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## Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma

### Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. Many thanks to Professor James Kainen for his guidance. I would also like to thank my family and friends for their support and patience, and especially for their willingness to listen to numerous accounts of dog attacks.

# ATTACKING THE DOG-BITE EPIDEMIC: WHY BREED-SPECIFIC LEGISLATION WON'T SOLVE THE DANGEROUS-DOG DILEMMA

*Safia Gray Hussain\**

## INTRODUCTION

In 2001, Diane Whipple was attacked and killed by her neighbors' two dogs just steps from her front door.<sup>1</sup> With a combined weight of 233 pounds, the dogs overpowered their owner and mauled Whipple for five minutes before their owner was able to pull them off and into her neighboring apartment.<sup>2</sup> The severity of the attack was evidenced by the scene: Police and paramedics found Whipple lying naked in a pool of blood, with bloody handprints covering the walls and bits of clothing and leash littering the floor.<sup>3</sup> Whipple died seventy minutes after surgeons attempted to repair torn arteries and lacerations up to one and one-half inches deep in her throat.<sup>4</sup> The horrendous mauling made headlines across the country and brought public attention to the threat posed by dangerous dogs.<sup>5</sup>

Such serious dog attacks are not uncommon. In Illinois, two children were critically injured when three pit bulls escaped from a home and attacked them.<sup>6</sup> In Oklahoma, a three-year-old boy lost his arm to four pit bulls after reaching through a chain-link fence to pet the dogs.<sup>7</sup> Death

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1. Michael Peña et al., *Powerful Dogs Maul Woman, Kill Her: S.F. Neighbors' Pets Lunged Down Hallway*, S.F. Chron., Jan. 27, 2001, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/01/27/MN139736.DTL>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See Marco P. della Cava & Anita Manning, *Killer Dogs and the Human Factor*, USA Today, Feb. 1, 2001, at 1D; Ron Harris, *Fatal Mauling Has Dog-Loving City in Uproar*, Chi. Sun-Times, Feb. 4, 2001, at 7, available at 2001 WL 4611281; Stephanie McCrummen, *Senseless: Manhasset Native Mauled to Death by 2 Dogs in California*, Newsday (Long Island, N.Y.), Jan. 29, 2001, at A3; Evelyn Nieves, *A Bizarre Dog Attack Shakes San Francisco*, N.Y. Times, Feb. 1, 2001, at A14.

6. *Marauding Pit Bulls Attack Six*, CNN.com, Nov. 6, 2005 (on file with the Fordham Law Review).

7. Mick Hinton, *Pit Bull Ban Proposed: Lawmaker's Idea Draws Quick Opposition*, Tulsa World, July 17, 2005, at A13.

resulting from a serious attack, though rare, is not unheard of: In Ohio, a sixty-seven year old retired surgeon was killed in the street by two pit bulls.<sup>8</sup> In San Francisco in July 2005, a twelve-year-old boy was killed by his mother's two pit bulls when he left the basement in which his mother shut him while she ran errands.<sup>9</sup>

Though all breeds of dog can and do inflict severe injury and death, extensive media coverage of serious pit bull attacks has resulted in public fear of these dogs in particular.<sup>10</sup> Despite the existence in the majority of the United States of dangerous-dog laws, which regulate ownership of dogs based on the animals' prior conduct,<sup>11</sup> legislators have proposed an additional quick-fix solution in response to public outcry and extensive media coverage of pit bull attacks. The solution is breed-specific legislation, a type of law that restricts or bans ownership of certain dog breeds, most commonly the pit bull terrier.<sup>12</sup> Unfortunately for Diane Whipple, however, legislation targeting ownership of pit bulls would not have protected her. She was killed by Presa Canarios,<sup>13</sup> a breed which does not fall within the common statutory definition of a pit bull terrier.<sup>14</sup>

The proliferation of dog bites in recent years has resulted in what one legal expert has dubbed "the dog bite epidemic."<sup>15</sup> This Note compares the effectiveness of dangerous-dog laws and breed-specific legislation as means of combating the dog-bite epidemic and suggests that, while both are constitutional, dangerous-dog laws more effectively, efficiently, and fairly address the problem by objectively examining a dog's prior conduct rather than making subjective evaluations of viciousness based solely on breed.<sup>16</sup>

Part I of this Note examines the growing problem of dog bites and dog-bite related deaths ("canine homicides") through statistical analysis. This part also provides a description and history of pit bull terriers, currently the most frequent target of breed-based laws. Part I concludes with an introduction to dangerous-dog laws and breed-specific legislation and summarizes the constitutional challenges brought against each. Part II

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8. E.M. Swift, *The Pit Bull: Friend and Killer*, Sports Illustrated, July 27, 1987, at 74.

9. Elizabeth Weise, *Pit Bull: Canine Non Grata*, USA Today, Aug. 22, 2005, at 6D, available at [http://www.usatoday.com/news/nation/2005-08-22-pitbull-debate\\_x.htm](http://www.usatoday.com/news/nation/2005-08-22-pitbull-debate_x.htm).

10. See Michael Fumento, *False Alarms*, Fumento.com, <http://www.fumento.com/mediacritic.html> (last visited Mar. 25, 2006) (also published in Forbes Media Critic, Fall 1994); see also *infra* notes 62-65, 112 and accompanying text.

11. See *infra* Part I.C.1.

12. See *infra* Part I.C.2.

13. Kenneth Morgan Phillips, *The Diane Whipple Case (People of the State of California v. Marjorie Knoller & Robert Noel)*, DogBiteLaw.com, July 27, 2005, <http://www.dogbitelaw.com/PAGES/Whipple.html>.

14. See, e.g., Miami-Dade County, Fla., Code art. II, § 5-17.1 (1989) (defining a pit bull as any dog that conforms to the standards of an American Pit Bull Terrier, Staffordshire Terrier, or Staffordshire Bull Terrier); see also *infra* text accompanying note 41.

15. See Kenneth Morgan Phillips, *Dog Bite Statistics*, DogBiteLaw.com, Nov. 11, 2005, <http://www.dogbitelaw.com/PAGES/statistics.html>.

16. See *infra* Part III.A.

examines common criticisms and concerns that accompany each type of law, and provides an overview of additional legislation that has been enacted to reduce the number of dog bites and attacks. Finally, Part III concludes that breed-specific legislation is an ineffective and inefficient means of combating the dog-bite epidemic. This part argues that dangerous-dog laws are a more effective, albeit imperfect, solution to the problem and proposes non-breed-based supplemental legislation that can be enacted to reduce the public threat posed by dangerous dogs.

#### I. REGULATING DANGEROUS DOGS: AN INTRODUCTION TO DANGEROUS-DOG LAWS AND BREED-SPECIFIC LEGISLATION

This part examines the dog-bite epidemic and the need to enact local and state legislation regulating ownership of dangerous dogs. This part additionally provides a description and history of the breed currently generating public controversy and fear in relation to dog bites and serious and fatal attacks on humans: the pit bull terrier. Finally, this part introduces the two most common types of laws regulating ownership of dangerous dogs—dangerous-dog laws and breed-specific legislation—and explores the constitutional challenges confronting each.

##### A. *The Dog-Bite Epidemic*

Americans are feeling the bite of a growing dog population. There are approximately sixty-eight million dogs kept as pets in the United States.<sup>17</sup> Every year, these dogs bite an estimated four to five million Americans, representing about two percent of the population, and that number is on the rise.<sup>18</sup> The Center for Disease Control warns that, each year, Americans have a one in fifty chance of being bitten by a dog.<sup>19</sup> Children are the most frequent bite victims, representing more than fifty percent of the total number of cases.<sup>20</sup> Nearly half of all American children have been bitten before the age of twelve.<sup>21</sup>

Serious dog bites may also be on the rise. Notably, while the dog population increased only two percent between 1986 and 1996, the number of dog bites requiring medical attention rose thirty-seven percent.<sup>22</sup> More than 350,000 victims per year, or nearly 960 per day, seek emergency room

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17. *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001*, Morbidity & Mortality Wkly. Rep., July 4, 2003, at 607 [hereinafter *Nonfatal Dog Bites*].

18. Phillips, *supra* note 15.

19. *Id.*

20. *Id.*

21. Brian C. Anderson, *Scared of Pit Bulls? You'd Better Be!*, City J., Spring 1999, at 60.

22. Matt Wapner & James F. Wilson, *Are Laws Prohibiting Ownership of Pit Bull-Type Dogs Legally Enforceable?*, J. Am. Veterinary Med. Ass'n, May 15, 2000, at 1552.

care for serious dog bites.<sup>23</sup> In fact, dog bites now rank among the top causes of nonfatal injuries, and are responsible second only to baseball and softball injuries for emergency room visits.<sup>24</sup>

The increasing number of dog bites has also negatively impacted the insurance industry. Dog bites account for one-third of homeowner insurance claims nationally,<sup>25</sup> and insurance companies pay out approximately \$345 million of the more than \$1 billion loss associated with dog bites annually.<sup>26</sup> As a result, companies are amending their homeowner insurance policies, with some attempting to limit or exclude coverage for dog bites.<sup>27</sup> Many are now also refusing to write policies for owners of historically dangerous breeds,<sup>28</sup> and most of those refusing coverage for dangerous dogs include pit bulls on the list of uninsurable breeds.<sup>29</sup>

There are three recurring commonalities in dog attacks. First, most dog bites occur in the home or another familiar place, with the vast majority of biting dogs belonging to the victim's family or friend.<sup>30</sup> Second, most attacks are perpetrated by unaltered males.<sup>31</sup> Finally, dogs contained or otherwise restrained on the owner's property are responsible for more serious and fatal attacks than those roaming at large.<sup>32</sup>

Despite the growing number of dog bites, attacks ending in human death are rare.<sup>33</sup> The number of canine homicides has remained fairly constant

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23. *Nonfatal Dog Bites*, *supra* note 17, at 605. In 2001, that number was an estimated 368,245 persons. *Id.*

24. *See* Wapner & Wilson, *supra* note 22, at 1552.

25. Charles Toutant, *Putting a Leash on Dog-Bite Claims: Carriers Seek to Limit Homeowner Coverage for Fierce Canine Breeds*, 173 N.J. L.J. 277, 277 (2003).

26. Phillips, *supra* note 15.

27. Toutant, *supra* note 25, at 277. Many of the policy changes are the result of an increase in the proportion of dog bites being litigated. *Id.* at 292.

28. *Id.* at 293.

29. *See id.* at 292-93 (noting that Allstate refuses to write policies for owners of pit bulls, Presa Canarios, and wolf hybrids); *see also* Kenneth Morgan Phillips, *Breed Specific Laws, Regulations and Bans*, DogBiteLaw.com, Dec. 17, 2005, <http://www.dogbitelaw.com/PAGES/breedlaws.html> (noting that pit bull and Rottweiler owners have the most trouble finding insurance and detailing a comprehensive list from the Automobile Club of uninsurable dogs).

30. Phillips, *supra* note 15. The percentages are sixty-one and seventy-seven, respectively. *Id.*

31. *See* Jeffrey J. Sacks et al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998*, J. Am. Veterinary Med. Ass'n, Sept. 15, 2000, at 836, 839.

32. *Id.* at 837. Sixty-seven percent of deaths during 1997 and 1998 resulted from unrestrained dogs on the owner's property; eleven percent resulted from restrained dogs on the owner's property. *Id.* By contrast, nineteen percent of deaths during the same time period resulted from attacks by unrestrained dogs off the owner's property. *Id.*; *see also* Marcy Setter, *Punish the Deed, Not the Breed: Pit Bull Education Packet 8* (2005), available at [http://understand-a-bull.com/BSL/Research/BSLPacket/press\\_pack\\_low.pdf](http://understand-a-bull.com/BSL/Research/BSLPacket/press_pack_low.pdf) (stating that twenty-five percent of canine homicides from 1965 to 2001 were inflicted by chained dogs).

33. Phillips, *supra* note 15. Fatal bites constitute less than 0.00001% of all dog bites annually. Sacks et al., *supra* note 31, at 839.

over time, at approximately ten to twenty per year.<sup>34</sup> As with nonfatal bites, most fatal attacks occur on the owner's property<sup>35</sup> and involve child victims.<sup>36</sup> Of the deaths inflicted by unrestrained dogs off the owner's property, the majority involve more than one dog.<sup>37</sup> Though more than twenty-five breeds have been implicated in canine homicides over the last twenty years,<sup>38</sup> pit bulls and pit bull mixes have been responsible for a disproportionate number; pit bulls were involved in approximately one-third of the fatal attacks between 1981 and 1992<sup>39</sup> and a comparable proportion of serious injuries.<sup>40</sup>

These statistics, combined with an increased number of reported attacks and media-generated publicity of pit bull attacks in particular, have made pit bulls a common target of breed-specific legislation. As a full exploration of the effectiveness of breed-specific legislation requires an examination of the dogs most frequently regulated and banned, Part I.B provides a description and history of the pit bull terrier.

### B. *The Pit Bull Terrier*

"Pit bull" does not describe any one particular breed of dog; rather, it is a generic category encompassing the American Staffordshire Terrier, the Staffordshire Bull Terrier, and the American Pit Bull Terrier.<sup>41</sup> Although neither the American Kennel Club nor the United Kennel Club recognizes all three breeds<sup>42</sup> and the breed descriptions and standards provided by the

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34. HSUS.org, HSUS Statement on Dangerous Dogs and Breed-Specific Legislation, [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/dangerous\\_dogs.html](http://www.hsus.org/pets/issues_affecting_our_pets/dangerous_dogs.html) (last visited Feb. 26, 2006) [hereinafter HSUS Statement]; see also Phillips, *supra* note 15 (placing the number of fatal attacks annually between fifteen and twenty).

35. Sacks et al., *supra* note 31, at 837 (providing statistics for 1997 and 1998).

36. *Id.* at 836. Seventy percent of the approximately twenty-seven people who died as the result of a dog attack during 1997 and 1998 were children. *Id.* at 837.

37. *Id.* (finding that of the canine homicides that occurred during 1997 and 1998, sixty percent of those committed by unrestrained dogs off the owner's property involved more than one dog); see also Kenneth Morgan Phillips, *Dangerous and Vicious Dogs*, DogBiteLaw.com, Feb. 7, 2006, <http://www.dogbitelaw.com/PAGES/danger.htm> (citing a study by the Humane Society of the United States and the Centers for Disease Control that reveals that all canine homicides during 1995 and 1996 that occurred off the owner's property involved more than one dog).

38. Sacks et al., *supra* note 31, at 836. A study conducted of attacks that occurred from May 1975 through April 1980 listed the following breeds as responsible for human deaths: German Shepherd, Husky, Saint Bernard, Bull Terrier, Great Dane, Malamute, Golden Retriever, Boxer, Dachshund, Doberman Pinscher, Collie, Chow Chow, Labrador Retriever, Yorkshire Terrier, and mixed or unknown breeds. *Id.* at 839.

39. *Id.* at 836. Between 1993 and 1996, however, Rottweilers were responsible for almost fifty percent of canine homicides. *Id.*

40. Anderson, *supra* note 21, at 60, 62.

41. Setter, *supra* note 32, at 1. *But see* Eve Adamson, *Tough and Tender*, Dog Fancy, Oct. 2005, at 45-46 (categorizing American Staffordshire Terriers, American Pit Bull Terriers, Staffordshire Bull Terriers, and Bull Terriers as common bull-and-terrier breeds).

42. The American Kennel Club ("AKC") recognizes the American Staffordshire Terrier and the Staffordshire Bull Terrier, while the United Kennel Club ("UKC") recognizes the

two organizations differ,<sup>43</sup> there are some common physical characteristics between the three breeds. These include the appearance of great strength, a compact muscular frame, a broad head with pronounced cheek muscles, and short glossy hair.<sup>44</sup> However, the lack of finite standards results in variations among and within the three breeds,<sup>45</sup> often making it difficult both to determine whether a particular dog should be categorized as a pit bull and to differentiate between pit bulls and other breeds.<sup>46</sup>

The exact origin of pit bulls is uncertain, though it is generally recognized that nineteenth-century England produced the first through a bulldog and terrier cross.<sup>47</sup> The dogs were originally bred for bull-baiting, a sport which pitted one or more dogs against a bull for the entertainment of spectators.<sup>48</sup> When bull-baiting was outlawed, dog fighting emerged as the new spectator sport.<sup>49</sup> In large part due to its fighting history, the pit bull developed an inherent aggression toward other dogs.<sup>50</sup> However, because the human handler had to be in the fighting ring with the dog to hold it in its

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American Pit Bull Terrier and the Staffordshire Bull Terrier. See American Kennel Club, American Kennel Club Breed Lists, [http://www.akc.org/breeds/complete\\_breed\\_list.cfm](http://www.akc.org/breeds/complete_breed_list.cfm) (last visited Feb. 26, 2006); United Kennel Club, UKC Breeds, <http://www.ukcdogs.com/RegBreedGroups.htm> (last visited Feb. 26, 2006). However, many pit bull types are listed with both registries, as different breeds in each. Adamson, *supra* note 41, at 46-47.

43. Neither kennel club provides precise standards for breed conformity. For example, the UKC states that for the American Pit Bull Terrier, "actual weight and height are less important than the correct proportion of weight to height." United Kennel Club, American Pit Bull Terrier Official U.K.C. Breed Standard, <http://www.ukcdogs.com/RegBreedGroups.htm> (last visited Feb. 26, 2006) [hereinafter UKC Standards] (giving no height requirement but stating that the desirable weight for males is between thirty-five and sixty pounds, and for females between thirty and fifty pounds). The AKC similarly states that for the American Staffordshire Terrier, "height and weight should be in proportion." American Kennel Club, American Staffordshire Terrier Breed Standard, [http://www.akc.org/breeds/American\\_staffordshire\\_terrier/index.cfm](http://www.akc.org/breeds/American_staffordshire_terrier/index.cfm) (last visited Feb. 26, 2006) [hereinafter AKC Standards] (giving no weight requirement but stating that a height of eighteen to nineteen inches at the shoulders for males and eighteen inches at the shoulders for females is preferable). Compare the AKC standards for the Bullmastiff, which calls for a weight of 110 to 130 pounds and a height at the withers of twenty-five to twenty-seven inches for males, and a weight of 100 to 120 pounds and a height at the withers of twenty-four to twenty-six inches for females. American Kennel Club, Bullmastiff Breed Standard, <http://www.akc.org/breeds/bullmastiff/index.cfm> (last visited Feb. 26, 2006).

44. AKC Standards, *supra* note 43; UKC Standards, *supra* note 43.

45. For example, the coat may be of any color and pattern, ears may be natural or cropped, and while a black nose is preferred, a red nose is acceptable. AKC Standards, *supra* note 43; UKC Standards, *supra* note 43.

46. See Setter, *supra* note 32, at 1 (noting that more than twenty-five breeds are commonly mistaken to be pit bulls). To experience the difficulty in properly identifying a pit bull, see [www.understand-a-bull.com/Findthebull/findpitbull\\_v3.html](http://www.understand-a-bull.com/Findthebull/findpitbull_v3.html) (last visited Feb. 26, 2006).

47. Adamson, *supra* note 41, at 46.

48. Dawn M. Capp, American Pit Bull Terriers: Fact or Fiction 9 (2004).

49. *Id.* at 10.

50. *Id.* at 11.



starting position and to separate fighting dogs if necessary, aggression towards humans was not tolerated.<sup>51</sup>

Ancestry and strategic breeding have resulted in dogs with unusual strength for their size, a tendency of unwarned and often unprovoked attacks,<sup>52</sup> a “bite-and-hold” fighting tactic,<sup>53</sup> and unwillingness to back down from a fight once commenced.<sup>54</sup> However, the most valued characteristic is gameness, defined as “unflagging courage and determination not to quit, even in the face of extreme pain and injury.”<sup>55</sup> Though these traits often attract criminals and status-seekers to the dogs,<sup>56</sup> search-and-rescue teams and police forces also value the pit bulls’ resilience, as the dogs are capable of enduring long hours engaged in difficult tasks.<sup>57</sup>

In the early part of the twentieth century, pit bulls were considered the epitome of the all-American dog.<sup>58</sup> The first war dog, Stubby, was a pit bull.<sup>59</sup> Pete the Pup from “The Little Rascals” was an American Staffordshire Terrier, one of the three breeds comprising pit bulls.<sup>60</sup> Teddy

51. *Id.*; Adamson, *supra* note 41, at 47. Dogs that exhibited human aggression were typically destroyed. Capp, *supra* note 48, at 85.

52. Unlike other dogs, pit bulls do not growl or bark before attacking. Anderson, *supra* note 21, at 65.

53. Setter, *supra* note 32, at 2. The bite force and jaw strength of pit bulls has stirred much controversy. Some estimate that pit bulls have a bite force of between 1600 and 2000 pounds per square inch (“psi”), an estimate relied on by many courts and commentators. *See, e.g.,* Garcia v. Village of Tijeras, 767 P.2d 355, 359 (N.M. Ct. App. 1988) (noting that pit bulls “have exceptionally strong bites, possibly twice the strength of bites of other dogs” (internal quotation omitted)); State v. Peters, 534 So. 2d 760, 764 (Fla. Dist. Ct. App. 1988) (ordinance in question stated that “the Pit Bull’s massive canine jaws can crush a victim with up to 2000 pounds of pressure per square inch—three times that of a German Shepherd or Doberman Pinscher”); *Beef Eater*, Maxim, Jan. 2006, at 20 (stating that pit bulls’ jaws “can deliver up to 2,000 pounds-per-square inch of flesh-chomping pressure”). *But see* Setter, *supra* note 32, at 2 (citing the American Canine Foundation, which states that “[a]ccording to the current scientific research there is no proof that the Pit Bull can bite harder than any other breed”). Dr. Howard Evans, Professor Emeritus at the College of Veterinary Medicine at Cornell University and the author of the textbook *Anatomy of the Dog*, rejects a related locking jaw myth, stating “there is no anatomical structure that could be a locking [jaw] mechanism in any dog.” *Id.*

54. *See* Anderson, *supra* note 21, at 64 (describing pit bulls as “frighteningly tenacious” with little able to stop their protracted attacks).

55. Capp, *supra* note 48, at 11.

56. Anderson, *supra* note 21, at 66-67 (noting that pit bulls have become a popular status symbol among drug dealers, underground dog fighters, and gang members).

57. For example, the pit bull Dakota is a member of an elite group comprised of the top twenty search-and-rescue dogs in the country. Capp, *supra* note 48, at 57. She has participated in searches for numerous missing persons, including Lacy Peterson, and for debris in the Space Shuttle Columbia disaster. *Id.* at 58. Popsicle, a drug-sniffing pit bull for U.S. Customs, is responsible for the largest narcotics bust ever made at the Hidalgo, Texas, point of entry. *Id.* at 68-69.

58. Mary Randolph, *Dog Law* 12/11 (4th ed. 2001).

59. Capp, *supra* note 48, at 6. Stubby was invited to the White House by two different presidents and personally decorated by General John Pershing. *Id.*

60. Adamson, *supra* note 41, at 47.

Roosevelt kept his pet pit bull in the White House.<sup>61</sup> However, the pit bulls' wholesome image was tarnished in the late 1980s after a series of highly publicized attacks.<sup>62</sup> Extensive media coverage of severe attacks and deaths inflicted by pit bulls pushed public fear of the dogs to public hysteria,<sup>63</sup> and their popularity began to grow among those looking for tough guard or status dogs that could be trained to attack.<sup>64</sup> Pit bulls have become the "current villains of the dog world"<sup>65</sup> and the frequent targets of breed-specific legislation.

### C. Legislative Approaches to the Dog-Bite Epidemic

In an effort to combat the dog-bite epidemic, the majority of states and many municipalities have enacted legislation designed to protect the public from dangerous dogs.<sup>66</sup> Two types of legislation emerged, both of which stir much debate as to the most effective and efficient means of bite prevention: dangerous-dog laws and breed-specific legislation. Dangerous-dog laws determine whether a dog is vicious or dangerous and impose ownership regulations based on the particular dog's prior conduct.<sup>67</sup> In contrast, breed-specific legislation regulates or bans ownership of particular breeds based on a belief that the breed is inherently vicious or dangerous.<sup>68</sup> Breed-specific legislation may be either the primary means of regulating dangerous dogs<sup>69</sup> or supplemental to existing state or local dangerous-dog laws.<sup>70</sup> Though the laws impose ownership regulations based on dissimilar criteria, both have been subject to constitutional attack. The constitutional arguments and several illustrative case summaries are explored below.

#### 1. Dangerous-Dog Laws

More than thirty states, the District of Columbia, and numerous cities have enacted dangerous-dog laws as a means of addressing the dog-bite

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61. Randolph, *supra* note 58, at 12/11.

62. Fumento, *supra* note 10.

63. *Id.*

64. See Swift, *supra* note 8, at 78, 80; *supra* note 56.

65. Randolph, *supra* note 58, at 12/11.

66. See *infra* note 71.

67. See *infra* text accompanying notes 73-78.

68. See *infra* notes 109-12 and accompanying text.

69. See, e.g., South Bend, Ind., Mun. Code art. 4.5, § 5-27 (1996) (prohibiting ownership of pit bulls without licensing the dog as a dangerous animal; the state has no legislation regulating ownership of vicious dogs generally); Topeka, Kan., Code ch. 18, §§ 18-141 to 18-148 (1981) (stating that ownership of a pit bull is prima facie evidence of ownership of a vicious dog; the state has no legislation regulating the ownership of vicious dogs generally).

70. See, e.g., Denver, Colo., Code div. 3, § 8-55 (1989) (pit bull ordinance supplemental to Colorado's dangerous-dog law, Colo. Rev. Stat. § 18-9-204.5 (2004)); Miami-Dade County, Fla., Code art. II, § 5-17 (1989) (pit bull ordinance supplemental to Florida's dangerous-dog law, Fla. Stat. Ann. §§ 767.11-767.12 (West 2005)).

epidemic.<sup>71</sup> These laws seek to reduce the threat dangerous dogs pose to the public by requiring owners of dogs so labeled to abide by statutorily defined precautionary measures.<sup>72</sup> A dangerous or vicious dog is typically defined as one that, without provocation, seriously injures or kills a person lawfully on the owner's premises; thus dangerous-dog laws impose regulations on owners by examining the behavioral history of a particular dog and owner rather than base a determination of dangerousness on breed alone.<sup>73</sup> Though procedural provisions of dangerous-dog laws vary by jurisdiction, some generalizations can be made.

Enforcement of dangerous-dog laws often relies on formal complaints from members of the public, animal control officers, or bite victims to identify dangerous dogs.<sup>74</sup> Generally, the appropriate animal control agency notifies the owner that complaints have been filed against the dog or that the dog has been determined by that agency's independent investigation to be vicious or dangerous.<sup>75</sup> The owner is then provided an

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71. The following states have either dangerous-dog laws or more generic vicious animal laws that serve to regulate vicious dogs: Arizona, Ariz. Rev. Stat. Ann. § 11-1029 (Supp. 2005) (vicious animal law); California, Cal. Food & Agric. Code §§ 31601-03, 31641-46 (West 2001); Colorado, Colo. Rev. Stat. § 18-9-204.5 (2004); Delaware, Del. Code Ann. tit. 7, §§ 1732-40 (2001 & Supp. 2004); District of Columbia, D.C. Code Ann. §§ 8-1901 to 8-1907 (LexisNexis 2004); Florida, Fla. Stat. Ann. §§ 767.11-767.13 (West 2005); Georgia, Ga. Code Ann. §§ 4-8-21 to -30 (1995 & Supp. 2005); Hawaii, Haw. Rev. Stat. §§ 142-74 to -75 (Supp. 2004); Idaho, Idaho Code Ann. § 25-2805 (2000); Illinois, 510 Ill. Comp. Stat. Ann. 5/2.19b, 5/15-15.3 (West 2004); Kentucky, Ky. Rev. Stat. Ann. § 258.235 (LexisNexis Supp. 2005); Louisiana, La. Rev. Stat. Ann. §§ 14:102.14-.18 (2004); Maine, Me. Rev. Stat. Ann. tit. 7, § 3952 (2002 & Supp. 2005); Maryland, Md. Code Ann., Crim. Law § 10-619 (LexisNexis 2002); Massachusetts, Mass. Ann. Laws ch. 140, § 157 (LexisNexis 1995 & Supp. 2005); Michigan, Mich. Comp. Laws Ann. §§ 287.321-323 (West 2003); Minnesota, Minn. Stat. Ann. §§ 347.50-.51 (West 2004); Montana, Mont. Code Ann. § 7-23-2109 (2005); Nebraska, Neb. Rev. Stat. §§ 54-617 to -624 (2004); Nevada, Nev. Rev. Stat. Ann. § 202.500 (LexisNexis 2001); New Hampshire, N.H. Rev. Stat. Ann. §§ 466:31-.31a (Supp. 2005); New Jersey, N.J. Stat. Ann. §§ 4:19-17 to -36 (West 1998 & Supp. 2005); New Mexico, N.M. Stat. Ann. § 77-1-10 (LexisNexis 1978) (vicious animal law); New York, N.Y. Agric. & Mkts. Law §§ 107, 108 (McKinney 2004 & Supp. 2006); North Carolina, N.C. Gen. Stat. §§ 67-4.1 to -4.5 (2003); North Dakota, N.D. Cent. Code § 42-03-01 (1999) (regulating nuisance dogs); Ohio, Ohio Rev. Code Ann. § 955.11 (LexisNexis 2004); Oklahoma, Okla. Stat. Ann. tit. 4, §§ 44-47 (West 2003); Oregon, Or. Rev. Stat. Ann. § 609.095 (West 2003) (regulating nuisance dogs); Pennsylvania, 3 Pa. Cons. Stat. Ann. §§ 459-502-A to -507-A (West 1995 & Supp. 2005); Rhode Island, R.I. Gen. Laws §§ 4-13.1-1 to 4-13.1-15 (Supp. 2005); South Dakota, S.D. Codified Laws §§ 47-3-710 to -770 (2004); Tennessee, Tenn. Code Ann. § 44-17-120 (2000); Texas, Tex. Health & Safety Code Ann. §§ 822.041-.047 (Vernon 2003); Vermont, Vt. Stat. Ann. tit. 20, § 3546 (Supp. 2005) (vicious domestic pet law); Virginia, Va. Code Ann. § 3.1-796.93:1 (Supp. 2005); Washington, Wash. Rev. Code Ann. §§ 16.08.070-100 (West Supp. 2006); West Virginia, W. Va. Code Ann. §§ 19-20-20 to 19-20-21 (LexisNexis 2004); Wyoming, Wyo. Stat. Ann. § 11-31-301 (2005).

72. Randolph, *supra* note 58, at 12/2.

73. *See, e.g.*, Cal. Food & Agric. Code § 31603; N.Y. Agric. & Mkts. Law § 107. Police dogs are often exempt from the definition of dangerous dogs. *See, e.g.*, Cal. Food & Agric. Code § 31609; 510 Ill. Comp. Stat. Ann. 5/15.

74. *See* Randolph, *supra* note 58, at 12/4.

75. *See id.*

opportunity to contest the determination before a judge or public health official.<sup>76</sup> If the judge or official confirms the previous determination, the owner must adhere to statutorily provided safety precautions or risk fines or forfeiture and possible destruction of the dog.<sup>77</sup> In situations involving a serious attack or other unusual circumstances, the judge may order immediate destruction of the dog or removal from city limits.<sup>78</sup>

Though not frequently, dangerous-dog laws have been the subject of constitutional attacks, primarily on the grounds of procedural due process.<sup>79</sup> To fully understand dangerous-dog laws and the states' ability to regulate ownership of dangerous or vicious dogs, however, an examination of the constitutionality of such legislation necessarily begins with the ability of the states to regulate ownership of dogs in general.

a. *State Regulation of Dogs: Sentell v. New Orleans & Carrollton R.R. and Nicchia v. New York*

The seminal case *Sentell v. New Orleans & Carrollton R.R.* established that the states may regulate dogs as a valid exercise of police power.<sup>80</sup> The plaintiff in *Sentell* filed suit to recover the value of his dog, which he alleged had been negligently killed by the defendant railroad company.<sup>81</sup> When the defendant denied negligence, and separately maintained that the plaintiff was not permitted to recover because he had failed to comply with state and local ordinances regulating ownership of dogs,<sup>82</sup> the plaintiff challenged the constitutionality of the state law.<sup>83</sup> The lower court maintained that the city ordinance could not prevent the plaintiff's recovery, that the legislation was an unconstitutional destruction of property rights, and that a law denying dogs protection as property unless listed for taxation was a violation of the plaintiff's right to due process.<sup>84</sup>

The U.S. Supreme Court upheld the constitutionality of the law, finding only an imperfect or qualified property right in dogs.<sup>85</sup> The Court stated

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76. *Id.* at 12/2.

77. *Id.* Those precautions may include prominently posting a "Beware of Dog" sign, keeping the dog in a locked enclosure, purchasing liability insurance, obtaining a special "vicious dog" license, and notifying animal control when the dog is sold or given away. *Id.* at 12/7.

78. *Id.* at 12/2.

79. See *infra* notes 96-108 and accompanying text.

80. *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897).

81. *Id.* at 698.

82. *Id.* The Louisiana law provided that owners could declare a dog as personal property and under the protection of the law only if the dog was placed on the assessment rolls. *Id.* The owner was not permitted to recover "beyond the amount of the value of such dog or dogs, as fixed by himself in the last assessment preceding the killing or injuries complained of." *Id.* at 699. The city ordinance forbade any dog to run at large unless the dog had a tag, which could be obtained from the treasurer for two dollars. *Id.*

83. *Id.* at 699-700.

84. *Id.* at 700.

85. *Id.* at 701.

that dogs, as imperfect or qualified property, have “been considered as holding their lives at the will of the legislature, and properly falling within the police power of the several States.”<sup>86</sup> Perhaps predicting an eventual grant of full property status to dogs, the Court continued,

Even if it were assumed that dogs were property in the fullest sense of the word, they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.<sup>87</sup>

The Court concluded by noting that “[i]t is purely within the discretion of the legislature to say how far dogs shall be recognized as property,”<sup>88</sup> thus implying that it is also within the legislature’s discretion as to how far dogs may be regulated. Although, as the Court predicted, dogs have since been afforded full property status in some circumstances,<sup>89</sup> lower courts frequently rely on the reasoning of the *Sentell* Court to uphold various state and local canine control ordinances, including dangerous-dog laws and breed-specific legislation.<sup>90</sup>

The Supreme Court again addressed the states’ ability to regulate dogs twenty-three years later in *Nicchia v. New York*.<sup>91</sup> The plaintiff was convicted of keeping two dogs without obtaining a license as required by state law.<sup>92</sup> She challenged the law as a violation of the Fourteenth Amendment guarantee of due process by depriving a citizen of the liberty of “owning and harboring a dog without procuring a license from and paying a fee therefore to the [American Society for the Prevention of Cruelty to Animals (“ASPCA”)], a private corporation.”<sup>93</sup> The Court concluded that a state’s power to require an owner to obtain licenses and pay fees fell within the rationale of *Sentell*, and thus did not amount to a deprivation of due process.<sup>94</sup>

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86. *Id.* at 702. The Court also noted that “public interests demand that the worthless [dogs] shall be exterminated.” *Id.*

87. *Id.* at 704.

88. *Id.* at 706.

89. *See, e.g.,* *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003) (holding privately owned dogs as “effects” subject to the protections of the Fourth Amendment).

90. *See* Lynn Marmer, Note, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. Cin. L. Rev. 1067, 1073 (1984) (giving examples of statutes regulating licensing, registration, running at large, and ownership limitations); *see also* *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1241-42 (S.D. Ohio 1989); *Colo. Dog Fanciers, Inc. v. City of Denver*, 820 P.2d 644, 653 (Colo. 1991) (en banc); *Garcia v. Vill. of Tijeras*, 767 P.2d 355, 362 (N.M. Ct. App. 1988).

91. 254 U.S. 228 (1920).

92. *Id.* at 228.

93. *Id.* at 230. The Court noted that the American Society for the Prevention of Cruelty to Animals (“ASPCA”) was incorporated for the purpose of enforcing laws designed to prevent cruelty to animals and was recognized by the legislature as a “valuable and efficient aid toward the enforcement of those laws.” *Id.* That the ASPCA was a private corporation receiving public funds was unobjectionable in light of earlier case law. *Id.*

94. *Id.* at 230-31.

b. *Constitutional Challenges to Dangerous-Dog Laws*

Given the pervasiveness of the *Sentell* Court's ruling that legislation regulating dogs is a valid exercise of the states' police power, and the Court's subsequent ruling in *Nicchia* that such regulations do not amount to a violation of a dog owner's substantive due process, dangerous-dog laws are not frequently challenged on these constitutional grounds. Because they serve a legitimate governmental interest in protecting the public health and welfare, dangerous-dog laws generally also withstand equal protection challenges as a valid exercise of the state's police power.<sup>95</sup> However, questions of procedural due process do arise, and the law may be found constitutionally infirm for failing to provide the owner of a dog labeled vicious or dangerous an opportunity to contest the determination.

For example, the court in *Phillips v. San Luis Obispo County Department of Animal Regulation*<sup>96</sup> found unconstitutional an ordinance permitting the county to destroy a dog without providing the owner notice and an opportunity to contest the dangerousness determination.<sup>97</sup> The dog in the case, a black Labrador, was ordered destroyed after the department received four reports of the dog biting a child.<sup>98</sup> Although the owners requested a hearing concerning the destruction order, the department did not believe the ordinance permitted the owners to appeal the order and granted only a courtesy hearing, at which the destruction order was affirmed.<sup>99</sup> The owners alleged the ordinance was unconstitutional as a violation of the right to due process for failing to provide a noticed hearing.<sup>100</sup> The court agreed that dogs were within the reach of procedural due process constraints, noting that dogs are personal property with economic and personal value.<sup>101</sup> The court concluded that the courtesy hearing did not substitute for due

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95. See, for example, *Emolo v. Department of Animal Care and Regulation*, No. C037620, 2002 WL 1376081 (Cal. Ct. App. June 25, 2002), in which the plaintiff claimed the ordinance violated equal protection by creating a suspect class of owners of vicious dogs. *Id.* at \*6. The plaintiff argued that because dogs found to be vicious could be ordered either destroyed or strictly regulated, the ordinance created two similarly situated classes. *Id.* at \*7. The court rejected the argument, stating that the hearing officer was allowed to determine whether a dog deemed vicious was so dangerous that it would always pose a threat to the public or whether, with training and additional measures of control, it posed a lesser degree of public danger. *Id.* As such, the court found that the two groups of dogs "[did] not pose the same risk of harm to the public and [were therefore] not similarly situated with respect to the legitimate purpose of the law." *Id.*

96. 228 Cal. Rptr. 101 (Ct. App. 1986).

97. *Id.* at 102.

98. *Id.*

99. *Id.*

100. *Id.* at 103.

101. *Id.* Specifically, the court stated that "[a]side from their economic value . . . it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt." *Id.* (internal quotations omitted).

process<sup>102</sup> and found that “due process requires that a dog owner have an opportunity to be heard prior to the destruction of his dog unless there is a need for prompt government action.”<sup>103</sup>

However, dangerous-dog laws need only provide an owner with a reasonable opportunity to be heard to withstand a constitutional challenge, as enunciated by the court in *Ridino v. County of Santa Cruz*.<sup>104</sup> The *Ridino* court rejected the plaintiff’s complaint that her due process rights were violated by the adjudicatory procedure the dangerous-dog law provided her.<sup>105</sup> Although the plaintiff was permitted to appeal her dog’s viciousness determination, the hearing commission did not allow her to make evidentiary objections and her attorney could not cross-examine witnesses until the defendant’s case in chief and the Commission’s witness examination was complete.<sup>106</sup> The court observed that though the hearing did not follow courtroom procedures, due process requirements are flexible and require only a “‘reasonable’ opportunity to be heard.”<sup>107</sup> Concluding that the plaintiff was able to call, ask questions of, and cross-examine witnesses, the court found that the plaintiff had ample opportunity to contest the dangerousness determination and thus that her due process rights had not been violated.<sup>108</sup>

## 2. Breed-Specific Legislation

Breed-specific legislation regulates or bans ownership of particular breeds,<sup>109</sup> typically providing that ownership of a target breed is prima facie evidence of ownership of a vicious or dangerous dog.<sup>110</sup> Unlike dangerous-dog laws, breed-specific legislation does not base the determination of dangerousness on any prior conduct; rather, all dogs of a target breed are subject to regulation based solely on membership in that breed.<sup>111</sup> Breed-based enactments generally follow on the heels of a highly publicized serious or fatal dog attack by a particular breed and are proposed by the legislature in response to public outcry and fear.<sup>112</sup>

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102. *Id.* at 106.

103. *Id.* at 103. The court stated that prompt government action would be needed in situations where, for example, the dog was vicious or rabid. *Id.* at 105.

104. No. H025549, 2003 WL 22384698 (Cal. Ct. App. Oct 20, 2003).

105. *Id.* at \*6.

106. *Id.*

107. *Id.* (citation omitted).

108. *Id.*

109. Phillips, *supra* note 29.

110. *See, e.g.*, Ohio Rev. Code Ann. § 955.11(A)(4)(a)(iii) (LexisNexis 2004) (“The ownership, keeping, or harboring of [a pit bull] shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog.”).

111. Phillips, *supra* note 29.

112. *See* Norma Bennett Woolf, *Dogs and the Law*, Dog Owner’s Guide, <http://www.canismajor.com/dog/laws1.html> (last visited Feb. 26, 2006); *see, e.g.*, Hinton, *supra* note 7 (reporting a pit bull ban proposed after a three-year-old boy lost his arm to a neighbor’s four pit bulls); Weise, *supra* note 9 (discussing a bill proposed by the California

Currently, Ohio has the only breed-specific state law, imposing dangerous-dog regulations on all pit bulls.<sup>113</sup> Though most states permit local legislatures to regulate dogs in any manner deemed necessary to protect the public, resulting in breed-specific enactments in several cities,<sup>114</sup> eleven states have expressly forbid breed-based local regulations or bans.<sup>115</sup> However, a recent court decision in favor of the City of Denver, which successfully challenged the Colorado state law prohibiting breed-specific legislation, may call into question the ability of a state to proscribe breed-based bans.<sup>116</sup>

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legislature that would permit breeding restrictions on pit bulls following a fatal attack on a twelve-year old boy); Kory A. Nelson, *Denver's Pit Bull Ordinance: A Review of Its History and Judicial Rulings* (Apr. 15, 2005), [http://www.denvergov.org/City\\_Attorney/template319853.asp](http://www.denvergov.org/City_Attorney/template319853.asp) (noting increased community support for pit bull regulations after a fifty-eight-year old reverend was attacked by a pit bull).

113. Ohio Rev. Code Ann. § 955.11(A)(4)(a)(iii) (defining a vicious dog as one that, inter alia, "belongs to a breed that is commonly known as a pit bull dog").

114. There has been an estimated fifty percent increase in the number of communities that have attempted to enact some type of breed-specific legislation over the past several years. Heather K. Pratt, Comment, *Canine Profiling: Does Breed-Specific Legislation Take a Bite Out of Canine Crime?*, 108 Penn. St. L. Rev. 855, 871 (2004) (citing Mike Pulfer & Dave Ferman, *Clamping Down on Vicious Dogs*, Cincinnati Enquirer, Feb. 16, 2001, available at [http://www.enquirer.com/editions/2001/02/16/tem\\_clamping\\_down\\_on.html](http://www.enquirer.com/editions/2001/02/16/tem_clamping_down_on.html)).

115. See Colo. Rev. Stat. § 18-9-204.5(5) (2004); Fla. Stat. Ann. § 767.14 (West 2005); 510 Ill. Comp. Stat. Ann. 5/24 (West 2004); Me. Rev. Stat. Ann. tit. 7, § 3950 (2002 & Supp. 2005); Minn. Stat. Ann. § 347.51 (West 2004); N.J. Stat. Ann. § 4:19-36 (West 1998); N.Y. Agric. & Mkts. Law § 107 (McKinney 2004); Okla. Stat. Ann. tit. 4, § 46(B) (West 2003); 3 Pa. Cons. Stat. Ann. § 459-507-A(b) (West 1995); Tex. Health & Safety Code Ann. § 822.047 (Vernon 2003); Va. Code Ann. § 3.1-796.93:1(2) (1994 & Supp. 2005). Until recently, California also prohibited local governments from enacting breed-specific regulations. Cal. Food & Agric. Code § 31683 (West 2001) (repealed 2005). The state legislature introduced S.B. 861, which permits local governments to require sterilization of potentially dangerous breeds, such as pit bulls and pit bull mixes, after the fatal mauling of a twelve-year-old San Francisco boy by pit bulls. S.B. 861, 2005-06 Leg., 2005-06 Reg. Sess. (Cal. 2005); *California OKs Forced Sterilization of Pit Bulls*, MSNBC.com, Oct. 7, 2005, <http://msnbc.msn.com/id/9624136>. On October 7, 2005, California Governor Arnold Schwarzenegger signed that bill into law. *Id.* Some state laws, such as Florida's, permit cities with breed-specific legislation in force at the time of enactment of the state statute to retain the local law. Fla. Stat. Ann. § 767.14.

116. A 2004 Colorado state law proscribing breed-specific enactments by local governments would have invalidated Denver's 1989 law that prohibited ownership and harboring of pit bulls in the City and County of Denver. Nelson, *supra* note 112. Denver challenged the state law and won a judgment that it was an unconstitutional violation of local control. *Id.* The State challenged Denver's local law as unconstitutional, claiming new facts and scientific developments had undermined the rationality of breed-specific legislation. *Id.* On April 7, 2005, a district court judge ruled that the State had failed to provide any new evidence to undermine the 1990 findings regarding differences between pit bulls and other dogs and upheld Denver's law as constitutional. *Id.*; see *Colo. Dog Fanciers, Inc. v. City of Denver*, 820 P.2d 644 (Colo. 1991) (en banc) (making the original finding as to differences between pit bulls and other breeds).



Like dangerous-dog laws, breed-specific legislation varies by jurisdiction, with the most stringent ordinances imposing a breed ban.<sup>117</sup> Despite this variance, the procedure by which a particular dog is determined to fall within the regulated breed is generally similar. An owner may challenge the applicability of the law to a particular dog, typically by presenting evidence that the dog is not a member of the target breed.<sup>118</sup> With breed-based bans, the owner also may prevent the dog's destruction by promising to permanently remove the dog from the jurisdictional limits of the law.<sup>119</sup> If a dog is determined to be a member of the target breed, the owner must abide by statutorily imposed safety precautions or risk fines or forfeiture and possible destruction of the dog.<sup>120</sup>

Despite consistent judicial affirmation of the states' ability to regulate dog ownership generally, breed-specific legislation is often challenged as constitutionally infirm for its one important distinction from dangerous-dog laws: It singles out one breed, and thus the owners of one breed, for regulation. The most common challenges allege violations of equal protection of the laws and due process, as guaranteed by the Fourteenth Amendment. Except in rare circumstances, however, the constitutionality of breed-specific laws has been upheld.

#### a. *Equal Protection Challenges*

The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>121</sup> In other words, laws must treat all individuals in similar conditions and circumstances in the same manner.<sup>122</sup> Though some legislative classifications are permissible, those classifications must be reasonably related to the purpose of the legislation.<sup>123</sup> Regulations that do not classify

117. See, e.g., Irondale, Ala., Code Ordin. Div. 8, § 3-90 (1997) (prohibiting pit bull ownership); Miami-Dade County, Fla., Code art. II, § 5-17.6 (1989) (banning ownership of any pit bulls new to the county after the provision's enactment); Topeka, Kan., Code ch. 18, § 18-144 (1981) (prohibiting pit bull ownership).

118. See, e.g., Denver, Colo., Code div. 3, § 8-55 (1989) (permitting an owner disputing the classification of a dog as a pit bull to "file a written petition with the manager for a hearing concerning such classification," after which hearing a dog not found to be a pit bull is released to the owner).

119. See, e.g., *id.* ("If the dog is found to be a pit bull, it shall be destroyed, unless the owner produces evidence deemed sufficient by the manager that the pit bull is to be permanently taken out of Denver . . .").

120. See, e.g., Irondale, Ala., Code Ordin. Div. 8, § 3-90 (stating that failure to comply with the ban will result in impoundment of the dog and immediate removal of the dog from the city; violators will be fined between \$200 and \$500); Miami-Dade County, Fla., Code art. II, § 5-17.6 (stating that acquisition of a new pit bull after the effective date of the ban may result in the destruction of the dog).

121. U.S. Const. amend. XIV, § 1.

122. See Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 601 (14th ed. 2001).

123. *Id.* at 601-02.

based on suspect categories and do not affect fundamental rights or interests are subject to minimal scrutiny, under which the essential question is whether there is a rational basis for the classification and a reasonable relationship between the classification and a legitimate governmental purpose.<sup>124</sup>

Breed-specific legislation opponents argue that a regulation or ban targeting only one or a few breeds violates owners' constitutional right to equal protection of the laws because the regulation unfairly singles out owners of a particular breed of dog.<sup>125</sup> Courts have uniformly held that minimal scrutiny applies in such cases because dog owners in general and pit bull owners specifically do not comprise a suspect class, nor does dog or pit bull ownership implicate a fundamental right or interest.<sup>126</sup> Further, most courts have held that a rational basis exists for classifying pit bulls alone as dangerous dogs. As the ordinances are typically enacted following a serious or fatal pit bull attack, pit bulls present or appear to present a greater public threat than other breeds at the time of the breed-based enactment.<sup>127</sup> As a result, courts agree that the classification bears a rational relationship to the legitimate governmental interest in regulating dangerous dogs for the public health and welfare.<sup>128</sup>

The court in *State v. Peters*<sup>129</sup> was among the early courts to address an equal protection challenge to breed-specific legislation. The ordinance at issue required pit bull owners to carry liability insurance, register pit bulls with the city, and confine the dogs indoors or in a locked pen.<sup>130</sup> The plaintiff pit bull owners claimed the ordinance violated their equal protection rights because it "irrationally differentiate[d] between owners of pit bulls and owners of other breeds of dogs."<sup>131</sup> In rejecting the claim, the court stated that "the constitutional guarantee of equal protection of the law does not guarantee that all dog owners will be treated alike; at most, the only guarantee is that all owners of defined pit bulls will be treated alike."<sup>132</sup>

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124. *See id.*

125. *See, e.g., Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1245 (S.D. Ohio 1989); *Colo. Dog Fanciers v. City of Denver*, 820 P.2d 644, 652 (Colo. 1991) (en banc); *State v. Peters*, 534 So. 2d 760, 763 (Fla. Dist. Ct. App. 1988).

126. *See, e.g., Vanater*, 717 F. Supp. at 1244; *Colo. Dog Fanciers*, 820 P.2d at 652; *Peters*, 534 So. 2d at 763-64.

127. *See, e.g., Vanater*, 717 F. Supp. at 1239 (noting that the ordinance was enacted after two attacks by pit bulls in neighboring cities); *Colo. Dog Fanciers*, 820 P.2d at 652 (relying on a trial court finding that pit bull attacks occur more often, are more severe, and are more likely to result in death than attacks by other dogs); *Peters*, 534 So. 2d at 764-65 (relying on ordinance language stating that pit bulls "have a greater propensity to bite humans than all other breeds").

128. *See, e.g., Vanater*, 717 F. Supp. at 1245-46; *Colo. Dog Fanciers*, 820 P.2d at 652; *Peters*, 534 So. 2d at 764.

129. 534 So. 2d 760.

130. *Id.* at 762.

131. *Id.* at 763.

132. *Id.*

Despite consistent court rulings that the classification of pit bulls as dangerous dogs under breed-specific laws bears a rational relationship to the legitimate governmental interest in public safety and welfare, opponents of breed-based regulations and bans argue that the classification itself is constitutionally infirm.<sup>133</sup> This argument is based on the notion that despite the existence of a rational relationship between the classification and a legitimate governmental interest, the classification must itself be rational to withstand a constitutional challenge.<sup>134</sup> To be rational, the classification must be neither overbroad nor underinclusive.<sup>135</sup> Under such analyses, the critical issue is to what degree the legislature should be permitted to generalize or to deal with a problem one step at a time and “thus to fall short of perfect congruence.”<sup>136</sup>

### i. Overbreadth Challenges

An overbreadth challenge to breed-specific legislation indicates that the legislature impermissibly overgeneralized by subjecting all members of the target breed to regulation regardless of prior behavior; that is, the breed-specific law is unconstitutional because it reaches both dangerous and docile members of the target breed.<sup>137</sup> However, as the Supreme Court stated in *Dandridge v. Williams*, “[i]f the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.”<sup>138</sup> As the following cases demonstrate, most courts have rejected overbreadth arguments on this basis, finding that the classification bears a rational relationship to the public safety and welfare.<sup>139</sup>

Under the vicious dog ordinance at issue in *Greenwood v. City of North Salt Lake*,<sup>140</sup> pit bulls were subject to regulations as inherently vicious animals.<sup>141</sup> Pit bull owners claimed the ordinance was overinclusive because it categorically regulated pit bulls “despite substantial evidence that

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133. See, e.g., *infra* notes 140-48, 152-55 and accompanying text.

134. See Sullivan & Gunther, *supra* note 122, at 605.

135. See *id.* at 606-08 (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949)).

136. *Id.* at 608.

137. See Russell G. Donaldson, Annotation, *Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as “Pit Bulls” or “Bull Terriers”*, 80 A.L.R. 4th 70, 94 (1990).

138. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal quotations and citation omitted), *cited in* *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1243 (S.D. Ohio 1989). Other jurisdictions have rejected the challenge by concluding that the doctrine does not apply outside the First Amendment. See, e.g., *State v. Robinson*, 541 N.E.2d 1092, 1097 (Ohio Ct. App. 1989) (“Generally, the overbreadth doctrine applies only if the legislation is applicable to conduct protected by the First Amendment.”).

139. See *supra* text accompanying notes 124-28.

140. 817 P.2d 816 (Utah 1991).

141. *Id.* at 821.

viciousness is not a specific breed characteristic.”<sup>142</sup> Though the court accepted that viciousness was not inherent in pit bulls, it nonetheless upheld the constitutionality of the ordinance.<sup>143</sup> Noting that the city had experienced a higher number of bites and attacks by pit bulls than by other breeds, the court found that the plaintiffs failed to demonstrate “that the classification does not further the objectives of the ordinance.”<sup>144</sup>

The court in *Garcia v. Village of Tijeras*<sup>145</sup> touched on the issue of overbreadth in addressing an argument that a pit bull ban constituted an uncompensated taking of private property.<sup>146</sup> The court determined that, considering the nature of the threat posed by a disproportionately high pit bull population and the number of recent attacks, the local legislature could have properly determined that a ban on all pit bulls was necessary for public safety.<sup>147</sup> The court concluded, “That a harmless or inoffensive American Pit Bull Terrier may be banned in order to abate the threat to safety of the [public] presented by other American Pit Bull Terriers does not render the ordinance invalid.”<sup>148</sup>

## ii. Under-inclusiveness Challenges

Opponents to breed-specific legislation also challenge the laws as underinclusive, arguing that in regulating only pit bulls and not all vicious dogs or even other aggressive breeds, the legislature took an impermissibly small step toward remedying the public threat posed by dangerous dogs.<sup>149</sup> However, the Supreme Court has stated that the legislature is permitted to provide remedies in a piecemeal fashion:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.<sup>150</sup>

In other words, a law will not be deemed unconstitutional merely because it contains classifications that are under-inclusive.<sup>151</sup> The court in *Vanater*

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142. *Id.* (internal quotations omitted).

143. *Id.*

144. *Id.*

145. 767 P.2d 355 (N.M. Ct. App. 1988).

146. *Id.* at 361-62.

147. *Id.* at 362-63.

148. *Id.* at 363.

149. See Donaldson, *supra* note 137, at 95-98.

150. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (citations omitted), *cited in* *State v. Peters*, 534 So. 2d 760, 763 (Fla. Dist. Ct. App. 1988).

151. See Sullivan & Gunther, *supra* note 122, at 605.

*v. Village of South Point*<sup>152</sup> relied on *Dandridge v. Williams* to uphold the constitutionality of a pit bull ban that defined a pit bull as a Staffordshire Bull Terrier, an American Staffordshire Terrier, or any mix thereof.<sup>153</sup> The plaintiffs argued that the ordinance was under-inclusive for failing to include other breeds “which could be grouped into the dangerous Pit Bull category.”<sup>154</sup> The court found that the village could enact regulatory measures against only pit bulls in light of the type of threat those dogs posed to the community, and failure to name or ban other potentially dangerous breeds did not render the law unconstitutional.<sup>155</sup>

#### b. *Due Process*

In addition to the right to equal protection of the laws, the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>156</sup> Due process claims have two forms: substantive due process and procedural due process. Substantive due process examines the substance of the law, while procedural due process evaluates the manner in which the law is administered. Violations of both have been raised in challenges to breed-specific legislation.

##### i. Substantive Due Process Challenges

The Fifth and Fourteenth Amendments require that laws regulating dogs bear a rational relationship to a legitimate government interest or goal,<sup>157</sup> though legislative enactments are entitled to a strong presumption of constitutionality.<sup>158</sup> Substantive due process challenges to breed-specific legislation are based on an argument that the breed-based regulation or ban is not rationally related to a legitimate government interest in the protection and safety of the public.<sup>159</sup> However, these challenges are often easily dismissed.<sup>160</sup> Pit bulls have been responsible for a disproportionate number of serious and fatal attacks on humans,<sup>161</sup> and breed-specific enactments generally follow a highly publicized or especially egregious attack.<sup>162</sup> Courts have had little difficulty determining that the breed-based legislative

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152. 717 F. Supp. 1236 (S.D. Ohio 1989).

153. *Id.* at 1239.

154. *Id.* at 1245.

155. *Id.* at 1245-46.

156. U.S. Const. amend. XIV, § 1.

157. See Donaldson, *supra* note 137, at 78-80.

158. See McGowan v. Maryland, 366 U.S. 420 (1961).

159. See, e.g., Garcia v. Vill. of Tijeras, 767 P.2d 355, 358 (N.M. Ct. App. 1988). The plaintiffs in *Garcia* did not dispute that public safety was a legitimate government interest, only that the pit bull ban was not rationally related to that interest. *Id.*

160. Marmer, *supra* note 90, at 1076 (noting that “the response by the legislators to the perceived threat of danger was not clearly unreasonable”).

161. See *supra* Part I.A.

162. See *supra* note 112 and accompanying text.

response to the attack is rationally related to the legitimate government goal of public safety.<sup>163</sup>

The Supreme Court of Kansas employed precisely that reasoning when it rejected the plaintiffs' substantive due process claim in *Hearn v. City of Overland Park*.<sup>164</sup> The plaintiffs challenged an ordinance that required all pit bull owners to abide by dangerous-dog regulations.<sup>165</sup> The court noted initially that "[d]ebatable questions as to reasonableness are not for the courts but for the legislature."<sup>166</sup> Based on trial testimony that pit bulls are more aggressive and destructive and had attacked and killed humans more frequently than other breeds, the court found substantial evidence to support the conclusion that pit bulls represented a "unique hazard to the public safety" and thus held that the regulation was rationally related to its purpose.<sup>167</sup>

## ii. Procedural Due Process Challenges

The void for vagueness doctrine, which arises under a procedural due process analysis, is perhaps the most commonly invoked and controversial challenge to breed-specific legislation. Procedural due process requires that the law in question provide adequate notice to the public of the regulated or prohibited conduct.<sup>168</sup> Specifically, the ordinance must define the proscribed activity with sufficient definiteness that ordinary persons can understand what conduct is prohibited.<sup>169</sup> Laws that fail to provide adequate notice or that encourage arbitrary enforcement by the state are unconstitutionally vague and thus a violation of due process rights.<sup>170</sup>

In breed-specific legislation cases, the challenge is in reference to the statutory definition of a pit bull. Opponents may note that there is no such breed as a pit bull<sup>171</sup> and that the statute fails to adequately define the breeds included within the classification and thus subject to the regulation.<sup>172</sup> Like equal protection and substantive due process

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163. Julie A. Thorne, Note, *If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?*, 39 Syracuse L. Rev. 1445, 1451 (1988); see, e.g., *Singer v. City of Cincinnati*, 566 N.E.2d 190, 192 (Ohio Ct. App. 1990); *Garcia*, 767 P.2d at 360.

164. 772 P.2d 758 (Kan. 1989).

165. *Id.* at 759.

166. *Id.* at 764-65 (citation omitted).

167. *Id.* at 765.

168. Sullivan & Gunther, *supra* note 122, at 1299.

169. *Id.*

170. See *id.*

171. See, e.g., *Am. Dog Owners Ass'n v. Dade County, Fla.*, 728 F. Supp. 1533, 1536 (S.D. Fla. 1989) (addressing plaintiffs' argument there is no such breed as a pit bull); *accord State v. Anderson*, 566 N.E.2d 1224, 1227 (Ohio 1991) (addressing the plaintiff's contention that "there is so much confusion and disagreement as to what constitutes a pit bull dog that an ordinary dog owner would not know whether he or she is required to comply with the statute").

172. See, e.g., *State v. Peters*, 534 So. 2d 760, 766 (Fla. Dist. Ct. App. 1988) (addressing the argument that, inter alia, the law contains alternative and inconsistent definitions of a pit

challenges, procedural due process arguments rarely succeed. The claims may be rejected by courts on a number of grounds, such as the inclusion of a sufficient description in the ordinance to notify owners of the regulated breed,<sup>173</sup> likelihood that owners know the type of dog they own,<sup>174</sup> or that application of the “common use and meaning” of a pit bull should put owners on notice.<sup>175</sup> Vagueness claims based on a failure to include a statutory definition of a pit bull have met with limited success, however, as the following two cases demonstrate.

The court in *American Dog Owners Ass’n v. City of Lynn*<sup>176</sup> evaluated for unconstitutional vagueness an ordinance regulating ownership of pit bulls.<sup>177</sup> The ordinance failed to define pit bulls by physical description or by reference to specific breeds.<sup>178</sup> The court accepted the findings of the trial judge that “there is no scientific means, by blood, enzyme, or otherwise, to determine if a dog is a particular breed or any mixture thereof.”<sup>179</sup> The court was particularly troubled that the ordinance seemed to permit arbitrary and subjective enforcement based on a dog’s appearance, stating,

[T]here may . . . be some dogs which, because of registration, known parentage or close conformance in appearance to commonly accepted standards representative of “Pit Bull,” would be “commonly understood” to be “Pit Bulls” . . . . [H]owever, . . . some dogs might appear to be “Pit Bulls” yet belong to a breed “commonly understood” *not* to be “Pit Bulls,” and that some dogs, “commonly understood” by the owner or dog

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bull); *State v. Robinson*, 541 N.E.2d 1092, 1094 (Ohio Ct. App. 1989) (addressing the argument that the statute is void for vagueness because it fails to provide any definition of a pit bull).

173. *See, e.g., Am. Dog Owners Ass’n v. City of Yakima*, 777 P.2d 1046, 1048 (Wash. 1989) (en banc) (finding an ordinance that listed specific breeds sufficient because it referred to detailed professional standards); *Dog Fed’n of Wis. v. City of S. Milwaukee*, 504 N.W.2d 375, 379 (Wis. Ct. App. 1993) (finding reference to specific breeds sufficient to defeat a vagueness challenge).

174. *See, e.g., Dade County*, 728 F. Supp. at 1539-40 (stating that most dog owners know the breed of their dog; additionally, because there is some breed of dog commonly referred to as a pit bull, “the law affords fair warning of what is proscribed”).

175. *See, e.g., City of Pagedale v. Murphy*, 142 S.W.3d 775, 779 (Mo. Ct. App. 2004) (stating that although the ordinance does not provide a definition of a pit bull, dogs have distinct physical and behavioral characteristics and that there is general knowledge and information available to dog owners sufficient to provide notice of whether a particular dog is a pit bull); *State v. Anderson*, 566 N.E.2d 1224, 1228 (Ohio 1991) (same).

176. 533 N.E.2d 642 (Mass. 1989).

177. The case involved a series of four ordinances, the first three of which were challenged as unconstitutionally vague. *Id.* at 645. The fourth ordinance, which voided the first three, was not in effect when the complaint was filed and thus the question of its constitutionality was not before the court. *Id.* However, the court made some observations regarding the fourth ordinance “to conserve judicial resources and to guide future conduct of the parties.” *Id.*

178. *Id.* at 645 n.8.

179. *Id.* at 646.

registry to be a breed "known as Pit Bull" might not appear to be "Pit Bulls" . . . .<sup>180</sup>

Because the ordinance left dog owners to guess what physical characteristics of a dog were proscribed, the court concluded that the ordinance appeared to be unconstitutionally vague.<sup>181</sup>

The court in *American Dog Owners Ass'n v. City of Des Moines*<sup>182</sup> was similarly concerned by an ordinance regulating pit bull mixes and dogs that have "the appearance and characteristics of being predominately" of the statutorily referenced pit bull breeds.<sup>183</sup> Although the court found that the part of the ordinance which referenced specific pit bull breeds provided sufficient notice to withstand a vagueness challenge, it severed that part regulating pit bull mixes and dogs with a pit-bull-like appearance.<sup>184</sup> Stating that the language of the ordinance permitted "subjective determinations based on . . . unknown standards," the court held that the unacceptable risk of "arbitrary and discriminatory" enforcement violated owners' due process.<sup>185</sup>

Having examined the need for legislation designed to combat the dog-bite epidemic and protect the public from dangerous dogs, as well as the constitutionality of dangerous-dog laws and breed-specific legislation, this Note turns to common concerns and criticisms of each type of law. Part II also examines recent laws proposed by all levels of government to supplement existing dangerous-dog regulations.

## II. PRACTICAL EVALUATIONS OF BREED-SPECIFIC LEGISLATION AND DANGEROUS-DOG LAWS

Despite numerous constitutional challenges to dangerous-dog laws and breed-specific legislation, courts have almost uniformly upheld these laws. However, constitutionality does not determine a law's efficacy, efficiency, and fairness. Regardless of the legality of a particular law, the law may not achieve the desired result because it is impracticable for its purpose. Indeed, many of the criticisms and concerns regarding laws enacted to combat the dog-bite epidemic by regulating dangerous-dogs are directed at the practicality of the regulations. Part II.A examines these common concerns and criticisms inherent in breed-specific legislation, while Part II.B summarizes the problems and weaknesses found in dangerous-dog laws. Finally, Part II.C introduces recent legislative enactments and

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180. *Id.*

181. *Id.* at 646-47. Despite this conclusion, the ordinance was not struck down by the court, which dismissed the case as moot. *Id.* at 647.

182. 469 N.W.2d 416 (Iowa 1991).

183. *Id.* at 417. The statute referenced Staffordshire Terriers, American Pit Bull Terriers, and American Staffordshire Terriers. *Id.* at 417.

184. *Id.* at 418.

185. *Id.*



proposals which supplement existing laws by further regulating dangerous dogs and imposing criminal liability for irresponsible or harmful ownership.

### A. Breed-Specific Legislation

Although courts rarely find breed-specific enactments constitutionally infirm, state legislatures more frequently find such laws practically ineffective and prohibitively inefficient. In addition, opponents raise a number of criticisms and concerns regarding breed-specific legislation not reflected in legal challenges to the laws. The aspects of breed-specific enactments examined most frequently by legislatures and critics are statistical evidence supporting the laws, the impact of the laws on public safety, enforcement costs, and the effect of the laws on the target breed. These factors are examined below.

#### 1. Statistical Evidence

Because statistics indicate that all breeds bite, critics of breed-based ordinances argue that legislation which targets one or even a few breeds may not reduce the number of dog bites or serious attacks.<sup>186</sup> Breed is not indicative of human aggression; rather, it is only one factor to be considered in an evaluation of a dog's biting tendency.<sup>187</sup> Several medical studies do not include breed as a relevant factor in biting propensity, instead listing heredity, sex, early experience, socialization and training, health, reproductive status, quality of ownership and supervision, and victim behavior.<sup>188</sup> Despite legislation singling out pit bulls as human aggressive, a study cited by the Prince George's County, Maryland, Vicious Animal Legislation Task Force found that between 1988 and 1993, pit bulls typically ranked no higher than fifth among breeds most responsible for severe bites.<sup>189</sup>

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186. Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 Animal L. 313, 326 (2004); Sacks et al., *supra* note 31, at 836; Karyn Grey, Note, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 Nova L. Rev. 415, 447 (2003); Pratt, *supra* note 114, at 878; Phillips, *supra* note 15; see Setter, *supra* note 32, at 5. For an example of bite propensity irrespective of breed, see Elizabeth Bishop, *Police Officer Suffers Bites in Chihuahua Attack*, News10.com, Dec. 30, 2005, <http://www.news10.net/storyfull2.aspx?storyid=15077> (reporting that a police officer, attacked by five Chihuahuas, was treated at a hospital for bites inflicted mostly around the ankles).

187. Rebecca Simmons, *Pooch Prejudice: Why Breed Bans Aren't the Answer*, HSUS.org, June 3, 2005, [http://www.hsus.org/pets/pets\\_related\\_news\\_and\\_events/pooch\\_prejudice.html](http://www.hsus.org/pets/pets_related_news_and_events/pooch_prejudice.html).

188. *Nonfatal Dog Bites*, *supra* note 17, at 608; Sacks et al., *supra* note 31, at 839; see also Opinion, *Pit Bull Ban Barks Up Wrong Tree*, Wis. State J., July 24, 2005, at B3, available at 2005 WLNR 11702608 ("Most of the factors contributing to dog bites are related to the level of responsibility exercised by dog owners." (quoting a study published in the medical journal *Pediatrics*)).

189. Vicious Animal Legislation Task Force, Report of the Vicious Animal Legislation Task Force, at Attachment J (2003) [hereinafter Task Force Report]. 1992 was the only year

However, fatal attacks on humans do appear to be a breed-specific problem.<sup>190</sup> From 1979 to 1996, dog attacks resulted in more than 300 human fatalities.<sup>191</sup> Though more than twenty-five breeds were involved in those fatalities, pit bulls and Rottweilers were responsible for a disproportionate number.<sup>192</sup> Between 1997 and 1998, for instance, pit bulls and Rottweilers jointly accounted for sixty-seven percent of canine homicides, though it is doubtful that they accounted for a comparable percentage of the dog population during the same time period.<sup>193</sup>

Although pit bulls are implicated in a disproportionate number of serious and fatal attacks, critics contend that these statistics are incorrect and misleading for two reasons. First, statistics tend to combine bites or fatalities by the three breeds comprising the pit bull category into a single group rather than separate the incidents by specific breed.<sup>194</sup> Additionally, those statistics are generally derived from subjective determinations of the attacking dog's breed, which, when identity is uncertain, may be ascribed to breeds with an aggressive reputation.<sup>195</sup> So while statistics may indicate that pit bulls are responsible for a given number of bites, the bites could have been inflicted by any combination of the three breeds, pit-bull dominant mixes, or one of the more than twenty-five breeds commonly mistaken for a pit bull.<sup>196</sup>

Second, statistics may not accurately convey the danger posed by a particular breed because of the "floating numerator" problem.<sup>197</sup> Ideally, bite rates could quantify the relative dangerousness of certain breeds by

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that pit bulls ranked higher than fifth, at second, and were then outranked by Cocker Spaniels. *Id.*

190. Sacks et al., *supra* note 31, at 836.

191. *Id.*

192. *Id.* at 837. Between 1981 and 1992, for example, pit bulls were responsible for approximately one-third of canine homicides; between 1993 and 1998, Rottweilers were the most commonly reported breed involved in fatal attacks. *Id.*

193. *Id.* at 839.

194. Setter, *supra* note 32, at 1.

195. Sacks et al., *supra* note 31, at 838; *see also* Phillips, *supra* note 29 (stating that "victims will name the type of dog that currently is on people's minds as being the dangerous dog"). Many attacks are falsely reported—either by the victim or the media—as pit bull attacks. *See, e.g., Breed Read*, Pulse24.com, Nov. 26, 2004, [http://www.pulse24.com/News/Top\\_Story/20041126-014/page.asp](http://www.pulse24.com/News/Top_Story/20041126-014/page.asp) (reporting that although the dog that mauled a boy was originally reported as a pit bull, the Humane Society determined the dog to be a mix of Whippet, Great Dane, and Dalmatian); Wil Cruz & Pete Bowles, *Pit Bull Mauls 3-Year-Old's Face*, NYNewsday.com, Feb. 6, 2004, <http://www.understand-a-bull.com/BSL/MistakenIdentity/Bronx%20PitBulltitleBoxer%20attackstory.pdf> (reporting in the headline that a pit bull was responsible for an attack, but then revealing in the story that a Boxer mauled the victim).

196. Setter, *supra* note 32, at 1.

197. Phillips, *supra* note 29. The numerator, number of bites, is said to float because the relevant denominator data, the total number of a particular breed in the general dog population and the amount of human interaction to which a dog is exposed, is unavailable. *Id.*; *see also* Sacks et al., *supra* note 31, at 838.

comparing bites to breed.<sup>198</sup> In other words, the numerator would be the number of dog bites or canine homicides per breed and the denominator the total number of the breed in the general canine population.<sup>199</sup> As a 2000 study stated, “[ten] fatal attacks by Breed X relative to a population of 10,000 X’s (1/1,000) implies a greater risk than 100 attacks by Breed Y relative to a population of 1,000,000 Y’s (0.1/1,000).”<sup>200</sup> However, many dogs are unregistered or unlicensed, making it difficult—if not impossible—to properly ascertain the population of a given breed.<sup>201</sup> The problem inherent in the current method of statistical analysis can be illustrated in this way: A report of five bites by Akitas and ten by pit bulls suggests that pit bulls are the more dangerous breed. If there are only ten Akitas in the canine population and one hundred pit bulls, however, it becomes clear that pit bulls in fact pose the lesser public threat.

## 2. Enforcement Costs

Many cities have repealed breed-specific legislation due to enforcement costs, which can be prohibitively high.<sup>202</sup> Direct costs of breed-based regulations and bans include additional animal control staff necessary for enforcement of the law, kenneling both for dogs awaiting a determination of breed and for dogs whose owners appeal such determinations, and veterinary care for kenneled dogs.<sup>203</sup> Direct costs also include the legal expenses the city must pay, such as attorneys’ fees and court costs, to defend its law against constitutional challenges.<sup>204</sup> Indirect costs may include loss of city revenue, as the ban could affect the number of or

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198. Sacks et al., *supra* note 31, at 838.

199. Phillips, *supra* note 29.

200. Sacks et al., *supra* note 31, at 838.

201. See Bonnie V. Beaver et al., *A Community Approach to Dog Bite Prevention*, J. Am. Veterinary Med. Ass’n, June 1, 2001, at 1733.

202. Setter, *supra* note 32, at 6. Two of the cities that have repealed breed-specific legislation due to cost are Cincinnati, Ohio, which repealed its thirteen-year-old breed ban because it was “too expensive [sic] to enforce and [] completely ineffective,” and Cleveland, Ohio, which rescinded its breed ban because of cost and effectiveness concerns. Task Force Report, *supra* note 189, at Attachment J. In 2001, Baltimore, Maryland, estimated that it cost more than \$750,000 per year for the city’s breed-specific law. Setter, *supra* note 32, at 6. The city repealed the law, expressing concern that, despite the expenditures, it was still unable to effectively enforce it. *Id.*

203. See Setter, *supra* note 32, at 6.

204. *Id.*

attendance at dog shows or exhibits held in the county,<sup>205</sup> and inhabitants, as owners may move outside city limits to protect their dogs.<sup>206</sup>

In 2003, Prince George's County, Maryland, formed a task force to "evaluate the effectiveness" of its vicious animal legislation, including its pit bull ban, and make recommendations for improvements and amendments.<sup>207</sup> The task force recommended repealing the ban and strengthening the city's dangerous-dog law.<sup>208</sup> The recommendation was based on numerous cost concerns: (1) The cost of maintaining a single pit bull throughout the entire determination and appeals process was approximately \$68,000; (2) fees from pit bull registrations over a two year period generated only \$35,000 while the cost to the Animal Management Division for maintenance of pit bulls over the same period was about \$560,000; and (3) the costs did not include expenditures such as payroll, cross-agency costs, and utilities.<sup>209</sup>

### 3. Impact on Public Safety

Breed-based regulations and bans are frequently enacted following a highly publicized dog attack and typically target the breed involved in the attack.<sup>210</sup> These legislative enactments are designed in part to alleviate public fear and provide a feeling of security.<sup>211</sup> However, that feeling of security may be false.<sup>212</sup> Unless a dog subject to a breed-based ordinance is registered, spotted by law enforcement officials or neighbors, or voluntarily turned in by the owner, enforcement is difficult.<sup>213</sup> Further, there is no guarantee that owners will abide by the law. In 2002, authorities estimated

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205. See Task Force Report, *supra* note 189, at 7 ("Since 1996, there has been a dramatic reduction in the number of dog shows/exhibitions being held in the County. This may be attributed, at least in part, to the breed-specific ban and confinement requirements for pit bulls at dog shows in the County."). The Task Force listed as unrealized indirect revenue income generated by hotels, gas stations, veterinarians, pet supply stores, restaurants, grocery stores, and drug stores. *Id.*

206. *Critics Assail Denver's Pit Bull Ban*, USA Today.com, July 20, 2005, [http://www.usatoday.com/news/nation/2005-07-20-denver-pit-bull\\_x.htm?csp=34](http://www.usatoday.com/news/nation/2005-07-20-denver-pit-bull_x.htm?csp=34) (describing a pit bull owner moving out of Denver to avoid the city's ban).

207. Task Force Report, *supra* note 189, at 4.

208. *Id.* at 14.

209. *Id.* at 7. The Task Force also listed the following reasons for the law's inefficiency: cross-agency overlap in responsibility, difficulty in determining breed, subjective definition of pit bull, limited shelter space, backlog in Animal Control Commission cases, limited educational resources, enforcement difficulties, difficulty in interpreting bite statistics, and immeasurable public safety benefits. *Id.* at 12.

210. See *supra* notes 63-65, 112 and accompanying text.

211. See Diane Blackman, *Breed Specific Legislation: Practicality of Breed Specific Legislation in Reducing or Eliminating Dog Attacks on Humans and Dogs*, DogPlay.com, <http://www.dog-play.com/pitbull.html> (last visited Feb. 26, 2006); Karen Peak, *Clear and Present Danger: Assessing the Risk a Breed Poses*, <http://www.understand-a-bull.com/Articles/ClearandPresentDanger.pdf> (last visited Feb. 26, 2006).

212. Peak, *supra* note 211.

213. See Randolph, *supra* note 58, at 12/12.

that in Miami-Dade County, Florida, which enacted a pit bull ban in 1988, approximately 50,000 pit bulls remained in the county illegally.<sup>214</sup> In Denver, which reenacted its pit bull ban in 2005, pit bull owners hide their dogs to avoid seizure and destruction.<sup>215</sup>

It is also not clear that breed-specific legislation has any impact on public safety.<sup>216</sup> Although the United Kingdom has prohibited the sale and breeding of pit bulls since 1991, the law has had no impact on the number of dog attacks.<sup>217</sup> Moreover, even if one breed is banned, owners who desire vicious dogs can circumvent the law by breeding and/or training a new vicious breed.<sup>218</sup> After Diane Whipple's death, for example, a number of Presa Canario breeders received calls from potential owners wanting "that dog that would kill."<sup>219</sup> As dog-bite law expert and attorney Kenneth Phillips states, "Any dog—literally any dog—can be a bad dog if the owner is a bad owner or the breeder is a bad breeder."<sup>220</sup>

#### a. *Slippery Slope*

Breeds responsible for canine homicides have varied over time, with Great Danes, German Shepherds, and Rottweilers taking the lead during different years.<sup>221</sup> Banning only the currently perceived dangerous breed causes a rise in the popularity of other breeds that can be trained to attack.<sup>222</sup> The number of bites and fatalities per breed seems to rise with a breed's popularity.<sup>223</sup> For example, as the popularity of Rottweilers rose in the 1990s, so too did the number of Rottweiler-related human deaths.<sup>224</sup> However, breed-specific legislation regulates or bans ownership only of breeds thought to be dangerous at a particular time. As public perception of a vicious breed shifts, an increasing number of breeds may be subject to regulation.<sup>225</sup> This slippery slope manifested in Germany, which began by

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214. Setter, *supra* note 32, at 5.

215. Nicholas Riccardi, *Denver's Dogged Outlaws*, L.A. Times, Aug. 2, 2005, at A1.

216. Setter, *supra* note 32, at 5.

217. Opinion, *supra* note 188.

218. Randolph, *supra* note 58, at 12/12.

219. Weise, *supra* note 9.

220. Mike McKee, *A Legal Career Goes to the Dogs: L.A. Solo Represents the Human Victims of Canine Attacks*, Recorder (S.F.), Dec. 27, 1999, at 1 (discussing the career of attorney Kenneth Morgan Phillips).

221. Sacks et al., *supra* note 31, at 839. Between 1975 and 1980, German Shepherds led as the breed responsible for the most human deaths with sixteen; between 1979 and 1980 Great Danes led, and between 1997 and 1998 Rottweilers and pit bulls led with a combined sixty percent of human deaths. *Id.* at 837, 839.

222. Phillips, *supra* note 29.

223. *Critics Assail Denver's Pit Bull Ban*, *supra* note 206.

224. Sacks et al., *supra* note 31, at 838-39 (citing American Kennel Club's dog registration statistics from 1990 to 1998).

225. See Bill Johnson, *Pit-Bull Ban May Reveal Unwarranted Prejudice*, Rocky Mtn. News (Denver, Colo.), May 11, 2005, at 7A, available at 2005 WLNR 7440626.

banning only a handful of breeds<sup>226</sup> and ultimately enacted a law that regulated ownership of any dog standing over 15.7 inches tall and weighing over forty-four pounds.<sup>227</sup> Prince George's County, Maryland, which bans pit bulls and Rottweilers, has, since the ban's institution, witnessed an introduction into the community of large, powerful dogs not subject to the ban.<sup>228</sup> In fact, Animal Control Chief Rodney Taylor notes that Presa Canarios, the breed responsible for Diane Whipple's death, have begun to appear in the county.<sup>229</sup>

#### 4. Breed Benefits

Bites and fatalities inflicted by pit bulls may stem from the increased popularity of both ownership of pit bulls as a status symbol and participation in illegal dog fighting.<sup>230</sup> Owners may train their dogs to attack on command<sup>231</sup> and may abuse the dog to enhance its aggression,<sup>232</sup> thereby increasing the risk of a bite or a serious or fatal attack. Pit bulls that refuse to attack on command or fight in the ring may be abandoned or destroyed.<sup>233</sup> Breed-specific legislation can reduce instances of abuse and abandonment by making it difficult—or impossible—for irresponsible owners to obtain or keep a particular breed.

In an article supporting pit bull breeding bans, Ingrid Newkirk, the president of People for the Ethical Treatment of Animals, states that most animal shelters cannot or will not adopt pit bulls, resulting in the destruction of a large number of the dogs.<sup>234</sup> She also notes that "pit bulls are perhaps the most abused dogs on the planet" because they are kept as guard dogs for "almost every drug dealer and pimp in every major city and beyond."<sup>235</sup> Because human tragedy is often the result of abuse, breed bans protect not only the public from dangerous or vicious dogs but the dogs from cruelty and destruction.<sup>236</sup>

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226. Karen Peak, *Why All Breeds Need to Fight* (2003), in Setter, *supra* note 32, at 33. Interestingly, Germany never banned German Shepherds, although the breed was responsible for 1956 bites from 1992 to 1996, compared to 320 bites by pit bulls. Capp, *supra* note 48, at 31; Phillips, *supra* note 29. The country has since repealed the ban on many specific breeds, including pit bulls. Task Force Report, *supra* note 189, at Attachment J.

227. Capp, *supra* note 48, at 31.

228. *Dangerous Dogs* (Discovery Channel broadcast Jan. 26, 2006).

229. *Id.*

230. See Peter Applebome, *Spurred by Public Clamor Over Attacks, Cities Move to Curb Pit Bulls*, L.A. Daily J., July 20, 1987, at 5.

231. Ingrid Newkirk, *Controlling an Animal as Deadly as a Weapon*, S.F. Chron., June 8, 2005, at B9, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/08/EDGDLD4G1S1.DTL>.

232. See Swift, *supra* note 8, at 80-83.

233. *See id.*

234. Newkirk, *supra* note 231. Many shelters have a written policy that forbids adopting out pit bulls. *See id.*

235. *Id.*

236. *See id.*

### B. *Dangerous-Dog Laws*

As with constitutional questions, dangerous-dog laws raise fewer concerns than their breed-specific counterparts. This may be due in part to the number of organizations that endorse and support dangerous-dog laws, including the American Veterinary Medical Association, the American Kennel Club, the United Kennel Club, the ASPCA, and The Humane Society of the United States (“HSUS”).<sup>237</sup> Nevertheless, some criticisms and concerns arise, primarily in regards to enforcement costs, ownership liability, and humane treatment. Each is discussed below.

#### 1. Enforcement Costs

Dangerous-dog laws share many of the same direct costs as breed-specific legislation. Dogs awaiting determinations or appeals of dangerousness require the same kenneling and veterinary care as do dogs awaiting breed determination.<sup>238</sup> Other similar direct costs include animal control staff necessary for enforcement of the law and any legal expenses incurred when owners contest or appeal a dog’s dangerousness determination.<sup>239</sup> There are cases involving disputes over a dog’s temperament that have remained unresolved for months, financially and physically burdening often overcrowded animal shelters responsible for housing the dog.<sup>240</sup>

Though 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.<sup>241</sup> 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.”<sup>242</sup> Animal control agencies are charged with enforcing the law and also may be responsible for bite investigations and bite data management and analysis.<sup>243</sup> Where there is no local agency in place to fulfill the responsibilities necessary to enforce them, dangerous-dog laws become “meaningless.”<sup>244</sup>

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237. See Setter, *supra* note 32, at 10. This list is inclusive, not exhaustive.

238. See Randall Lockwood, *Humane Concerns About Dangerous-Dog Laws*, 13 U. Dayton L. Rev. 267, 274 (1988).

239. See *id.* at 271-74. The primary distinction may be indirect costs; for example, dangerous-dog laws would necessarily not have the same effect on dog show attendance as would breed-specific legislation.

240. *Id.*

241. *Id.* at 271; Pratt, *supra* note 114, at 877.

242. Lockwood, *supra* note 238, at 271 (advocating for public funding of animal-control agencies).

243. Beaver et al., *supra* note 201, at 1736.

244. Lockwood, *supra* note 238, at 271 (noting that practical problems such as lack of funding arise when dangerous dog laws are drafted without input from animal welfare and control organizations or are “conceived in a climate of hysteria”).

## 2. Owner Liability

Owners are generally financially liable in tort for any injury their dog inflicts, either under the relevant dangerous-dog statute, a common law "one-bite" rule, or a negligence theory.<sup>245</sup> However, unless a dog seriously injures or kills a person, under many dangerous-dog laws the owner is unlikely to be criminally charged.<sup>246</sup> Even if criminal charges are filed against an owner, successful cases usually must rely on evidence that the owner knew the dog presented a danger to the public and failed to take reasonable precautions.<sup>247</sup> Further, punishment in successful cases is minimal.<sup>248</sup>

It is generally accepted that the problem with dangerous-dogs is attributable to irresponsible ownership.<sup>249</sup> A recent study revealed that problem behavior, by both dog and owner, preceded the majority of attacks.<sup>250</sup> While dangerous-dog laws provide for destruction or impoundment of the dog, irresponsible owners receive little or no criminal punishment.<sup>251</sup> Thus, under many dangerous-dog laws, "the dog suffers the consequences of its owner's irresponsibility."<sup>252</sup>

## 3. Humane Concerns

Animal welfare and rescue organizations have raised humane concerns related to dangerous-dog laws.<sup>253</sup> First, laws that add to ownership

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245. Randolph, *supra* note 58, at 11/5. In more than half the states, statutes make owners strictly liable if their dog inflicts injury. *Id.* at 11/6. Under the common law "one-bite" rule, an owner is liable for injuries only if the owner knew or had reason to know that the dog was likely to cause the particular type of injury. *Id.* at 11/11. Under a negligence theory, an owner is liable if a person is injured as a foreseeable result of the owner's unreasonably negligent handling of the dog. *Id.* at 11/15.

246. *Id.* at 12/8. *But see infra* notes 257-63 and accompanying text.

247. Randolph, *supra* note 58, at 12/8.

248. *See* Burstein, *supra* note 186, at 327 (arguing that criminal liability "should amount to more than a slap on the wrist"). *But see* Thorne, *supra* note 163, at 1465 (examining a Georgia law that imposes a fine ranging from \$5000 to \$10,000 and/or a prison sentence between one and ten years on an owner who "knowingly and willfully fails to comply with the provisions of [the law and whose] dangerous dog aggressively attacks and causes severe injury or death of a human being" (alteration and emphasis in original) (internal quotation and footnote omitted)).

249. *See, e.g.*, HSUS Statement, *supra* note 34 (noting that "the 'problem dog' at any given time is often the most popular breed among individuals who tend to be irresponsible"); Peak, *supra* note 211 ("The danger a dog poses comes from the human who owns it.").

250. Sacks et al., *supra* note 31, at 840. Problem behavior by owners may include permitting a dog to roam freely or failure to abide by statutorily required safety precautions. *See id.* During the trial of Robert Noel and Marjorie Knoller, owners of the two Presa Canarios that killed Diane Whipple, witnesses testified that the dogs had previously exhibited aggressive behavior and that the owners had failed to control the behavior or take precautions. Phillips, *supra* note 13.

251. Setter, *supra* note 32, at 20.

252. *Id.*

253. *See* Lockwood, *supra* note 238, at 273.



expense, for example by mandating construction of security enclosures or increased licensing fees, add also to the number of unwanted animals euthanized in shelters each year.<sup>254</sup> Second, dangerous-dog laws raise questions regarding the handling and housing of dogs deemed dangerous under the law.<sup>255</sup> Ohio's dangerous-dog law illustrates this point. While the state law requires dangerous dogs to be kept in a secure enclosure, it does not mandate adequate space, shelter from the elements, or opportunities for exercise and socialization.<sup>256</sup> As the Humane Society Director of Higher Education Programs noted, "Even the most dangerous dog would be of no risk to the public if it were kept in a concrete bunker, but this could not be considered humane."<sup>257</sup>

### C. Recent Enactments

In addition to enacting breed-specific or dangerous-dog laws, many local and state governments are exploring other measures intended, at least in part, to reduce the number of dog bites and serious and fatal attacks. Three such measures are the imposition of criminal liability on the owner of a dog that inflicts serious injury or death, potentially dangerous-dog laws, and statutes prohibiting dog fighting.

#### 1. Criminal Liability

Depending on the circumstances surrounding the dog attack, some states have enacted legislation enabling the state to charge the owner of a dog that seriously injures or fatally attacks a person with anything from letting a vicious dog run loose to murder.<sup>258</sup> In Florida, for example, it is a crime to own a dog that "aggressively attacks" a person and causes severe injury or death.<sup>259</sup> If the dog was previously declared dangerous under the state's dangerous-dog law, the crime is a felony punishable by up to five years imprisonment or a \$5000 fine; if the dog was not previously declared dangerous, it is a misdemeanor punishable by up to sixty days imprisonment or a \$500 fine.<sup>260</sup> In Michigan, if a dangerous dog fatally

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254. *See id.*

255. *Id.*

256. *Id.* at 273-74.

257. *Id.* at 273.

258. Randolph, *supra* note 58, at 12/8. California was the first state to charge a person with murder for a fatal dog attack, though the defendant was convicted of involuntary manslaughter and sentenced to three years in prison. *Id.* at 12/9. The defendant's chained dog mauled and killed a two-year-old. *Id.*

259. *Id.* at 12/9 (citing Fla. Stat. § 767.13 (2005)).

260. Fla. Stat. Ann. §§ 775.082(3)(d), 775.082(4)(b), 775.083(1)(c), 775.083(1)(e) (West 2005); Randolph, *supra* note 58, at 12/9. The law also provides punishment of up to one year imprisonment or a \$1000 fine if a dog that has previously been declared dangerous attacks or bites a person or domestic animal without provocation. Fla. Stat. Ann. §§ 775.082(4)(a), 775.083(1)(d).

attacks a person, the state may charge the owner with involuntary manslaughter.<sup>261</sup>

Even absent a specific criminal dog-attack statute, evidence of a dog's prior aggressive behavior may be sufficient to sustain a criminal conviction. Such was the case with Marjorie Knoller and Robert Noel, the owners of the two Presa Canarios that attacked and killed Diane Whipple, who were criminally charged in California for Whipple's death.<sup>262</sup> Both Knoller and Noel were charged and convicted of death caused by a mischievous animal and involuntary manslaughter; Knoller, who was present at the scene, was additionally charged with second degree murder.<sup>263</sup> In overturning the lower court's order for a new trial on the jury verdict finding Knoller guilty of second-degree murder, the appellate court found Knoller's failure to muzzle the dogs in public after several aggressive encounters with neighbors sufficient to uphold the conviction by establishing that Knoller consciously endangered the life of another.<sup>264</sup>

## 2. Potentially Dangerous-Dog Laws

Potentially dangerous-dog laws are another method by which communities are attempting to reduce the number of dog bites and serious attacks.<sup>265</sup> These laws are appealing because many existing dangerous-dog laws do not take effect until one or two human bites have been inflicted.<sup>266</sup> Further, whereas dangerous-dog laws may not classify a dog as dangerous until it inflicts serious bodily injury or death on a human, potentially dangerous-dog laws generally permit a dog to be categorized as potentially dangerous and thus subject to regulations after an unprovoked bite that results in minimal or no injury.<sup>267</sup> A dog also may be declared potentially

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261. Randolph, *supra* note 58, at 12/9 (citing Mich. Comp. Laws Ann. § 287.323(1) (West 2003)).

262. Phillips, *supra* note 13.

263. *Id.*

264. People v. Noel, 28 Cal. Rptr. 3d 369, 416-17 (Ct. App.), *review granted and depublished by* 116 P.3d 475 (Cal. 2005). At issue on appeal was the sufficiency of the evidence to support a finding of the implied malice, or a "conscience disregard for the life of another person," necessary to sustain the second-degree murder conviction. *Id.* at 416. The California Supreme Court addressed the issue on July 27, 2005, although both defendants already served four-year sentences and are now on parole. Noel, 116 P.3d 475; Phillips, *supra* note 13.

265. See, e.g., Cal. Food & Agric. Code § 31602 (West 2001); Ga. Code Ann. § 4-8-21 (1995); Md. Code Ann., Crim. Law § 10-619 (LexisNexis 2002).

266. Swift, *supra* note 8, at 84 (discussing a Rhode Island law that deemed a dog vicious when it "approaches a person in an apparent attitude of attack when unprovoked"). Dangerous-dog regulations would not be imposed until the second bite in jurisdictions that adhere to the "one bite" rule. See *supra* note 245.

267. See, e.g., Cal. Food & Agric. Code § 31602 (defining a potentially dangerous dog as one that bites a person and causes less severe injury than muscle tears, disfiguring lacerations, or injuries that require multiple sutures or corrective or cosmetic surgery); Ga. Code Ann. § 4-8-21 (defining a potentially dangerous dog as one that "without provocation bites a human being on public or private property"); Md. Code Ann., Crim. Law § 10-

dangerous if it inflicts severe injury on or kills a domestic animal while off the owner's property.<sup>268</sup>

Bartlesville, Oklahoma, recently enacted a potentially dangerous-dog law after several pit bull attacks on neighbors and schoolchildren on a public street.<sup>269</sup> Under the law, a potentially dangerous dog is one that inflicts an unprovoked bite on a person, attacks when unprovoked, or severely injures or kills a domestic animal.<sup>270</sup> The law requires owners to keep such dogs muzzled, on a six-foot leash or enclosed in a pen with a warning sign on their property, obtain a special collar bearing a code number issued by the Police Department, and carry a minimum of \$50,000 in liability insurance.<sup>271</sup>

### 3. Illegal Dog Fighting Statutes

Because dogs bred for fighting have been trained to be dangerously aggressive, the presence of these dogs in a community increases the risk of attacks not only on other animals but on humans.<sup>272</sup> Though dog fighting is illegal in all fifty states and punishable as a felony in forty-seven states, law enforcement officials and animal care professionals maintain that there has been an increase in the so-called sport.<sup>273</sup> In 2004, the HSUS, which keeps a database of news reports on dog fighting, estimated that 40,000 people and 250,000 pit bulls were involved in illegal fights.<sup>274</sup>

New York's illegal dog fighting statute is typical of that of most states.<sup>275</sup> The law makes it a felony, punishable by up to four years in prison and a fine of up to \$25,000, to cause an animal to fight, train an animal to fight, let an animal fight or be trained to fight on premises under one's control, and own or keep an animal trained to fight on premises used for fighting.<sup>276</sup> Further, it is a misdemeanor, punishable by one year in prison and a fine of

619(c)(1)(i) (defining a potentially dangerous dog as one who "has inflicted a bite on a person while on public or private real property").

268. See, e.g., Cal. Food & Agric. Code § 31602(c); Md. Code Ann., Crim. Law § 10-619(c)(1)(ii).

269. Laura Summers, *B'Ville Puts Collar on Stray Pets*, Tulsa World, Aug. 17, 2005, at A14. The new law also requires owners to pay an annual city licensing fee for every dog, cat, and ferret and show proof of rabies vaccinations on the collars of dogs and cats. *Id.* Owners who fail to comply with the vaccination rule are subject to a \$200 fine. *Id.*

270. *Id.*

271. *Id.*

272. HSUS.org, Dogfighting Fact Sheet, [http://www.hsus.org/hsus\\_field/animal\\_fighting\\_the\\_final\\_round/dogfighting\\_fact\\_sheet/](http://www.hsus.org/hsus_field/animal_fighting_the_final_round/dogfighting_fact_sheet/) (last visited Feb. 26, 2006).

273. Maryann Mott, *U.S. Dog-fighting Rings Stealing Pets for "Bait,"* Nat'l Geographic News, Feb. 18, 2004, [http://news.nationalgeographic.com/news/2004/02/0218\\_040218\\_dogfighting.html](http://news.nationalgeographic.com/news/2004/02/0218_040218_dogfighting.html).

274. *Id.*

275. Randolph, *supra* note 58, at 13/13.

276. N.Y. Agric. & Mkts. Law § 351 (McKinney 2004 & Supp. 2006).

up to \$15,000, to own or keep an animal in circumstances evincing the intent to engage the animal in a fight.<sup>277</sup>

Some states have enacted or attempted to enact laws that further discourage dog fighting. In January 2004, an Arizona state representative introduced a bill designed to supplement the state's existing felony dog fighting statute.<sup>278</sup> The bill, which would become the first law of its kind in the country, proposed making it a crime—punishable by up to two years in prison and a \$150,000 fine—to steal an animal for use in dog fighting.<sup>279</sup> The bill, which was signed into law in 2004, makes it a felony to take a dog “for the purpose of dog fighting.”<sup>280</sup> In addition, state law requires veterinarians to report any dog injuries or deaths that may have been inflicted in a dog fight.<sup>281</sup>

Currently pending in Congress is the Animal Fighting Prohibition Enforcement Act of 2005, which increases penalties for interstate trafficking of animals used in dog fighting to a felony level and prohibits use of the United States Postal Service for commercial speech promoting animal fighting within the United States.<sup>282</sup> The HSUS is among the animal welfare and health groups promoting the bill, noting that a federal law providing for felony punishment is necessary to prevent states with misdemeanor penalties from becoming a magnet for dog fighters.<sup>283</sup>

The comparative analysis of practical considerations in dangerous-dog laws and breed-specific legislation presented in Part II of this Note is relevant in Part III, which suggests that dangerous-dog laws are the more effective and efficient solution to the dog-bite epidemic. Part III concludes with proposals for additional measures that local governments may enact to protect the public from dangerous dogs.

### III. SOLUTIONS FOR THE DOG-BITE EPIDEMIC

The recognition of a dog-bite epidemic in America, coupled with a recent spate of serious and fatal attacks on humans, has provoked state and local

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277. *Id.*

278. Mott, *supra* note 273. Arizona law makes it a class five felony to own, possess, or train any dog with the intent to fight it or cause any dogs to fight, Ariz. Rev. Stat. Ann. § 13-2910.01 (2001), and a class six felony to be “knowingly present at any place or building where preparations are being made for an exhibition of the fighting of dogs, or is present at such an exhibition,” *id.* § 13-2910.02.

279. Mott, *supra* note 273.

280. Ariz. Rev. Stat. Ann. § 13-1802(E) (Supp. 2005).

281. Ariz. Rev. Stat. Ann. § 32-2239 (2002). California has a similar law requiring veterinarians to report any dog's injury or death that may have been caused by participation in a dog fight. Cal. Bus. & Prof. Code § 4830.5 (West 2003).

282. S. 382, 109th Cong. (2005); H.R. 817, 109th Cong. (2005). The bill, which also raises penalties to a felony level for interstate trafficking of animals used for cockfighting and hog-dog fights and the weapons used in cockfighting, recently unanimously passed in the Senate. *Id.*; HSUS.org, Legislation and Laws, [http://www.hsus.org/legislation\\_laws/](http://www.hsus.org/legislation_laws/) (last visited Feb. 26, 2006).

283. See HSUS.org, *supra* note 272.

legislative responses intended to effectively and efficiently address the threat dangerous dogs pose to society.<sup>284</sup> Those responses typically take one or both of two forms: dangerous-dog laws or breed-specific legislation. Both have stirred public controversy and raised questions relating to the constitutionality of the proposed regulation<sup>285</sup> and its practical effect on the risk of bites or serious attacks by dangerous dogs.<sup>286</sup> Both types of laws have almost unanimously been upheld as constitutional.<sup>287</sup>

Constitutionality, however, is not indicative of efficacy. Indeed, an evaluation of practical considerations such as statistical evidence, enforcement costs, and the laws' effect on public safety reveal that dangerous-dog laws are a more effective and efficient means of regulating dangerous dogs. This Note argues that breed-specific legislation is a politically expedient but practically ineffective means of addressing the dog-bite epidemic, and that state and local legislatures can reduce the risk of dog bites and prevent serious attacks through better enforcement of existing laws and implementation of breed-neutral supplemental legislation. Part III.A presents the practicality argument in more detail. Part III.B then discusses the need for better enforcement of existing laws and proposes enacting additional legislative measures to combat the dog-bite epidemic.

#### A. *Attacking the Dog-Bite Epidemic*

Breed-specific legislation fails to adequately address the dog-bite epidemic, as it targets all dogs of a specific breed regardless of past behavior rather than regulates a specific dog of any breed based on the dog's—and owner's—prior conduct.<sup>288</sup> By eliminating or regulating the breed currently generating public fear, breed-based laws ignore three basic facts: All dogs can and do inflict injury, regardless of breed; breed alone is not dispositive of human aggression, even in historically dog-aggressive breeds; and any dog can be trained and any breed can be bred to be aggressive.<sup>289</sup> Breed-specific legislation thus creates a false sense of public security through oversimplification of the problem and under-inclusiveness in the solution.<sup>290</sup> In this manner, breed-specific legislation, though designed to decrease the threat to public safety, may have the perverse

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284. See *supra* Part I.A, C.

285. See *supra* Part I.C.

286. See *supra* Part II.

287. See *supra* Part I.C.

288. See *supra* notes 109-11 and accompanying text.

289. See *supra* notes 38, 187-88, 220-21 and accompanying text.

290. Although a statute will not be held unconstitutionally infirm simply because it is under-inclusive, see *supra* notes 149-55 and accompanying text, this argument addresses under-inclusiveness as a practical rather than constitutional concern.

effect of increasing the risk of serious attack or death by failing to regulate dangerous dogs that do not fall within the statutorily proscribed breed.<sup>291</sup>

Breed-specific legislation is also practically, as opposed to constitutionally, over-inclusive, resulting in an inefficient allocation of limited financial and human resources. The imposition and enforcement of breed-based regulations and bans is an expensive endeavor<sup>292</sup> with no clear indication of effectiveness.<sup>293</sup> At the same time, there is a real concern that existing dangerous-dog laws are ineffectively enforced due to a lack of funding.<sup>294</sup> Because breed-based laws do not differentiate between vicious and docile members of the target breed,<sup>295</sup> all dogs of a particular breed are necessarily subject to regulation. Already limited local resources must be split inefficiently between investigating complaints regarding dogs that have exhibited objectively observable vicious behavior and investigating complaints that a dog is of a subjectively determined target breed, a problem compounded when there is an unknown number of the target breed in any given population.<sup>296</sup>

By contrast, dangerous-dog laws remove the practical problems associated with under- and over-inclusiveness because they embrace the three basic facts breed-specific legislation ignores. By evaluating the public threat a particular dog poses based upon prior aggressive behavior rather than breed alone, legislatures can ensure that only dogs actually posing a danger are regulated, and owners of non-dangerous dogs are spared. Removing breed from a dangerousness determination also eliminates the problems of practical over-inclusiveness by permitting animal control and enforcement agencies to regulate dogs that pose the greatest threat to public safety, as objectively indicated by the particular animal's prior aggressive behavior.<sup>297</sup> Enforcement costs may be lowered by targeting only those dogs with prior indices of a bite tendency by reducing or eliminating the direct and indirect costs associated with breed-specific laws.<sup>298</sup> Moreover, limited human and financial resources are not divided between investigating complaints of behavior and those of breed,<sup>299</sup> rather, the resources can be

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291. In other words, dedicating limited local resources to locating, confiscating, and destroying the target breed would necessarily divert those resources from investigating complaints of dangerous and/or unlawful behavior, such as permitting a dog to roam at large.

292. See *supra* Part II.A.2.

293. See *supra* notes 210-20 and accompanying text.

294. See *supra* notes 241-44 and accompanying text.

295. See *supra* note 137 and accompanying text.

296. See *supra* note 201 and accompanying text.

297. See *supra* note 73 and accompanying text.

298. See *supra* notes 203-09 and accompanying text.

299. For example, from May to July 2005, more than 380 Denver pit bulls were impounded. *Critics Assail Denver's Pit Bull Ban*, *supra* note 206. Assuming Denver has limited resources to enforce its laws and space to house dogs, both were necessarily diverted from rounding up, impounding, and kenneling dogs whose behavior rather than breed objectively indicated that the dog posed a threat to public safety.

allocated to their most efficient and valuable use—effective enforcement of existing dangerous-dog laws.

Although canine homicides may be a breed-specific problem, only fifteen to twenty dog attacks per year result in a human fatality.<sup>300</sup> Though not insignificant, the number is minimal compared to the millions of dog bites inflicted on Americans each year.<sup>301</sup> Moreover, the number of fatal attacks annually has remained fairly constant<sup>302</sup> despite the enactment of numerous breed-based regulations and bans, while the number of nonfatal dog bites continues to rise.<sup>303</sup> Human deaths represent a small proportion of dog-bite injuries,<sup>304</sup> and therefore should not be the primary consideration in creating and enacting laws designed to protect the public from dangerous dogs.

Finally, legislation designed to protect the public from dangerous dogs should attempt a balance between protecting the public from dangerous dogs and respecting the rights of responsible owners. In other words, the law should acknowledge that ownership is a significant factor determining a dog's biting propensity and overall aggressiveness,<sup>305</sup> and balance the need to regulate or prevent irresponsible ownership for public safety purposes with the rights of responsible dog owners.<sup>306</sup> Breed-specific legislation, and breed-based bans in particular, fail in this regard both by ignoring the effects of ownership and environment on a dog's behavior and by ignoring or eliminating the rights of responsible owners. Breed-specific laws regulate or destroy dogs regardless of prior conduct and may require even responsible owners to sacrifice their rights to private property and, as is often the case with dogs, members of their families.<sup>307</sup> Dangerous-dog laws, on the other hand, emphasize responsible ownership by eliminating property and enjoyment rights from only those owners unable or unwilling to comply with public safety regulations.<sup>308</sup> In this manner, dangerous-dog laws create a fairer balance between the right of the public to be free from the threat of dangerous dogs and the rights of responsible dog owners to enjoy the companionship of their pets.

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300. See *supra* notes 33-34 and accompanying text.

301. See *supra* note 18 and accompanying text.

302. See *supra* note 34 and accompanying text.

303. See *supra* note 18 and accompanying text.

304. See *supra* text accompanying notes 18, 34.

305. See *supra* note 188 and accompanying text.

306. This balance is precisely what N.Y. Agric. & Mkts. Law § 107 (McKinney 2004), which prohibits local governments from enacting breed-specific legislation, seeks to achieve. New York State Senator Dean G. Skelos noted that the bill was intended to place emphasis on the need for responsible pet ownership as well as assure owners of specific dog breeds that their animals would not be subjected to unfair treatment. Letter from Sen. Dean G. Skelos, N.Y. State Senator, to Michael C. Finnegan, Counsel to the Governor (Aug. 25, 1997) (on file with New York Public Science, Industry and Business Library).

307. See *supra* notes 101, 109-11 and accompanying text.

308. See *supra* notes 77-78 and accompanying text.

## B. Proposals

Although a more effective and efficient solution to the dog-bite epidemic, dangerous-dog laws are an admittedly imperfect one. Despite the enactment of dangerous-dog laws in more than thirty states, the number of dog bites continues to increase each year,<sup>309</sup> suggesting that existing laws are not effectively enforced and do not create sufficient incentives for owners to abide by statutory regulations. Additionally, dangerous-dog laws contain a potentially hazardous gap, in that two bites may be required before regulations, fines, or civil or criminal liability are imposed on the owner.<sup>310</sup> To remedy the weaknesses in existing dangerous-dog laws, local governments should encourage strict enforcement of existing laws, impose criminal penalties for dog-inflicted human injury or death, and implement breed-neutral supplemental legislation designed to prevent the first bite.

### 1. Short Leashes for Violators of Current Laws

In discussing the pit bull problem in New York City, reporter Brian C. Anderson noted that the city could “do a lot of good simply by enforcing laws already on the books.”<sup>311</sup> Though Anderson referenced only the city’s licensing laws,<sup>312</sup> strict enforcement of all laws designed to protect or with the effect of protecting the public from dangerous dogs, including existing dangerous-dog laws, could reduce the number of dog bites and attacks. For instance, licensing laws enable a city to maintain accurate records of dogs within its jurisdiction and thus any reported aggressive incident by a particular dog.<sup>313</sup> This information would enable officials to impose and verify compliance with precautionary regulations. Anderson noted that Calgary, Canada, halved the number of aggressive dog incidents through strict enforcement of its licensing laws.<sup>314</sup> Similarly, leash and anti-roaming laws also reduce the likelihood of bites or more serious attacks by requiring owners to exercise control over their dogs at all times. Although the majority of bites are inflicted by dogs on the owner’s property,<sup>315</sup> a significant number of fatal—and presumably nonfatal—attacks are committed by dogs roaming unrestrained off the owner’s property.<sup>316</sup> Strict

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309. See *supra* note 18 and accompanying text.

310. See *supra* note 266 and accompanying text.

311. Anderson, *supra* note 21, at 67.

312. *Id.* Brian C. Anderson noted that although the law required all dogs to be licensed, the city made little effort to enforce the law. *Id.* As a result, approximately ninety percent of New York’s one million dogs are unlicensed. *Id.*

313. See *id.*; Beaver et al., *supra* note 201, at 1736.

314. Anderson, *supra* note 21, at 67. The law allowed officials to keep computerized records of complaints against individual dogs and impound them or require muzzling. *Id.* As a result, eighty percent of the dogs in Calgary are licensed. *Id.*

315. See *supra* notes 30, 32 and accompanying text.

316. See *supra* note 32. Less than one-half of one percent of canine homicides were committed by leashed dogs off the owner’s property. Sacks et al., *supra* note 31, at 840.



enforcement of these laws should therefore contribute to a reduction in the number of bites and attacks.

Dangerous-dog laws similarly require strict enforcement for effectiveness. Problem behavior by both owners and dogs often precedes fatal attacks.<sup>317</sup> Although laws that target prior behavior are better suited to identifying and regulating dangerous dogs than those targeting only breed, no law can serve its purpose absent strict enforcement of its provisions. As an example of the effect this proposal might have in preventing bites or serious attacks, consider again the tragic death of Diane Whipple.<sup>318</sup> Evidence presented at the trial of Marjorie Knoller and Robert Noel, owners of the Presa Canarios that fatally mauled Whipple, indicated that the dogs had displayed human aggression on several prior occasions, yet both dogs remained unmuzzled in public and in the custody of irresponsible and, as trial testimony and numerous television interviews revealed, callous owners.<sup>319</sup> Assuming complaints of any human aggression exhibited by the dogs had been formally filed with the appropriate animal control agency, enforcement of California's dangerous-dog law may have prevented Whipple's death by requiring both dogs to be muzzled in public.<sup>320</sup> However, enforcement should not be limited to the imposition of statutory precautions; rather, effective enforcement requires assurance of compliance. Owners should be subject to routine examination of their property, and dangerous dogs should be immediately removed from those unwilling or unable to comply by the first inspection. In the Whipple case, noncompliance would have been punished by the removal and, if necessary, destruction of both dogs.

Finally, state law only infrequently imposes criminal liability on owners of biting dogs, unless the dog seriously or fatally attacks a person.<sup>321</sup> Further, the success of a criminal case against the owner often requires evidencing the owner's prior knowledge of a dog's dangerousness and failure to take reasonable precautionary measures in light of that knowledge.<sup>322</sup> However, an owner's subjective knowledge of a dog's biting or aggressive tendencies may be difficult or impossible to establish, as owners facing criminal charges may be reluctant to admit knowledge of a

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This statistic suggests that responsible ownership and enforcement of existing dog laws could have a dramatic impact on reducing the number of serious and fatal attacks.

317. See *supra* note 250 and accompanying text.

318. See *supra* notes 1-5 and accompanying text.

319. See *supra* note 264 and accompanying text. During the trial and press interviews, both Knoller and Noel maintained that Whipple's actions had instigated and prolonged the fatal attack. Phillips, *supra* note 13.

320. The author is unaware if any formal complaints were filed against the Presa Canarios and, if so, the results of those complaints. The argument is made simply as an illustration of the effect strict enforcement of the laws may have on preventing serious dog attacks.

321. See *supra* note 246 and accompanying text.

322. See *supra* text accompanying note 247.

dog's prior dangerous conduct.<sup>323</sup> Absent previously filed complaints or testimony by a previous victim, then, criminal charges will not result in conviction. Failure to take reasonable precautions, on the other hand, may be established by objective and observable evidence such as the lack of a secure enclosure or improper means of restraint. Moreover, the imposition of criminal liability should not be delayed until multiple biting incidents have occurred. Permitting criminal convictions for the owners of dogs that inflict serious or fatal injuries to rest on negligence alone, regardless of the owner's prior knowledge of a dog's dangerousness, could deter irresponsible ownership of dangerous dogs and thereby decrease the public threat such dogs pose.

## 2. Supplemental Legislation: Potentially Dangerous-Dog Laws and Illegal Dog Fighting Statutes

Enacting potentially dangerous-dog laws as supplemental to existing dangerous-dog laws is a primary means by which local governments can reduce the public threat that dangerous or vicious dogs pose. Unlike dangerous-dog laws, potentially dangerous-dog laws may impose ownership regulations before a dog first bites a human.<sup>324</sup> At a minimum, ownership regulations may be imposed at the first human bite, regardless of whether that bite produces injury.<sup>325</sup> By requiring owners to abide by statutory precautions when a dog first exhibits human or animal aggression, potentially dangerous-dog laws could preempt the first human bite and, in the case of laws that allow one bite before deeming a dog dangerous, prevent a subsequent serious or fatal attack.

Enacting illegal dog fighting statutes with more stringent felony punishments for violators is a second means by which the number of aggressive dogs may be reduced and, with it, the number of dog bites and serious attacks.<sup>326</sup> Though, historically, fighting dogs were bred to eliminate tendencies of human aggression,<sup>327</sup> the modern "street" dog fighter does not appear to take such care in breeding or training. Fighting dogs may be abused to encourage aggression or trained to fight in an unconventional or cruel manner,<sup>328</sup> which may have the result—intended or

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323. See Phillips, *supra* note 13 (noting that both Robert Noel and Marjorie Knoller, owners of the Presa Canarios that fatally mauled Diane Whipple, denied that the dogs had a history of human aggression).

324. See *supra* notes 267-68 and accompanying text.

325. See *supra* note 267 and accompanying text.

326. See *supra* note 272 and accompanying text.

327. See *supra* text accompanying notes 50-51.

328. See *supra* notes 231-32 and accompanying text. One "training regimen" for a fighting pit bull included starving the dog, then fattening it on inexpensive canned dog food and beans and rice, forcing it to run around the block behind the trainers' bicycles, feeding it chicken blood, taking it looking for cats and strays to attack, injecting it with black-market penicillin and vitamin B12, and rubbing it with used motor oil to make the hair grow over

otherwise—of fostering human as well as dog aggression. Dogs that are abused to encourage aggression or trained to fight thereby present a greater risk to public safety, as they are more likely to inflict bites or severe injuries that could result in death. Although dog fighting is illegal in all fifty states, the number of dog fights has increased,<sup>329</sup> suggesting that the threat posed by current felony punishments is an insufficient deterrent for the activity.<sup>330</sup>

Given the apparent difficulty of enforcing dog fighting statutes,<sup>331</sup> legislatures should additionally target and punish conduct that marginally contributes to or encourages dog fighting, as such conduct increases the risk of a serious or fatal attack. Arizona's law making it a felony offense to steal dogs<sup>332</sup> is on point, as it punishes actions that ultimately lead to the training of fighting dogs. Imposing penalties for conduct which directly impacts dog fighting therefore could have a negative effect on the practice and minimize the likelihood of a biting incident.

### CONCLUSION

Enacting effective and efficient legislation to protect Americans from the threat posed by dangerous dogs is a necessary step in combating the dog-bite epidemic. The constitutionality of the proposed regulation cannot be the definitive or final consideration, however; rather, local legislatures must evaluate the practical effect of the law by analyzing objective factors that include statistical evidence, enforcement costs and available resources, and other relevant considerations. Legislation designed to reduce the number of bites and serious attacks must balance the need to protect society from dangerous dogs with the rights of responsible dog owners by emphasizing the need for and importance of responsible ownership. Aided by strict enforcement and breed-neutral supplemental legislation, dangerous-dog laws can effectively and efficiently provide a solution to the dog-bite epidemic.

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the scars. Swift, *supra* note 8, at 83. Some dogs are not trained at all, but put into a fighting ring to “get[] torn up” for the enjoyment of spectators. *Id.* at 82.

329. See *supra* notes 273-74 and accompanying text.

330. This Note does not suggest an optimal length of incarceration or monetary amount in fines to serve as an effective deterrent to dog fighting, only that reevaluation of current penalties is necessary.

331. See *supra* notes 273-74 and accompanying text.

332. See *supra* text accompanying notes 278-80. Broad language in the law, such as making it a crime to steal any animal for the purpose of dog fighting, would enable law enforcement officials to target a broader range of conduct that contributes to dog fighting, as it would permit imposing punishment for theft of smaller animals used as “bait” during training.

## *Notes & Observations*