use, and rigorous training of racehorses results in thousands of racehorses being disposed of and sold into a thriving slaughter market for horse meat and other horse products that is scantily regulated by the federal government.

## **V. Comprehensive Statutory & Legal Reform:**

The problems inherent in the U.S. horseracing industry are complicated, interrelated, and numerous. Proposing a comprehensive plan of legal reform requires a thorough understanding of these pervasive and interconnected issues. Such a strategy at reform would require a plan that utilizes both currently implemented statutory schemes and provisions as well as the implementation of proposed legislation. While some statutes provide that horses are to be classified as companion animals, an overwhelming number of statutes at both the federal and state levels classify horses as livestock.<sup>139</sup> This extensive legal property scheme is currently best suited to meet the needs and costs associated with the maintenance, healthcare, and associated

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<sup>135</sup> See U.S. Government Accountability Office, *Horse Welfare: Action Needed to Address Unintended Consequences from Cessation of Domestic Slaughter*. (2011)

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> See Sonia S. Waisman, Pamela D. Frasch, Bruce A. Wagman, *Animal Law Cases and Materials*. 19. (2014)

liability of horses and horse ownership. The livestock designation of domestic horses, including racehorses, also carries with it legal implications regarding the administration of various performance-enhancing and “therapeutic” drugs currently given to racehorses. The explicit FDA ban of over 300 of these substances in animals slaughtered for human consumption poses serious potential legal liability to the horseracing industry which continues to administer these drugs to horses that in turn may be sent to slaughter for human consumption.<sup>140</sup> Meat destined for human consumption legally may not contain these drugs. The horseracing industry should not be permitted to continue to administer drugs to racehorses for performance and “therapeutic” purposes whilst simultaneously relying on the lesser legal protections afforded to animals designated as livestock. In effect, they should be forced to adhere uniformly to a legal property statutory scheme and be subject to the legal implications of such a designation for the benefit of both horses and people alike. While the pervasive designation of horses as livestock may not grant horses some of the legal protections typically afforded companion animals in the U.S. (e.g., protection from slaughter for human consumption), it does mandate that drugs administered to these animals comply with the FDA, USDA, and other federal entities responsible for regulating drugs administered to livestock. In effect, the horseracing industry should not be allowed to “have its cake and eat it too.” Furthermore, while this property scheme does not provide for an outright ban on horse slaughter, there are other statutory provisions that do, including the de facto ban on the use of federal funds for inspections at horse slaughter facilities contained in the Obama Administration’s 2014 federal budget spending bill.<sup>141</sup> While this ban on horse slaughter is helpful for the purposes of protecting horses and contributing to racehorse industry reform, a still more effective solution to combat the residual live horse trade with foreign nations would be

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<sup>140</sup>See A.J. Higgins, *From ancient Greece to modern Athens: 3000 years of doping in competition horses*. 31. (2016)

<sup>141</sup>See Horse Channel, *Horse Slaughter Ban Reinstated Under New Federal Budget*. (2014)

the outright, nationwide ban on horse slaughter in the United States. Animal welfare activist organizations such as PETA and the ASPCA have advocated for such a proposal.<sup>142</sup> Additional proposed statutes including the SAFE Act, if approved, would provide further protection for racehorses and other equines against slaughter in the United States as well as against export outside of the U.S. for slaughter in foreign nations.<sup>143</sup> While primarily concerned with human health and safety, the SAFE Act would serve as a backdoor method of preventing horse slaughter for human consumption, thereby closing the problematic loophole that currently incentivizes some individuals involved in the racehorse industry to sell their unwanted horses to buyers who can then gain a profit by exporting the horses for slaughter outside of the United States, notwithstanding the current ban on horse slaughter for human consumption within the country. Consequently, the lack of a financially viable market for horse slaughter both within and outside the United States would greatly reduce the number of racehorses and other equines slaughtered each year. Comprehensive reform must also account for the rampant and largely unregulated drug use as well as the overbreeding that currently characterize the U.S. horseracing industry. Approval of federal statutes like the Thoroughbred Horseracing Integrity Act of 2015 would provide a uniform program that bans the use of many of the performance-enhancing drugs, including those currently recognized as “therapeutic” in nature on a nationwide level.<sup>144</sup> The Thoroughbred Horseracing Integrity Act of 2015 would most likely be more successful in this mission as well as more accountable than current regulatory programs and horseracing entities that supposedly address and manage these issues. An independent thoroughbred horseracing anti-doping authority, presumably a federal agency affiliated with the FDA and/or USDA, would

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<sup>142</sup> Id.

<sup>143</sup> See Animal Welfare Institute, *Safeguard American Food Exports (SAFE) Act*. (2016)

<sup>144</sup> See 114th Congress, H.R.3084 - *Thoroughbred Horseracing Integrity Act of 2015*. (2015-2016)



develop and enforce the program's policies.<sup>145</sup> The independent status of this regulatory authority would circumvent the accountability, transparency, and compliance issues associated with the current scheme of horserace industry internal governance. In addition, this act could serve as a base for supplemental statutes designed to enhance the effective regulation of drugs administered to racehorses and compliance by racehorse industry entities, as well as provide a model for similar statutes designed to provide nationwide protection to horses in other equine pursuits such as the Quarter horse, Arabian horse, and endurance racing industries. To combat the inherent overbreeding and overpopulation issue in the horseracing industry, a quota should be enacted to limit the annual breeding and production of new racehorses. An independent authority such as that proposed in the Thoroughbred Horseracing Integrity Act of 2015, a federal regulatory entity such as the FDA or USDA, or a unique independent federal authority could be enlisted to perform this function. Such a quota has been considered by some politicians, including Senator Mary Landrieu, a democratic senator from Louisiana who proposed for consideration a bill that would set a federally-determined cap on annual breeding in the racehorse industry, that would provide for drug regulation, and that would create and enforce a mandated racehorse retirement fund.<sup>146</sup> While an official bill has yet to be drafted, the National Thoroughbred Racing Association has requested input into this potential legislation and confirmed the breeding cap component.<sup>147</sup> A statute such as this could help to alleviate the issue of overbreeding and overpopulation in the horseracing industry, thereby decreasing the number of unwanted horses, increasing the value and perhaps racing viability of existing horses, and further curtailing the market for horse slaughter. The proposal for a racehorse retirement fund is also a provision that should be implemented in comprehensive horseracing industry reform. Such

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<sup>145</sup> Id.

<sup>146</sup> See Paulick Report Staff, Federal Lawmakers to Consider a Cap on Breeding. (2010)

<sup>147</sup> Id.

a proposal has been advocated by animal rights activist groups such as PETA.<sup>148</sup> This proposal would require horse owners and breeders to pay a \$360 fee for each new foal registered.<sup>149</sup> The money aggregated from these fees would be placed into a fund used to provide care for the over 10,000 racehorses currently sent to slaughter each year.<sup>150</sup> In addition, the fee-per-foal requirement could help to alleviate the industry issue of overbreeding. In 2012, the Jockey Club endorsed PETA's 2011 proposal styling it as the "Thoroughbred 360 Lifecycle Fund" and assembling an organization known as the Thoroughbred Aftercare Alliance (TAA).<sup>151</sup> This congregation of owners, trainers, breeders, racetracks, jockeys, horse-rescue experts and organizations, and other industry entities has begun constructing the framework for the program by initiating the process of inspection and accreditation of stables to be used as "sanctuaries" for retired racehorses as well as by raising the required funds.<sup>152</sup>

## **VI. Conclusion:**

These proposed pathways of reform are by necessity as interconnected to one another as are the inherent problems in the horseracing industry which they are designed to remedy. Assistance from federal statutory bans such as the SAFE Act and an outright federal ban on both domestic horse slaughter and horse exportation to foreign nations for slaughter for human consumption would serve to afford racehorses and other equines greater legal protections by drastically curbing the viability of the horse slaughter market. Statutory uniformity governing the regulation and compliance of racehorse drug administration provided by the implementation of laws such as the Thoroughbred Horseracing Integrity Act of 2015 would greatly reduce the current rampant and largely unregulated drug abuse inherent in the U.S. sport of horseracing,

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<sup>148</sup> See Michelle Sherrow, 'Secretariat' Star Wants Racehorses Retired. (2011)

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Id.

thereby improving health and safety conditions for horses as well as people who currently consume them. Further statutory implementation and oversight from independent regulatory authorities for the purposes of enacting a breeding cap on racehorses as well as establishing a racehorse retirement fund would help alleviate the problem of horse overpopulation, further reduce the viability of the horse slaughter market, and provide for the care of retired racehorses. Synergy is the key to this comprehensive proposal of reform. While its success and compliance remains to be seen, the TAA and organizations like it could serve as an effective example of collaboration between horseracing industry individuals and entities, local, state, and federal governments, animal welfare organizations, and the public that collectively addresses the various problems inherent in the U.S. horseracing industry in order to achieve preserve the much-needed comprehensive reformation and ultimately, survival of the sport.

## **The Hallelujah Horses Find a Home**

By Jim D. Sarlis

Imagine if you had to find homes for nearly a thousand horses. Now imagine that you had to do it in the dead of winter with no place to keep them in the meantime. Well, that's the daunting task that fell to Elaine Nash, the founder and executive director of a non-profit equine transportation and protection organization called Fleet of Angels. And this is the story of how she launched a national campaign to accomplish the biggest rescue of horses in history.

### **The Call to Action**

It started with a call in October 2016 from the police department of a small rural South Dakota town. They explained that the State of South Dakota had just taken possession of 270 severely neglected, starved, and abused horses that needed homes. Without hesitation, Nash and her organization immediately went into action. Nash left her home in Colorado and traveled to South Dakota to oversee the whole operation. As if finding homes for 270 horses was not enough of a challenge, Nash learned that hundreds more horses had been impounded<sup>1</sup> by the State—637 of them. The original owner was unable to reimburse authorities for the cost of their care, so they would be put up for auction. Nash knew from experience what would come next: So-called "kill buyers" would purchase the horses, then send them for slaughter in places like Mexico or Canada.<sup>2</sup> She couldn't let that happen. So she decided that she had to intervene to save them all. A total of 907 horses. All in need of homes. And in a hurry. After all, the harsh South Dakota winter was looming on the horizon.

### **From Humble Beginnings to Nationwide Network**

Elaine Nash grew up on a ranch in New Mexico where horses were a major part of her life. By the time she was in high school, she was training horses. She worked her way through college while operating her own training stable. Nash founded Fleet of Angels after coming to the realization that more at-risk horses could be saved if there were affordable transportation to get them from where they were to their forever homes. It started off as a clearinghouse to connect people who had horse trailers, stables, food, and other necessities, with people looking to transport or adopt horses, or just needed a safe spot for an overnight stay for horses traveling long distances.

As Nash puts it, "Fleet of Angels doesn't usually take actual custody of the horses we help, since most of the time our members are providing transportation for horses that someone else has rescued," however, "[t]his case was very different in that we found ourselves with almost 1000 horses to feed, care for, and find homes for—and we didn't even have a horse facility to take them to when this first happened."<sup>3</sup> Nash had to orchestrate a massive national rescue campaign, integrating varied resources across

a wide geographical area, so she reached out to other equine welfare organizations to help with the massive rescue. A website was created.<sup>4</sup> Donations of money, facilities, trailers, stables, transportation, hay, feed, and volunteer efforts, were solicited and had to be marshaled. "It was a huge responsibility for us to take on. It was incredibly tough work for the crew, unbelievably expensive to cover all the costs, and extremely stressful on us all. It took the help of hundreds of individuals and dozens of organizations to make this mission successful."<sup>5</sup>

### **A Daunting Undertaking: Overcoming Nature and Logistics**

A small team convened in South Dakota, braving extreme weather conditions. As Nash describes it: "Wind chills were down to 50 below zero; wind was up to 40 miles per hour. It snowed all day every day, hard blowing snow, for weeks."<sup>6</sup> Since many of the horses were ungelded stallions or wild mustangs that tended not to stay in their pens, Nash's team had to improvise, on foot, to work with them: "We didn't have helicopters or horseback or four-wheelers.... It was all done just luring horses into pens with feed and getting little in at a time and trying to move them in the ice and the snow and the cold and the wind."<sup>7</sup>

During their two months in South Dakota, Nash and her team succeeded in finding homes for about two-thirds of the horses, arranging the adoptions directly from the facility on which they were impounded by the authorities, despite having to do the work on an emergency basis during weeks of horrific blizzards and sub-zero conditions. But that still left 312 horses still in need of homes. And this last bunch were the most challenging. They were the oldest. Most had health problems. Many were blind. Some of the males needed to be gelded.

These remaining horses were transported to an adoption hub they established in Fort Collins, Colorado. "We had to get those horses to a milder climate," said Nash. "With 40 mph winds, temperatures dipping to -40 chill factor, and snow blowing sideways for days at a time, our crew could barely even see the horses to work with them. It was brutal.... And the horses were really suffering in the cold without shelter of any kind."<sup>8</sup>

Ten semi-trucks ferried the remaining 312 horses from South Dakota to Colorado. Nash hunkered down in a Days Inn a few miles from the property to run the adoption operation. A makeshift hospital manned by a local veterinarian was set up. Many of the males were gelded. This phase lasted eight months. In fact, the horses had spent so much time with each other that they had formed little foster families. Because of this, some of the adopters took more than one horse just to keep foster siblings and families together—the horses that had bonded and were deemed too attached to each other to be separated.

Eight months later, Nash still called the Days Inn home—but she and her team had placed a majority of the horses. By that point, a few dozen horses remained, including

20 stallions that were too old to geld. Many were blind. They tended to stick together and help each other, and they needed to be adopted together. Once again, the community stepped up, and by the end of the month, forever-homes had been found for the remaining horses. They were kept on the property until Fleet of Angels could arrange transport. And Nash could finally check out of that Days Inn. She had been away from her home for nearly a solid year.

### **The Hallelujah Horses and Beyond: The Amazing Work of Fleet of Angels**

The project became known as The Hallelujah Horses. It was the largest rescue operation of its kind ever. It was done in record time. And the horses involved were all saved from probable slaughter. "Hallelujah" just seemed the appropriate reaction as the adoptions progressed, and the name stuck.

What's even more amazing is that, even while in the midst of this overwhelming project, Fleet of Angels simultaneously continued its core work of transporting other horses and even provided emergency disaster relief from coast to coast. They evacuated hundreds of horses per day out of Florida in advance of Hurricane Irma. They evacuated and cared for thousands of horses affected by Hurricane Harvey and Hurricane Irma, and in the areas fighting the California wildfires.

Fleet of Angels is the only organization with a national network designed to quickly evacuate equines from the paths of natural disasters, such as hurricanes, wildfires, floods and tornadoes. They can also arrange for stabling and other services until the animals are able to return home. Fleet of Angels has also been praised for developing, and releasing an online, searchable Horse Helpers Directory in each disaster-prone region of the country, making it fast and easy for horse owners facing a natural disaster to connect with rescuers and service providers to protect equines that are at risk of being injured or killed during storms, fires, or floods.

Pro-slaughter advocates argue that there are tens of thousands of unwanted horses, and that the only solution is to ship them off to slaughter. But, Nash maintains, that is simply untrue, and the Hallelujah Horses are living proof.<sup>9</sup>

### **Fast Forward to Today**

Nash now lives in Evans, Colorado, where she continues the work of Fleet of Angels and also works to educate people about the crises facing American horses through speaking engagements, writing articles, and networking on social media.<sup>10</sup>

The American Society for the Prevention of Cruelty to Animals recently honored Nash and Fleet of Angels with the ASPCA Equine Welfare Award.<sup>11</sup> The Hallelujah Horses website continues to post stories and photo updates from the horse adopters, showing how the horses have thrived since they took them in.<sup>12</sup>

## Endnotes

1. Impoundment is when the state takes custody of an animal. Virtually all jurisdictions have statutes that provide for the capture and impounding of livestock and other animals if they are strays, or if there is evidence of abuse or neglect, or where certain costs of care and upkeep are not paid, and, if the government's costs of keeping and storing them after impoundment are not paid after a given period of time, for their sale at auction. In South Dakota, this is governed by Title 40 of its Codified Laws. *See, e.g.*, S.D. Cod. Law § 40-1-5 (Impoundment of neglected, abandoned, mistreated, or cruelly treated animal-expenses of care as lien), § 40-1-5.1 (Liability of owner or caretaker for impounded animal), and § 40-1-34 (Disposition of impounded animals).
2. Every year, kill buyers funnel more than 100,000 American horses – working, racing, and companion horses, and even children's ponies – into the horse meat trade, going from auction to auction and gathering up young and healthy horses for slaughter for human consumption, often misrepresenting their intentions in the process. Humane Society of the United States, Kitty Block's Blog, Jan. 2015, available at <https://blog.humanesociety.org/2015/01/kill-buyers-horse-slaughter.html>.
3. Posts about The Hallelujah Horses written by Debbie Coffey, available at <https://rtfitchauthor.com/tag/the-hallelujah-horses/>.
4. The domain name is, appropriately enough, [www.thehallelujahhorses.com](http://www.thehallelujahhorses.com).
5. Posts about The Hallelujah Horses written by Debbie Coffey, available at <https://rtfitchauthor.com/tag/the-hallelujah-horses/>.
6. Kelly L. Williams, "Seeking Sanctuary," Humane Society online news magazine, *All Animals*, March/April 2018, p.6-7, available at <http://www.humanesociety.org/news/magazines/2018/03-04/hallelujah-horses.html>.
7. *Id.*
8. Posts about The Hallelujah Horses written by Debbie Coffey, available at <https://rtfitchauthor.com/tag/the-hallelujah-horses/>.
9. Kelly L. Williams, "Seeking Sanctuary," Humane Society online news magazine, *All Animals*, March/April 2018, p.6-7, available at <http://m.humanesociety.org/news/magazines/2018/03-04/hallelujah-horses.html>.
10. Posts about The Hallelujah Horses written by Debbie Coffey, available at <https://rtfitchauthor.com/tag/the-hallelujah-horses/>.
11. *Id.* at <https://rtfitchauthor.com/2018/01/01/congratulations-to-fleet-of-angels-founder-elaine-nash-on-receiving-the-aspcas-equine-welfare-award/>; ASPCA News online, November 16, 2017, The ASPCA Honors Animal and Human Heroes at the 2017 Humane Awards Luncheon, available at <https://www.aspcas.org/news/aspcas-honors-animal-and-human-heroes-2017-humane-awards-luncheon>.
12. *See*, [www.thehallelujahhorses.com](http://www.thehallelujahhorses.com).

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The Failure of  
Breed-Specific Legislation and How To Fix It

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## **THE FAILURE OF BREED-SPECIFIC LEGISLATION AND HOW TO FIX IT**

This comment argues that law makers should repeal breed-specific legislation (“BSL”) in favor of pre-existing dangerous dog ordinances. BSL in practice operates wholly contrary to its stated objective of preventing dog attacks, and instead, endangers the health and welfare of individuals and the communities it purports to protect. To resolve the patent failure of BSL, we must rethink what individual responsibility means when owning domesticated dogs. This comment posits that the BSL system must be abolished and we must, as a society, address our mindset towards companion animals to effectively address the real concerns underlying BSL.

### **I. LEGAL STATUS OF DOMESTICATED DOGS, THEN AND NOW**

#### **a. Have dogs always been considered property?**

Companion animals have long been considered property of their human companions.<sup>1</sup> However, the lesser legal status dogs enjoy today was not always the rule.<sup>2</sup> During the middle ages, courts held animals “... accountable for their actions as if they were capable of possessing the necessary *mens rea* to understand and choose to commit criminal acts...”<sup>3</sup> Incredibly, domesticated animals were once appointed legal representation and were provided due process rights.<sup>4</sup>

#### **b. Current legal status**

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<sup>1</sup> Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 472 (1996) (“[I]t should ... come as no surprise that hierarchy has long and explicitly dominated the political and legal relationships between humans and nonhuman animals in the Western tradition. Justifying the massacre of guiltless nonhuman animals by the Flood, Rashi, the eleventh-century Jewish scholar, educator, and leading commentator on the Talmud, claimed that “since animals exist for the sake of man, their survival without man would be pointless.”<sup>2</sup> His claim was widely shared); *see also* Joel P. Bishop, *Bishop on Criminal Law* § 594, at 434 (John M. Zane & Carl Zollman eds., 9th ed. 1923) (“Man has always held animals in subjection, to be used or destroyed at will for his advantage or pleasure.”).

<sup>2</sup> Cynthia A. Mcneely & Sarah A. Lindquist, *Dangerous Dog Laws: Failing to Give Man’s Best Friend a Fair Shake at Justice*, 3 J. ANIMAL L. 99, 102 (2007).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

In contrast, modern courts have consistently upheld that animals are legal chattel of their respective owners.<sup>5</sup> In *Kennedy v. Byas*, a Florida appellate court reaffirmed the tenant that “[w]hile a dog may be considered by many to be a member of the family, under Florida law animals are considered to be property.”<sup>6</sup> These court opinions are based on “precedence written during much earlier ages when dogs were seen as unfeeling, basically valueless entities that resided outside and with whom most humans did not have an emotional attachment.”<sup>7</sup>

Courts and legislatures have struggled with the legal classification of companion animals and whether they are truly chattel by law. In *Bass v. State*,<sup>8</sup> another Florida appellate court decision, “the court analyzed whether a lower court erred by designating a police dog an ‘individual,’ a designation which resulted in a harsher penalty being imposed upon a convicted criminal who injured the dog. The appellate court concluded that ‘as much as dogs are loved and cherished by their owners, they are not persons or ‘individuals’ for purposes of the criminal law.’”<sup>9</sup>

The current legal status of companion animals is significant in the BSL context because it enables BSL’s very existence. If animals were given a heightened legal status, common law tells us that a complete prohibition against particular breeds could violate the animal’s due process rights.<sup>10</sup> Thereby, BSL would be unconstitutional and impossible to enforce. Because animals are treated as property, BSL cannot incorporate due process procedures as chattel cannot exercise due process rights. As social attitudes increasingly shift towards a higher legal recognition of domesticated animals, due process concerns may again become a plausible legal argument.

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<sup>5</sup>*Id.* at 110.; Wise, 23 B.C. ENVTL. AFF. L. REV. 471, 538 (1996).

<sup>6</sup>Mcneely& Lindquist, 3 J. ANIMAL L. 99, 110 (2007)(quoting *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. 1st DCA 2004)).

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

<sup>8</sup> *Bass v. State*, 791 So. 2d 1124 (Fla. 4th DCA 2000).

<sup>9</sup>Mcneely& Lindquist, 3 J. ANIMAL L. 99, 110 (2007)(quoting *Bass v. State*, 791 So. 2d 1124 (Fla. 4th DCA 2000)).

<sup>10</sup>Mcneely& Lindquist, 3 J. ANIMAL L. 99, 110 (2007).

## II. THE ORIGINS OF BREED-SPECIFIC LEGISLATION

BSL refers generally to "... laws that either regulate or ban certain dog breeds in an effort to decrease dog attacks on humans and other animals."<sup>11</sup> To evaluate the effectiveness of BSL in decreasing dog attacks on humans and other animals, we must examine the problem it attempts to solve.

In 2011, there was 78.2 million domesticated dogs in the United States, not including feral dogs.<sup>12</sup> During the same year there was 31 dog bite fatalities.<sup>13</sup> That translates to a 0.0000409207% chance that the family dog would have attacked and killed an individual in 2011. Extrapolating this data to a lifetime risk-analysis, the National Safety Council rates the likelihood that an individual will be killed by a dog during their lifetime at 1 in 114,622.<sup>14</sup> For comparison, the lifetime chance that an individual will be killed as a result of a motor vehicle accident at 1 in 113,<sup>15</sup> death by heat exposure stands at 1 in 10,784,<sup>16</sup> and death by contact with hornets, wasps, and bees stands at 1 in 64,706.<sup>17</sup> In short, you are twice as likely to die from a wasp or bee sting as a dog bite, yet there is tremendous public outcry only on the latter. Why is that? Because hornets, wasps, and bees are beneficial insects? Don't domesticated animals serve a different, yet very beneficial purpose?

Proponents of BSL argue that these statistics are misleading, and specific types of dogs are statistically more likely to harm or injure individuals than others. Therefore, they argue, the

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<sup>11</sup> ASPCA, BREED-SPECIFIC LEGISLATION, <http://www.aspc.org/animal-cruelty/dog-fighting/what-breed-specific-legislation> (last accessed 11/21/2016).

<sup>12</sup> Meagan Dziura, *Should we Beware of Dog or Beware of Breed? An Economic Comparison*, 10 J. L. ECON. & POL'Y 463, 469 (2014).

<sup>13</sup> Richard H. Polsky, *Fatal dog attacks in the United States*, DOGEXPERT.COM, <https://www.dogexpert.com/fatal-dog-attacks/> (last visited Oct. 9, 2016).

<sup>14</sup> WHAT ARE THE ODDS OF DYING FROM..., NATIONAL SAFETY COUNCIL, *available at* <http://www.nsc.org/learn/safety-knowledge/Pages/injury-facts-chart.aspx> (last visited Oct. 9, 2016).

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

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

<sup>17</sup> *Id.*

more dangerous breeds should be banned for the health and safety of the community.<sup>18</sup> However, this message has not been historically consistent – either in the type of breed being banned or in its stated purpose. Recently, the object of breed-ban vitriol has been the pit-bull.<sup>19</sup> Other targets of proponents for breed-specific legislation have included “... Rottweilers, American Staffordshire Terriers (pit-bulls), Chow Chows, German Shepherds, Doberman Pinschers, and Akitas.”<sup>20</sup> These dogs do share one thing in common—their size. A correlation does not equal corroboration however. One particular “type” of breed has been the recent target of media sensationalism that attempts to justify BSL without corroborating support.

### III. MEDIA COVERAGE AND THE RISE OF PIT-BULL BANS

Media coverage of dog attacks have fueled the spread of BSL ordinances across North America.<sup>21</sup> BSL is not the result of dissemination of factual information. Instead, BSL is a reactionary consequence of the 24-hour news cycle.<sup>22</sup>

One particularly poignant case illustrates the media’s impact on BSL. In 2001, Diane Whipple was mauled to death by a 140-pound PresaCanario,<sup>23</sup> a large, mastiff-type breed.<sup>24</sup> Marjorie Knoller, the owner of the dog, was convicted of second-degree murder and sentenced to

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<sup>18</sup>Mcneely& Lindquist, 3 J. ANIMAL L. 99, 112 (2007)(“[h]umankind has made the dog in its image, and, increasingly, that image has become a violent one. The breeds of dogs that have been chosen to reflect our aggressive impulses have changed over the millennia. In the last 20 years the choice has moved from German shepherds, to Dobermans, to pit-bulls, to Rottweilers to a current surge in problem wolf-dog hybrids”); DOGSBITE.ORG, *Pit-bull myths*, <http://www.dogsbite.org/dangerous-dogs-pit-bull-myths.php> (last visited Oct. 9, 2016).

<sup>19</sup>DOGSBITE.ORG, *About us*, <http://www.dogsbite.org/dogsbite-about.php> (last visited Oct. 9, 2016) (some breed-ban proponents go as far as to supporting policies such as prohibiting felons from owning a pit-bull; “[p]it bulls were selectively bred for an activity that is now a felony in all 50 states: dogfighting. Pit-bulls are the ‘chosen’ breed for drug dealers, gang members, and other violent offenders and as such, make up the vast majority of dogs shot by police officers. Convicted felons do not have the right to own a firearm, nor should they have a right to own a dog breed easily deployed as a ‘deadly weapon’”).

<sup>20</sup>Dziura, *supra* note 2, at 470-71.

<sup>21</sup>Mcneely& Lindquist, 3 J. ANIMAL L. at 99.

<sup>22</sup>*Id.*

<sup>23</sup> Bob Egelko, *15 years to life in S.F. dog maul death*, SF GATE (Sept. 23, 2008), <http://www.sfgate.com/bayarea/article/15-years-to-life-in-S-F-dog-maul-death-3268437.php>.

<sup>24</sup>VETSTREET, *Perro de PresaCanario*, <http://www.vetstreet.com/dogs/perro-de-presa-canario> (last visited 11/20/2016).

15 years to life for her part in the attack, which included failing to muzzle "... her aggressive 140-pound PresaCanario dog before taking it out of the apartment. [failing to] call for help, retrieve a weapon or dial 911 while the animal was mauling Diane Whipple for at least 10 minutes."<sup>25</sup>

The media scrutiny surrounding the mauling and subsequent criminal proceedings were intense. As recently as 2015, Knoller challenged her second-degree murder conviction, with news reports reiterating "[t]he motion brings up memories for many in the Bay Area of the couple's dogs, Bane and Hera, who ferociously bit Whipple, killing her in a Pacific Heights apartment building in the hallway where they all lived in January 2001."<sup>26</sup>

Undoubtedly the Knoller case presents a public health and safety problem that municipalities and governments have an affirmative obligation to resolve, either through criminal prosecutions or ordinances. San Francisco has attempted to do just that by prosecuting Knoller and enacting San Francisco Ordinance Section 43.1, requiring the mandatory spaying and neutering of pit-bulls.<sup>27</sup> But why did the mauling not result in an ordinance banning the PresaCanario, the dog that grabbed so much attention around the globe?

The answer may be found in what some pit-bull advocates see as intense media bias against pit-bulls.<sup>28</sup> Some BSL advocates, such as the Coalition for Living Safely with Dogs,

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<sup>25</sup>Egelko, *15 years to life in S.F. dog maul death*, SF GATE (Sept. 23, 2008).

<sup>26</sup>Stephanie Chuang & Lisa Fernandez, *Notorious San Francisco Dog-Mauling Case Back in Federal Court: Owner Marjorie Knoller Seeks to Overturn Murder Conviction*, NBC BAY AREA (Nov. 16, 2015), <http://www.nbcbayarea.com/news/local/San-Francisco-Dog-Mauling-Federal-Court-Owner-Marjorie-Knoller-Seeks-to-Overturn-Conviction-350638111.html>.

<sup>27</sup>San Francisco, California, Municipal Code § 43.1 (note that the Knoller case did not directly result in the implementation of San Francisco's BSL); Carolyn Jones, *Pit-bull factions find peace in S.F. neuter law*, SF GATE (July 24, 2010), <http://www.sfgate.com/crime/article/Pit-bull-factions-find-peace-in-S-F-neuter-law-3257850.php> (in 2005 "... the city adopted a mandatory spay-neuter law for pit-bulls in the wake of the mauling death of 12-year-old Nicholas Faibish, the number of pit-bulls impounded and euthanized has dropped dramatically, according to animal control officials").

<sup>28</sup>Mcneely & Lindquist, 3 J. ANIMAL L. at 100 ("heightened media reporting of dog attacks has resulted in a public perception of dogs as inherently vicious creatures likely to turn on their human house mates or other innocent victims at any moment. While caution is nonetheless necessary in any situation where one deals with any animal--

argue that the media "... often fails to provide context when reporting dog-bite incidents. Most often [members say], the owner is to blame because of improper care or control of a dog."<sup>29</sup>

This failure to hold dog owners accountable for dog attacks began in earnest during the 1980's, when the "pit-bull scare" began in force.<sup>30</sup> Media reports on pit-bull attacks became widespread during the 1980's. In 1983 and 1984, there were 31 reports of pit-bull attacks.<sup>31</sup> That number crept up to 70 the next year and 115 the next, exploding to 530 in 1987.<sup>32</sup> Even though reports of pit-bull attacks grew exponentially throughout the 1980's, actual dog bite statistics did not correlate with the rise in media coverage. As a result, sensationalism clearly played a role in the demonizing of pit-bulls during the 1980's. The following is anecdotal, yet typical of prevailing attitudes of the media at that time;

"One man who was 'attacked' by a Pit-bull in 1986 did not assess the temperament of the Pit-bull by the dog which allegedly attacked him, but rather by the image of the Pit-bull as portrayed in the media. The 'attack' occurred when his neighbor's loose Pit-bull came near the man's daughter, when he kicked the dog away, apparently the dog snapped at him. He easily warded off the dog with his foot and no injuries occurred. But it was reported in the media that the man 'escaped serious injury.' He is quoted as saying, 'The Pit-bull has the same instincts as a panther and should be treated as such. Some say if you train it enough, maybe it can become a pet. Well, so can a rattlesnake. But in the meantime, they're killing people, ripping their throats out.' ... The Pit-bull hysteria would continue unabated in 1987 and the media, not above cannibalizing itself, would begin to report on the over-reporting of Pit-bull stories."<sup>33</sup>

These allegations, if true, would justify BSL. Reporting this "attack" as an "escape of serious injury" is, at best, misleading.

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especially interactions involving very young children--the media-inflamed hysteria over 'vicious' dogs has resulted in innocent dogs merely engaging in normal dog behaviors, such as running and barking, being treated as abnormal, dangerous, or even vicious criminals deserving of lifelong confinement or even death").

<sup>29</sup> John Davidson, *The media takes it lumps over reporting about pit-bulls*, DENVER POST (July 18, 2010), <http://blogs.denverpost.com/fetch/2010/07/18/the-media-takes-its-lumps-over-reporting-about-pit-bulls/1387/>.

<sup>30</sup> Michael Fumento, *False Alarms*, FUMENTO.COM; see Hussain, 74 FORDHAM L. REV. at 2875.

<sup>31</sup> Fumento, *False Alarms*, FUMENTO.COM.

<sup>32</sup> *Id.*

<sup>33</sup> SPORTING DOG NEWS, *The Media Attacks a "Breed": The Pit-bull*, SPORTING DOG NEWS.COM (OCT. 26, 2015), <HTTP://WWW.SPORTING-DOG-NEWS.COM/THE-MEDIA-ATTACKS-PIT-BULL/>.

### a. Montreal's BSL

In the aftermath of the 24/7 news cycle, breed bans began popping up across North America. There are now over 700 cities in the United States with BSL, many of which target pit-bulls.<sup>34</sup> The most recent example of BSL targeting pit-bull type breeds comes from Montreal, Canada, where a BSL was slated to be enforced in 2016.<sup>35</sup> Montreal's BSL has been suspended indefinitely pending the outcome of a legal challenge to the legislation from Montreal's SPCA chapter.<sup>36</sup>

Like most BSL enacted in North America, the origins of Montreal's BSL was reactionary.<sup>37</sup> Montreal's BSL "was proposed in the wake of a horrific attack [on] Montreal resident Christiane Vadnais [who was] was found dead after being attacked by a neighbor's dog who had entered her own backyard. Soon thereafter, Montreal Mayor Denis Coderre announced he'd be seeking to pass and implement a new dog law targeting 'dangerous breeds,' including pit-bulls."<sup>38</sup>

On the surface, Montreal took a well-reasoned approach to a serious public health problem. Quebec's Health Minister and Public Security Minister both supported Montreal's attempt to implement BSL, with the Public Security Minister stating the reasonable proposition that the proposed BSL was a matter of "... ensuring public safety ... [where w]e're going to have

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<sup>34</sup> DOGSBITE.ORG, *Breed-specific laws state-by-state*, <http://www.dogsbite.org/legislating-dangerous-dogs-state-by-state.php> (last visited 11/20/2016).

<sup>35</sup> Arin Greenwood, *Montreal Shouldn't Ban Pit-bulls*, SLATE.COM (Sept. 27, 2016), [http://www.slate.com/articles/health\\_and\\_science/science/2016/09/montreal\\_wants\\_to\\_ban\\_pit\\_bulls\\_but\\_has\\_no\\_evidence\\_it\\_will\\_help.html](http://www.slate.com/articles/health_and_science/science/2016/09/montreal_wants_to_ban_pit_bulls_but_has_no_evidence_it_will_help.html).

<sup>36</sup> Christian Cotroneo, *Montreal's Pit-bull Ban Gets Suspended Indefinitely*, THE DODO (Oct. 5, 2016), <https://www.thedodo.com/montreal-pit-bull-ban-suspended-2031863212.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



a proposal for a province-wide approach that takes into account what the cities are doing now and how we can co-operate even further.”<sup>39</sup>

Unfortunately however, Montreal did not propose BSL using objectively verifiable information. In fact, “[t]he dog implicated in the killing was additionally of an unknown breed: Though some described him as a pit-bull, he was registered with the city as a boxer. (Visual breed identification is notoriously fallible, and even though the dog was killed immediately after the attack, DNA samples were not taken or tested).”<sup>40</sup> If a certain breed of dog is truly the issue, Montreal’s proposed ban fails to even identify what breed caused the public health crisis in the first place. It is significant to note that Montreal failed to take any DNA samples from the dog to identify the breed. Instead, officials declared a wholesale ban on pit-bulls without any plausible support or reasoning, proposing BSL that would be neatly categorized as “arbitrary and capricious.” In spite of this, Montreal’s BSL is enforced against “Staffordshire bull terriers. American pit-bull terriers. American Staffordshire terriers. Any mix with these breeds. Any dog that presents characteristics of one of those breeds.”<sup>41</sup>

Montreal’s proposed BSL states that residents owning one of these banned breeds must acquire a permit to keep the animal.<sup>42</sup> Once a dog is registered and “... deemed to be dangerous, a euthanasia order will be issued for it.”<sup>43</sup> However, even if the registered dog is not deemed to be dangerous, that doesn’t mean there are no negative implications for registered owners. Under the proposed legislation, “[b]y 31 March 2017, the [banned] dogs must be sterilised, micro-chipped and vaccinated. They must also be kept on a short leash and muzzled in public. [In

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<sup>39</sup> Kamila Hinkson, *Dangerous dogs to be euthanized under proposed Montreal bylaw*, CBSNEWS (Aug. 17, 2016), <http://www.cbc.ca/news/canada/montreal/montreal-pit-bull-ban-bylaw-proposal-introduced-1.3724246> (full text is available in French only).

<sup>40</sup> Greenwood, *Montreal Shouldn’t Ban Pit-bulls*, SLATE.COM (Sept. 27, 2016); Jessica Murphy, *Montreal pit-bull ban put on hold*, BBC NEWS (Oct. 4, 2016), <http://www.bbc.com/news/world-us-canada-37526015>.

<sup>41</sup> Hinkson, *Dangerous dogs to be euthanized under proposed Montreal bylaw*, CBSNEWS.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

addition, pitbull owners must undergo a criminal background check.”<sup>44</sup> These regulations impose more than a mere inconvenience on dog owners; they seek to obfuscate pit-bull ownership to the point of an outright ban.

An additional issue under Montreal’s proposed BSL is determining when a dog is “dangerous,” presenting a logistical nightmare for taxpayers and regulators alike. Taxpayers will foot the bill for regulators to determine what dogs are banned, resulting in the proliferation of lawsuits for false identifications against the city.<sup>45</sup> Considering the dog attack which initiated the BSL movement in Montreal was registered as a “Boxer,” and the fact that the Boxer fails to be identified as a “banned breed” under Montreal’s regulations, it is evident there are undisclosed ulterior motives behind the breed ban.

#### **b. Denver’s BSL**

Denver has a longstanding breed-ban on pit-bulls. Like many enacted forms of BSL around the country, breed bans were enacted in the wake of a gruesome attack. In Denver, that attack occurred in 1989, “when Wilbur Billingsley ... suffered seventy bites and two broken legs ... [from a] five-year old pit-bull named Tate, [who] had escaped from a yard two doors down from Billingsley’s home.”<sup>46</sup>

In crafting BSL, Denver officials, like in Montreal, had trouble defining “pit-bull” under their proposed BSL. The Denver city council recognized, “... what is known conversationally as a ‘pit [bull]’ isn’t so much a specific breed of dog as a general type that could include as many as half a dozen officially recognized breeds.”<sup>47</sup> The City Council skirted the definitional issue by

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<sup>44</sup> Murphy, *Montreal pit-bull ban put on hold*, BBC.

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

<sup>46</sup> Jared Jacang Maher, *For two decades, pit-bulls have been public enemy #1 in Denver. But maybe it’s time for a recount*, WESTWORD (Sept. 24, 2009), <http://www.westword.com/news/for-two-decades-pit-bulls-have-been-public-enemy-1-in-denver-but-maybe-its-time-for-a-recount-5105359>.

<sup>47</sup>*Id.*

enacting an ordinance that roughly classified pit-bulls as a “type,” being “... any dog displaying the majority of the physical traits of an American Pit-bull Terrier, an American Staffordshire Terrier or a Staffordshire Bull Terrier – or ‘any dog displaying the majority of physical traits of any one or more of the above breeds.’”<sup>48</sup>

Determining what “physical traits” makeup the larger pit-bull breed type has been difficult to say the least. Kevin O’Connell presents one such example. In 2009, O’Connell’s dog was seized and impounded.<sup>49</sup> The Denver “Pit-bull Evaluation Team” his dog “... had enough pit-bull blood to qualify as illegal under the city’s [pit-bull ban].”<sup>50</sup> O’Connell paid the \$500 fine and signed an affidavit swearing the dog wouldn’t be brought back within Denver city limits.<sup>51</sup>

Subsequently, O’Connell took the unusual step of requesting a hearing officer to evaluate whether the city’s pit-bull evaluators made the appropriate determination under Denver’s ordinances.<sup>52</sup> During O’Connell’s hearing, specially trained animal control officers presented evidence that they determine physical characteristics of a pit-bull through intuition, with one officer stating that “... he knows a pit-bull when he sees one.”<sup>53</sup> In fact, no animal control officer could recite any objective measurement of what constitutes characteristics of a pit-bull, despite the Denver ordinance’s specific reference to American Kennel Club and Uniform Kennel Club standards for the breed.<sup>54</sup>

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<sup>48</sup>*Id.*

<sup>49</sup> Jared Jacang Maher, *In Denver, Animal Control decides which dogs are pit-bulls. But what happens if they’re wrong?* WESTWORD (Oct. 15, 2009), <http://www.westword.com/news/in-denver-animal-control-decides-which-dogs-are-pit-bulls-but-what-happens-if-theyre-wrong-5105621>.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*; Denver, Colorado, Municipal Code § 8-55 (“A “pit-bull,” for purposes of this chapter, is defined as any dog that is an American Pit-bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one (1) or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds. The A.K.C. and U.K.C. standards for the above breeds are on

### c. Difficulties in Identifying “Pit-bull Type” Breeds

O’Connell’s hearing is not an outlier. In fact, difficulty in identifying the breed is not unique to Denver. Ontario’s Attorney General Michael Bryant proposed identifying pit-bulls in a wholly subjective way; “I’ve said before and I will say again, if it walks like a pit-bull, if it barks and bites like a pit-bull, wags its tail like a pit-bull, it’s a pit-bull.”<sup>55</sup>

Ontario’s Attorney General is on point with his subjective “analysis,” but for all the wrong reasons. There is no special training requirements to identify breeds under the majority of enacted BSL.<sup>56</sup> Not only that, legislators and city councils in many instances “... passed their BSL legislation without any input from a veterinarian, presumably the type of expert most capable of identifying dog breeds.”<sup>57</sup> It is no surprise then that animal control officers often can end up with arbitrary or incorrect identifications.<sup>58</sup>

Some BSL proponents argue that pit-bulls are readily identifiable in modern society. Proponents of BSL suggest, “[g]iven the staggering amount of press coverage of Michael Vick’s pit-bulls, television shows devoted to pit-bulls, such as, *Pit-bulls and Parolees* and *Pit Boss* by Animal Planet and *DogTown* by National Geographic, and the constant production of ‘positive pit-bull’ stories by the pit-bull community, it seems unlikely that the average person cannot

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file in the office of the clerk and recorder, ex officio clerk of the City and County of Denver, at City Clerk Filing No. 89457”).

<sup>55</sup>STOP BSL, *Difficulty of Breed Identification*, <https://stopbsl.org/bsloverview/impossibleid/> (last visited Nov. 19, 2016).

<sup>56</sup>Dana M. Campbell, *Pit-bull Bans: The State of Breed-Specific Legislation*, GPSOLO, AMERICAN BAR ASSOCIATION (July/August 2009), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/pit-bull.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pit-bull.html).

<sup>57</sup>*Id.*

<sup>58</sup>UNITED KENNEL CLUB, *UKC Position on Breed Specific Legislation*, <http://www.ukcdogs.com/web.nsf/webpages/library/ukcbsl> (last visited 11/19/2016).

identify a pit-bull. Pro-pit-bull groups cannot on one hand parade such imagery and on the other say the public cannot identify a pit-bull.”<sup>59</sup>

This is the same circular argument Denver uses in identifying pit-bulls under its BSL. Under the line of reasoning above, proponents argue pit-bulls can be identified as a “type” because our society has been constantly exposed to images of pit-bulls. The most definitive solution to the identification problem would be the implementation of a simple DNA test, but unfortunately, “There currently exists no legally accepted scientific method to positively identify breeds or mixes, and many breeds look very similar, especially to the general public.”<sup>60</sup> The difficulty in identifying mix-breed dogs will continue unabated until acceptable scientific methods are adopted which can positively identify targeted breeds in a meaningful way.

#### **IV. BSL AND THE AMERICANS WITH DISABILITIES ACT**

The federal government has recognized time and again the importance of service animals on the health and welfare of individuals. Wholly omitting entire segments of a species that “may” be of a particular “type” is unduly burdensome under the Americans with Disabilities Act (“ADA”). Under the ADA, a “service animal” must be a dog, and that dog must have been “...individually trained to do work or perform tasks for an individual with a disability. The task(s) performed by the dog must be directly related to the person’s disability.”<sup>61</sup> The ADA protects disabled individuals by prohibiting against discriminating service animals in public accommodations.<sup>62</sup>

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<sup>59</sup>*Pit-bull myths*, DOGSBITE.ORG, <http://www.dogsbite.org/dangerous-dogs-pit-bull-myths.php> (last visited Feb. 19, 2017).

<sup>60</sup>UNITED KENNEL CLUB, *UKC Position on Breed Specific Legislation*, <http://www.ukcdogs.com/web.nsf/webpages/library/ukcbsl> (last visited Nov. 19, 2016).

<sup>61</sup>U.S. DEP’T JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA, *available at* [https://www.ada.gov/regs2010/service\\_animal\\_qa.html](https://www.ada.gov/regs2010/service_animal_qa.html) (last visited Oct. 9, 2016); *see* 42 U.S.C. § 12101 et. seq. (1990).

<sup>62</sup> 42 U.S.C. § 12182 (1990)(legislative comments referring to “[s]ervice animals, particular public accommodations” are most useful for illustrating this point. Specifically, the “[j]ustice Department’s commentary to

Too often, however, BSL runs afoul of the ADA when confiscating service animals without adequate due process for the service animal owners. The tension between ADA accommodation laws and breed bans is exemplified in *Fry v. Napoleon Community Schools*, where a middle-school student in Michigan with cerebral palsy was denied access to her service dog on school grounds.<sup>63</sup> The *Fry* plaintiff was “... prescribed the service dog ... at age 5 to help her pick up items she dropped, use a walker, open and close doors, turn off the lights, remove her coat and help transfer her to and from the toilet.”<sup>64</sup> The school denied access for the student’s service animal, arguing that she was provided “... a human aide as part of her Individualized Education Program (IEP) under the IDEA [Individuals with Disabilities Education Act].”<sup>65</sup> In this case, the dog wasn’t a target of breed-specific legislation – the breed was a Goldendoodle.<sup>66</sup> *Fry* is useful for our purposes by demonstrating an ADA violation when the school refused to allow the service animal to a place of public accommodation.<sup>67</sup>

*Tracey v. Solesky* applies the *Fry* analysis in the BSL context. In *Tracey*, a tenant in an apartment complex owned a pit-bull which seriously injured a child.<sup>68</sup> The child’s parents sued

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regulation providing that public accommodation should generally modify policies to permit use of service animal by individual with disability, which indicated that “broadest feasible access” should be provided to service animals in all places of public accommodation, except in rare circumstance, was not inconsistent with ADA, under which regulation was promulgated; commentary merely explained requirement that reasonable modifications must be made and allowed for exception where modification would fundamentally alter nature or jeopardize safety of public accommodation, in accordance with ADA. *Johnson v. Gambrinus Company/Spoetzl Brewery, C.A.5 (Tex.) 1997, 116 F.3d 1052*”).

<sup>63</sup> *Fry v. Napoleon Comm. Schools*, 136 S.Ct. 2540 (U.S. 2016); Kimberly Leonard, *Supreme Court Hears Case on Service Dogs in Schools*, U.S. NEWS (Oct. 31, 2016), <http://www.usnews.com/news/national-news/articles/2016-10-31/supreme-court-hears-case-on-service-dogs-and-education>.

<sup>64</sup> Kimberly Leonard, *Supreme Court Hears Case on Service Dogs in Schools*, U.S. NEWS (Oct. 31, 2016), <http://www.usnews.com/news/national-news/articles/2016-10-31/supreme-court-hears-case-on-service-dogs-and-education>.

<sup>65</sup> *Fry v. Napoleon Comm. Schools*, 788 F.3d 622, 623 (6th Cir. 2014).

<sup>66</sup> Kimberly Leonard, *Supreme Court Hears Case on Service Dogs in Schools*, U.S. NEWS (Oct. 31, 2016), <http://www.usnews.com/news/national-news/articles/2016-10-31/supreme-court-hears-case-on-service-dogs-and-education>.

<sup>67</sup> 42 U.S. § 12181(7)(J) (Lexis 2016).

<sup>68</sup> *Tracey v. Solesky*, 427 Md. 627 (Md. Ct. App. 2012) (overturned by legislation MD CTS & JUD PRO § 3-1901).

the landlord, alleging negligence and strict liability.<sup>69</sup> The Maryland Court of Appeals ruled in favor of the child’s parents and imposed strict liability on the landlord.<sup>70</sup> What is significant about *Tracey* is not the holding, but the dissent’s analysis of what a “dangerous dog” really means. In particular, the dissent illustrates how breed-specific legislation can impede federal ADA protections;

“[a]ccording to some experts, there are more than twenty-five breeds of dogs commonly mistaken for pit-bulls.<sup>71</sup> Notwithstanding this empirical evidence, the majority relies upon the assumption that all pit-bulls are inherently dangerous. In this record, there is no evidence from expert witnesses to support the proposition that pit-bulls or pit-bull mixed-breeds are inherently dangerous. It appears that the media has demonized pit-bulls as gruesome fighting dogs and has not revealed the long history of pit-bulls as family dogs with passive behaviors.<sup>72</sup> The majority also assumes that breed-specific rules, as opposed to behavior modification rules, are a better approach to controlling the problem of dog bites caused by pit-bulls and mixed-breed pit-bulls that attack humans. Again, the empirical evidence is in dispute. Some experts conclude that breed-specific liability rules provide a superficial sense of security because many factors completely unrelated to the breed or appearance of dogs affect their tendency toward aggression, including early experience, socialization, training, size, sex, and reproductive status.”<sup>73</sup>

The *Tracey* dissent recognizes, pit-bulls have been handed a particularly bad reputation without supporting empirical evidence. Particularly important in the BSL context is the dissent’s assertion that BSL provides a superficial sense of security: it gives legislatures a feeling that they’re making a difference, without really addressing the underlying cause of dog attacks.

Also as the *Tracey* dissent recognizes, pit-bulls have been historically favored as family dogs with passive behaviors. Passive behavior is a particularly useful trait for a service animal assigned to mitigate individuals with severe mental and emotional damages. Service groups are

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<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>Safia Gray Hussain, *Attacking the Dog Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, Note, 74 Fordham L.Rev. 2847, 2870 (2006).

<sup>72</sup>See Jamey Medlin, *Pit-bull Bans and the Human Factors Affecting Canine Behavior*, Comment, 56 DePaul L.Rev. 1285, 1304–1318 (2007) (discussing the role of pit-bulls as family pets in the early twentieth century in contrast to public perception today); Lynn Ready, *Pit-Bull Terrier Therapy Dogs Provide Great Service to Their Community*, Best Friends Animal Society Pit-bull Terrier Initiatives (Apr. 28, 2011), [http:// network.bestfriends.org/initiatives/pit-bulls/17100/news.aspx](http://network.bestfriends.org/initiatives/pit-bulls/17100/news.aspx).

<sup>73</sup>*Tracey*, 427 Md. at 661-662.

increasingly identifying pit-bulls as particularly useful for service members and first responders dealing with mental and emotional trauma because they ““can identify with [pit-bulls] because [the pit--bulls] have either have seen a lot of trauma or been through a lot of trauma.””<sup>74</sup>

A further benefit of utilizing pit-bulls as service animals is to alleviate overcrowding at local animal shelters, and in turn, decrease euthanasia rates. Pit-bulls are disproportionately represented in local animal shelters.<sup>75</sup> It’s not just pulling the animals for local shelters and placing them with individuals that is helpful however, the handful of service dog training organizations who take the dogs out of animal shelters place them in a training program compliant with ADA guidelines.<sup>76</sup> Not only do these organizations provide well-trained service animals with the right temperament for service members and first responders, such programs also are far cheaper than, for example, specialty German Shepard breeding programs, which can cost in excess of \$30,000 per animal.<sup>77</sup> That is a significant investment for disabled individuals, and the social benefits of pit-bulls as service animals far outweighs any perceived aggression. As this comment has discussed previously, the penultimate service dog—the German Shepard—was once banned by BSL just like pit-bulls are today. If our outdated social norms can overcome the fear of pit-bulls, we can capitalize on a cheaper breed that is proven to be just as effective.

## V. EFFECT ON THE COMMUNITY

In addition to discriminatory ADA policies, BSL imposes negative externalities on communities through discriminatory insurance practices. Even if the breed isn’t banned by BSL,

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<sup>74</sup>Tracey, 427 Md. at 661-662.

<sup>75</sup> John Burgeson, Pit bulls dominate shelters, CTPost (Nov. 16, 2013), <http://www.ctpost.com/local/article/Pit-bulls-dominate-shelters-4986436.php>.

<sup>76</sup>Tracey, 427 Md. at 661-662.

<sup>77</sup>*Commonly Asked Questions*, SAINT FRANCIS GERMAN SHEPHERD SERVICE DOGS (Feb. 5, 2017), [http://www.sfgsservicedogs.com/commonly\\_asked\\_questions.html](http://www.sfgsservicedogs.com/commonly_asked_questions.html); *Frequently Asked Questions (FAQ)*, SHORE SERVICE DOGS, INC. (Feb. 5, 2017), <http://www.shoreservicedogs.com/considering1.shtml> (“... on average, it would cost approximately \$30,000 to \$49,000 for these highly trained dogs”).



insurance practices makes it nearly impossible to train certain dogs with desirable predispositions to become service animals.<sup>78</sup>

While states have begun to recognize that BSL has been ineffective to combat dog bites, “[i]nsurance companies have failed to follow the states’ lead and continue to refuse to issue homeowner’s policies for those that own particular breeds of dogs that the insurer deems dangerous purely based on their breed.”<sup>79</sup> Currently, the only state to expressly discourage discriminatory insurance policies is Pennsylvania.<sup>80</sup> In all other states, it is the purview of the insurance company to include or exclude bans on particular breeds, whether or not that is tied to any meaningful data.

Sabrina DeFabritiis, a Suffolk University Law School Professor, argues that the insurer’s emphasis on dog bite statistics is misplaced, where insurers make “... faulty assumptions and using dog bite statistics improperly.”<sup>81</sup> This faulty emphasis is readily distinguishable as a discriminatory practice when analyzing breed-ban impacts on home ownership.

For example, pit-bulls are one of the most popular breed of dog in 28 states.<sup>82</sup> Mortgages almost universally require homeowners insurance, which may contain provisions banning particular breeds of dogs, or at least, make that policy more expensive.<sup>83</sup> As a result,

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<sup>78</sup>SUIT SEEKS INSURANCE FOR DISABLED HOMEOWNERS WITH PIT-BULLS FOR SERVICE DOGS, 25 WESTLAW J. INS. COVERAGE 39, 5 (July 2015); Ricky D. Salder, *Dog Breeds that will Raise your Home Owners Insurance Rates*, ACTIVE RAIN (June 7, 2012), available at <http://activerain.com/blogsviw/3333379/dog-breeds-that-will-raise-your-home-owners-insurance-rates>; Stanley Coren, *14 Dog Breeds Blacklisted by Insurance Companies*, PSYCHOLOGY TODAY (May 27, 2014), available at <https://www.psychologytoday.com/blog/canine-corner/201405/14-dog-breeds-blacklisted-insurance-companies>.

<sup>79</sup> Sabrina DeFabritiis, *Fido’s Fallacy*, 9 ALBANY GOV’T L. REV. 1 (Apr. 2016).

<sup>80</sup> *Id.*; PA. CONS. STAT. ANN. § 459-507-A(d) (West 2015).

<sup>81</sup> DeFabritiis, 9 ALBANY GOV’T L. REV. 1 (Apr. 2016).

<sup>82</sup> *Pit-bulls: Everything You Need to Know*, BEST FRIENDS (Feb. 5, 2017), <http://bestfriends.org/resources/pit-bulls-everything-you-need-know>.

<sup>83</sup> Sabrina DeFabritiis, *Fido’s Fallacy*, 9 ALBANY GOV’T L. REV. 1 (Apr. 2016); PA. CONS. STAT. ANN. § 459-507-A(d) (West 2015).

homeowners may be faced with a choice of renting to keep their family pet or obtaining a mortgage.<sup>84</sup> For many, that may be an easy choice. For others, it is decidedly more difficult.

In addition to discriminatory insurance policies, a second way breed bans impact local communities is a lack of uniformity by state and local authorities when enforcing BSL. More particularly:

“[t]hough there may be significant expenditures associated with the enforcement of dangerous-dog legislation, a lack of adequate funding can render it difficult to effectively enforce the laws. Local budgets may not permit sufficient financial assistance to establish or maintain a local animal control agency, and even when a community can and does provide for a local agency, the agency is often ‘grossly under-budgeted and understaffed.’ Animal control agencies are charged with enforcing the law and also may be responsible for bite investigations and bite data management and analysis.”<sup>85</sup>

Because of this lack of adequate funding for BSL, data is often inadequate or misleading, compounding the issue of inadequate provisions within emerging BSL provisions and targeting certain breeds the public deems “dangerous” without sufficient information to determine whether that determination is supported by data.

A third way in which local communities are impacted by BSL is through “backyard breeding.” Backyard breeders are defined as “... irresponsible breeding of animals. Often this is due to ignorance or neglect where a pet dog or cat accidentally becomes pregnant because the owner has failed to have them desexed.”<sup>86</sup>

So what defines “responsible” and “irresponsible” breeding and how does BSL exacerbate the problem? First, we must analyze what breeders should do, and then analyze how BSL prevents individuals from adhering to responsible breeding practices.

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

<sup>85</sup>Safia Gray Hussain, *Attacking the Dog Bite Epidemic: Why Breed Specific Legislation Won't Solve the Dangerous Dog Dilemma*, 74 *FORDHAM L. REV.* 2847, 2875(2006).

<sup>86</sup>*What is a backyard breeder?*, RSPCA (Mar. 9, 2016), available at [http://kb.rspca.org.au/What-is-a-backyard-breeder\\_331.html](http://kb.rspca.org.au/What-is-a-backyard-breeder_331.html).

The ASPCA promulgates a set of comprehensive criteria for responsible breeding, the following are some of the more technical “best practices” suggested by the ASPCA for responsible breeding;<sup>87</sup>

1. Screens breeding stock for heritable diseases; removes affected animals from breeding program. Affected animals are altered; may be placed as pets as long as health issues are disclosed to buyers/adopters.
2. Has working knowledge of genetics and generally avoids inbreeding.
3. Removes aggressive animals from breeding program; alters or euthanizes them.
4. Bases breeding frequency on mother’s health, age, condition and recuperative abilities.
5. Screens and counsels potential guardians; discusses positive and negative aspects of animal/breed.
6. Complies with all applicable laws regulating breeders in their jurisdiction.
7. Provides an adoption/purchase contract in plain English that spells out breeder’s responsibilities, adopter’s responsibilities, health guarantees and return policy.

As evidenced by the examples above, much of the ASPCA’s best practices requires specialized knowledge. For example, determining what behaviors truly constitutes an “aggressive animal” is difficult, and to expect casual backyard breeders to adhere to these practices is at best, improbable. Determining which dogs are susceptible to hereditary diseases could be an even more difficult task, requiring a working knowledge of the breeds’ history and some type of medical training to identify what diseases are historically prevalent.

BSL is implicated in this analysis because owners are unlikely to register their dog as “dangerous” and risk euthanasia when those individuals seek to breed their animals. Consequently, those areas the ASPCA identifies as requiring specialized knowledge are unlikely to be addressed, making the ASPCA list an unattainable model in BSL jurisdictions.

While the ASPCA’s best practices are largely aspirational, many cities have municipal ordinances which require licensing of dog breeders to ensure some uniformity and adherence to

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<sup>87</sup>*Position Statement on Criteria for Responsible Breeding*, ASPCA (last visited February 5, 2017), <http://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-criteria-responsible-breeding>.

these principals. For example, ordinances in Houston, Texas require a breeder's permit for "(1) Commercial breeder[s]; (2) Hobby/conformation breeder; or (3) Non-commercial breeder."<sup>88</sup>

One of the reasons backyard breeders are hesitant to seek a permit is because they must register their basic information with the regulatory authority, including "... (1) The name, address, and telephone number of the applicant; (2) The name, address, and telephone number of the location where the breeding will be conducted; (3) A description of the types of animals to be bred; and (4) Any other information deemed necessary by the [regulatory authority]."<sup>89</sup> While this registration process only requires "basic" information, the request itself is highly intrusive.

As evidenced by the Denver, Colorado example earlier in this paper, breed bands can and have targeted general "traits" of dogs,<sup>90</sup> making the regulatory authority the ultimate arbitrator in determining whether the dogs are in violation of the city ordinance. As a result, owners of banned breeds are further reluctant to register with regulatory authority and fail to adhere to the ASPCA best practices listed above, becoming a backyard breeder both out of self-interest, and because their animal may be seized and euthanized if they disclose ownership of the animal.

## VI. OPTIONS BEYOND BSL

State and local governments have a powerful tool to address dog attacks without enacting BSL—dangerous dog laws. BSL is attractive to legislators because it provides "... [a] quick-fix solution in response to public outcry and extensive media coverage of pit-bull attacks."<sup>91</sup>

If the objective of BSL is to prevent dog attacks, the most beneficial allocation of resources must focus on where and when these attacks occur. A comprehensive report was

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<sup>88</sup> Houston, Texas, Municipal Code § 6-111.

<sup>89</sup>*Id.* at § 6-112.

<sup>90</sup>See Jared Jacang Maher, *For two decades, pit-bulls have been public enemy #1 in Denver. But maybe it's time for a recount*, WESTWORD (Sept. 24, 2009), <http://www.westword.com/news/for-two-decades-pit-bulls-have-been-public-enemy-1-in-denver-but-maybe-its-time-for-a-recount-5105359>.

<sup>91</sup>Safia Gray Hussain, *Attacking the Dog Bite Epidemic: Why Breed Specific Legislation Won't Solve the Dangerous Dog Dilemma*, 74 *FORDHAM L. REV.* 2847, 2875(2006).

conducted in 2006 by the National Canine Research Council, identifying “..the most common factors in fatal dog attacks.”<sup>92</sup> Those factors are:<sup>93</sup>

1. 97 percent of the dogs involved were not spayed or neutered.
2. 84 percent of the attacks involved owners who had abused or neglected their dogs, failed to contain their dogs, or failed to properly chain their dogs.
3. 78 percent of the dogs were not kept as pets but as guard, breeding, or yard dogs.

It stands to reason that addressing the three factors raised by the National Canine Research Council; failing to spay and neuter aggressive animals, animal abuse, and containing guard dogs; are all behaviors that can be readily addressed by placing the burden of responsibility where it belongs—individual owners.

The Centers for Disease Control studied the issue of canine attacks and came to the same conclusion as the National Canine Research Council; owner behavior impacts dog attacks. Notably, the CDC compared dog bites in Denver, Colorado, analyzing dog bites over a one-year period, “...limited to those dogs that had bitten a nonhousehold member and whose victim sought medical attention for the bite. Ultimately, the researchers concluded that their study required further analysis, such as the determination of each dog’s breed and an analysis of the victim’s behavior in each bite situation. The most important result ... is that owners ‘may be able to reduce the likelihood of owning a dog that will eventually bite’ through owner behavior and breed selection based on owner lifestyle.”<sup>94</sup>

While the CDC readily admits their research needed further analysis, the conclusion is clear, humans can help alleviate dog attacks through their own interaction with animals and thinking about which companion animal fits within their existing lifestyle. The onus of the

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<sup>92</sup> Dana M. Campbell, *Pit-bull Bans: The State of Breed-Specific Legislation*, GPSOLO, AMERICAN BAR ASSOCIATION (July/August 2009), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/pit-bull.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pit-bull.html).

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

<sup>94</sup> Sabrina DeFabritiis, *Fido’s Fallacy*, 9 ALBANY GOV’T L. REV. 1 (Apr. 2016); PA. CONS. STAT. ANN. § 459-507-A(d) (West 2015).

problem is on the owner, and failing to recognize owner behavior is a mistake that BSL readily makes.

The American Bar Association has studied the issue and supports the CDC's conclusions, finding that an effective replacement for BSL focuses on community involvement and education. Ledy VanKavage, a leading expert on BSL quoted in the ABA's analysis, suggests approaching the ineffectiveness of breed bans by "... improving dangerous dog laws generally, [and by] addressing the [National Canine Research] factors without singling out any breeds. [VanKavage] cites St. Paul, Minnesota, and Tacoma, Washington, as both having passed model laws in 2007 that target troublesome pet owners []."<sup>95</sup>

St. Paul, Minnesota, is an apt model of effectively leveraging community and law enforcement resources to effectively address dog attacks without imposing an ineffective BSL program.<sup>96</sup> In St. Paul, once a dog is deemed "dangerous," the owner is subjected to onerous restrictions, such as warning signs outside their homes, keeping the dog restrained, and forcing the dogs to wear muzzles.<sup>97</sup> Notably, unlike the Montreal example, these restrictions are not enacted based on breed before a determination has been made whether or not the animal is "dangerous" under the ordinance.

While St. Paul imposes subjectively reasonable steps in imposing responsibility on the individual dog owner, it is the registration requirements under the ordinance which is truly revolutionary for dangerous dog laws. First, the owner's information is entered into a central database.<sup>98</sup> The purpose of the database, according to a recent interview on Minnesota's

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

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

<sup>97</sup> Rachel Slavik, *What The Label 'Dangerous' Means for Owners And Dogs In Mpls.*, CBS MINN., (April 28, 2015), <http://minnesota.cbslocal.com/2015/04/28/what-the-label-dangerous-means-for-owners-and-dogs-in-mpls/>.

<sup>98</sup> Rachel Slavik, *What The Label 'Dangerous' Means for Owners And Dogs In Mpls.*, CBS MINN., (April 28, 2015), <http://minnesota.cbslocal.com/2015/04/28/what-the-label-dangerous-means-for-owners-and-dogs-in-mpls/>.

dangerous dog laws, is a focus on public education.<sup>99</sup> A central database of dangerous dogs in the area helps animal control officers determine what actually caused the attack<sup>100</sup> instead of focusing on physical characteristics that has been proven ineffective in dealing with the dog-attack problem.

The St. Paul dangerous dog database is useful in another respect; it can also categorize dogs into different sub-categories, telling animal control officers what level of potential danger each dog possesses.<sup>101</sup> To categorize the dangerousness of a dog, animal control officers conduct their investigations into dog attacks by "... [determining] was that bite provoked or the incident provoked."<sup>102</sup> Categorizing dog attacks provides a powerful tool for law enforcement officials, particularly first responders, in knowing the aggressiveness of an animal before any interaction. Two categories are especially important in the St. Paul example, "... if the attack is unprovoked and kills or causes a substantial injury, the animal can be deemed dangerous. But if the attack injury isn't severe, an animal can be labeled potentially dangerous."<sup>103</sup>

The St. Paul classification system focuses on 1) whether the attack was provoked or unprovoked, and 2) degree of injury. This approach is much more holistic than many ordinances around the county, focusing on the circumstances rather than viewing the end result in a vacuum. Ergo, even the classification system in St. Paul focuses on not only the dog's behavior, but the behavior of the human victim in any attack in determining whether the dog is truly deemed "dangerous."

A program that focuses on responsible pet ownership rather than ineffective breed bans has many proponents in the anti-BSL movement. Among them is the ASPCA, who propose the

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<sup>99</sup>*See id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

following list of solutions that are breed-neutral to deal with dog attacks. In particular, the ASPCA’s proposed list is designed to “... hold reckless dog owners accountable for their aggressive animals.”<sup>104</sup>

Holding property owners responsible for damage caused by their property is an age-old tenant in the law.<sup>105</sup> In stark contrast to this fundamental principal, BSL seeks to avoid owner culpability and focus instead on wholesale ban of particular breeds of animals. A focus on imposing individual responsibility seeks to remedy BSL’s lack of personal accountability, holding property owners responsible for the actions of their animals without unduly burdening other owners without cause.

There may also be economic benefits to a more holistic approach to addressing dog-attacks through holding dog owners accountable for the actions of their animals. Best Friends Animal Society “... has developed an economic analysis tool ... that would help cities determine the potential fiscal impact of enforcing BSL versus having a good non–breed–specific dangerous dog law in place. Armed with this tool, cities can now consider cost as one additional factor to weigh before deciding to enact BSL.”<sup>106</sup> Enforcing any law requires resources, whether that be time, money, or both. Quantifying how those resources are best allocated, that is, how can we spend finite regulatory resources in a more effective manner, is a laudable goal and one that Best Friends seeks to accomplish with their comparison tool.

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<sup>104</sup> Dana M. Campbell, *Pit-bull Bans: The State of Breed-Specific Legislation*, GPSOLO, AMERICAN BAR ASSOCIATION (July/August 2009), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/pit-bull.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pit-bull.html).

<sup>105</sup> E.g., Miss. Plain Lang. Model Jury Instr. Civ. 3108 (Westlaw 2015); Lonnie E. Griffith et al., 3B C.J.S. Animals § 436 (Westlaw 2016).

<sup>106</sup> Dana M. Campbell, *Pit-bull Bans: The State of Breed-Specific Legislation*, GPSOLO, AMERICAN BAR ASSOCIATION (July/August 2009), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/pit-bull.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pit-bull.html).



Local legislatures are not the only lawmaking group who struggles to hold dog owners responsible for their animals. Courts have struggled with the very same concept. The dissent in *Tracey v. Solesky* points to the majority in particular, but speaks to the judiciary’s overall failure critically evaluate how responsibility should be apportioned between animal owners and regulators in delineating responsible pet ownership. In particular, the dissent found that;

“The issues raised involving breed-specific regulation are not appropriate for judicial resolution ... and the problems inherent in defining what constitutes a ‘mixed-breed’ pit-bull, the matter of creating a new standard of liability is fraught with problems and is beyond the sphere of resolution by any appellate court.”<sup>107</sup>

The *Tracey* dissent is clearly unwilling to craft a theory of liability to fit the pro-BSL narrative. It shouldn’t be the role of the judiciary to prevent animal attacks any more than individual owners. Instead, the most effective solution to the complexities of animal attacks lie in owner accountability programs, holding owners responsible for the damages caused by their legal property.

There is at least one thing that nearly every animal welfare organization agrees on in this country: BSL because ordinances have no tangential relation to their stated goal.<sup>108</sup>

Stephan Otto, director of legislative affairs for the Animal Legal Defense Fund, summarized why all of these national animal welfare groups oppose BSL:

“[i]f the goal is dog–bite prevention, then dogs should be treated as individuals under effective dangerous dog laws and not as part of a breed painted with certain traits that may not be applicable to each dog. By doing so, owners of well–trained, gentle dogs are not punished by a breed ban, while dangerous dogs of all breeds are regulated and may have their day in court to be proven dangerous.”<sup>109</sup>

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<sup>107</sup> *Tracey v. Solesky*, 427 Md. 627 (Md. Ct. App. 2012) (overturned by legislation MD CTS & JUD PRO § 3-1901).

<sup>108</sup> *Id.* (“... the American Veterinary Medical Association, Humane Society of the United States, Animal Legal Defense Fund, Best Friends Animal Society, American Society for the Prevention of Cruelty to Animals, the American Kennel Club, and the National Animal Control Association all oppose BSL”).<sup>108</sup>

<sup>109</sup> *Id.*

The statistical correlation between breed and bites is tenuous at best. Moreover, BSL proponents cannot readily classify what is and what is not a particular targeted breed to engage in any effective enforcement mechanism under current forms of BSL.

## VII. CONCLUSION

So how can we achieve the laudable goal that BSL purports to achieve—reduce dog bites and fatalities? Several alternatives exist, some more intrusive than others. The most realistic and efficient solution is in the form of “dangerous dog” ordinances, where the enforcement burden shifts from regulators and taxpayers to individual dog owners, holding owners responsible for the damage caused by their property.

If BSL has taught us anything, these ordinances are only as good as the agency enforcing them. Consequently, for dangerous dog laws to become an efficient replacement of BSL, we must ensure regulators, when they do become involved, are given the proper funding and education to determine what constitutes “aggression” to avoid the same desperate impacts found with BSL.<sup>110</sup>

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<sup>110</sup> AMERICAN KENNEL CLUB, *Ohio Court Rules BSL Unconstitutional*, March 7, 2006, <http://www.akc.org/government-relations/legislative-alerts/ohio-court-rules-bsl-unconstitutional/>.



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