

# THE BLACK MAN’S DOG: THE SOCIAL CONTEXT OF BREED SPECIFIC LEGISLATION

By  
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*Hundreds of communities throughout the United States have imposed breed-specific dog laws that prohibit ‘pit bulls’ in the name of public safety. This Article examines the relationship between pit bulls and people of color incorporating new research to argue that these laws may be rooted in racial bias. In such instances, breed-specific bans function as a means of keeping minorities out of majority-white neighborhoods. Finally, this Article suggests that if true ownership data mirrors the perceived ownership distribution measured here, such laws may be susceptible to challenge under the Fair Housing Act if it can be shown that they disproportionately exclude minority residents.*

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## I. INTRODUCTION

Breed-specific bans have been implemented in over 1,000 communities across America.<sup>1</sup> These laws prohibit citizens from owning certain types of dogs, so-called ‘banned breeds.’ Most commonly, this legislation targets ‘pit bull’ terriers, reputed to be more physical and violent than other breeds. Individuals who own dogs of this kind where legislation is enacted must either surrender their animals or move to a

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<sup>1</sup> *Estimated U.S. Cities, Counties, States and Military Facilities with Breed-Specific Laws*, DOGSBITE.ORG (Oct. 12, 2011), <https://www.scribd.com/doc/56495216/Estimated-U-S-Cities-Counties-States-and-Military-Facilities-with-Breed-Specific-Pit-Bull-Laws> [<https://perma.cc/X5TK-AW7Y>] (accessed Sept. 2, 2018).

different city or neighborhood without such restrictions.<sup>2</sup> No new owner may settle in the area so long as they possess such a dog. Critics argue that these bans are not based on sound scientific or statistical evidence—that pit bulls pose no greater risk than any other breed of dog. Advocates of these laws urge that the bans are crucial to protect the public health and safety from dangerous dogs. Yet, perhaps these concerns have less to do with dogs and more to do with the individuals who own them. Breed-specific legislation may be being used as a new form of redlining to keep minorities out of majority-white neighborhoods.

“We don’t want those people here,” a city council member said of the bans.<sup>3</sup> Strong cultural ties exist between pit bull dogs and the Black community. The same is true of the Latino community. Research undertaken here to investigate this claim suggests that people of color are perceived to be the most likely owner of this breed of dog.<sup>4</sup> While at the present time, actual ownership data is not available, if true ownership resembles the perceived distribution measured here, such a finding may form the basis for a legal claim. Under new law, breed-specific legislation could be challenged under the Fair Housing Act if it can be shown that these laws are disproportionately excluding minority groups.

## II. BREED-SPECIFIC LEGISLATION

Opponents of breed-specific legislation (BSL) argue that it unfairly discriminates against certain dogs based on their physical appearance (after all, pit bull is not a specific breed of dog but a group of breeds including: American pit bull terrier, American Staffordshire terrier, Staffordshire bull terrier, and American bulldog). Most bans allow officials to apply the ordinances to any dog that ‘looks like’ a member of one of these breeds or a mix including one of them.<sup>5</sup> Advo-

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<sup>2</sup> The text of breed-specific bans varies from one community to the next. Some have outright bans while others contain a grandfather provision allowing current owners to register their existing dogs. Some ordinances allow the dogs so long as they are muzzled or require mandatory sterilization. Others require the individual to register for a permit within ninety days and obtain liability insurance in excess of \$1 million in order to keep the dog. Dana M. Campbell, *Pit Bull Bans: The State of Breed-Specific Legislation*, 26 GPSOLO 36, 38 (2009), <http://www.jstor.org/stable/23673613> [<https://perma.cc/B3M8-NP4B>] (accessed Sept. 2, 2018).

<sup>3</sup> *The Majority Project: New Tools to Stop “Pit Bull” Dog Owner Discrimination*, ANIMAL FARM FOUNDATION, INC., <https://animalfarmfoundation.org/2014/06/10/the-majority-project-new-tools-to-stop-pit-bull-dog-owner-discrimination/> [<https://perma.cc/Q5-BG-4Z36>] (accessed Sept. 2, 2018).

<sup>4</sup> Hillary Twining et al., *Managing the Stigma of Outlaw Breeds: A Case Study of Pit Bull Owners*, 8 SOC’Y & ANIMALS 25, 26 (2000), <https://www.researchgate.net/publication/233484216> [<https://perma.cc/Z63U-G5YK>] (accessed Sept. 2, 2018).

<sup>5</sup> Studies show that identifications of pit bulls are often incorrect. Kimberly R. Olson & Julie K. Levy, *Incorrect Breed Identification*, MADDIE’S FUND (Feb. 2012), <http://www.maddiesfund.org/incorrect-breed-identification.htm> [<https://perma.cc/5FY6-VDB5>] (accessed Sept. 2, 2018). One Florida study found that less than half of all ani-

cates and owners have attempted to challenge breed bans on a constitutional basis; however, these suits have seen little success.<sup>6</sup> “Dogs are subject to [the] police power [of the state] and may be destroyed or regulated to protect citizens.”<sup>7</sup> Even where a “statute lacks a specific definition of ‘pit bull dog’” courts have noted that, “mathematical certainty [in this respect] is not . . . essential.”<sup>8</sup> Most breed-specific ordinances may be applied broadly to dogs that are ‘recognizable’ as a pit bull based on their “physical appearance,” or “phenotype,” despite contentions that these physical characteristics are not reliable indicators of breed.<sup>9</sup>

Conflicting research exists with respect to whether pit bulls do, in fact, present a higher risk of injury to humans. Some studies suggest that they are responsible for a disproportionate number of fatal dog attacks. Other studies, however, find that pit bulls are no more dangerous than other breeds that are not included under such bans and, in fact, may be less dangerous. A 2013 American Veterinary Medical Association Study examining fatal attacks from the last decade found that a valid determination of breed was only possible in 17.6% of these cases, and found no increased risk from pit bulls.<sup>10</sup> However, DogsBite.org, a pro-BSL group, found that pit bulls were responsible for 65.6% of fatal attacks during a similar time period.<sup>11</sup> One possible explanation for these significant discrepancies is the studies’ varying methodologies. Critics of BSL argue that increased safety concerns about pit bulls are largely the result of reporting bias: Some research has shown that animals that have bitten are more likely to be identified as pit

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mals identified as pit bulls by shelter staff actually had any genetic relationship to pit bull breeds through DNA testing. *Id.*

<sup>6</sup> 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 (1990).

<sup>7</sup> *Am. Dog Owners Ass’n v. City of Yakima*, 777 P.2d 1046, 1048 (Wash. 1989) (alteration in original).

<sup>8</sup> *State v. Robinson*, 541 N.E.2d 1092, 1097 (Ohio Ct. App. 1989) (alteration in original).

<sup>9</sup> *Garcia v. Village of Tijeras*, 767 P.2d 355, 358 (N.M. Ct. App. 1988). This is especially true with respect to mixed-breed dogs. When Mike and Amy Johnson’s dog, Niko, was seized pursuant to the ban in Kansas City, Kansas, it took them eight months of legal action to order a DNA test, which later confirmed what they had said all along—that Niko was a boxer mix. Campbell, *supra* note 2, at 37. During this time, Niko was held in an animal control kennel. *Id.* See also Olson & Levy, *supra* note 5 (describing how dog shelter workers mistakenly identified mixed breeds and “true” pit bulls by observing the dogs).

<sup>10</sup> Gary Patronek et al., *Co-Occurrence of Potentially Preventable Factors in 256 Dog Bite-Related Fatalities in the United States (2000–2009)*, 243 J. AM. VETERINARY MED. ASS’N 1726, 1732–34 (2013), [http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/javma\\_dbrf\\_factors\\_0009\\_dec\\_2013.pdf](http://www.marylanddogfederation.com/uploads/1/6/6/0/16605940/javma_dbrf_factors_0009_dec_2013.pdf) [https://perma.cc/5SPY-VUPF] (accessed Sept. 2, 2018).

<sup>11</sup> *U.S. Dog Bite Fatalities: Breeds of Dogs Involved, Age Groups and Other Factors Over a 13-Year Period (2005–2017)*, DOGSBITE.ORG (May 2018), <https://www.dogsbite.org/reports/13-years-us-dog-bite-fatalities-2005-2017-dogsbite.pdf> [https://perma.cc/XJW2-U4B6] (accessed Sept. 2, 2018).

bulls or pit bull mixes after the fact.<sup>12</sup> In addition, significantly more media attention is given to attacks involving dogs identified as pit bulls than to those involving other breeds.<sup>13</sup> Pro-BSL studies, by and large, tend to rely on surveys of media reports to generate their estimates.<sup>14</sup> Aside from statistics, a certain cultural mythology exists around pit bulls. Many believe that they are not only more vicious than other dogs, but more powerful and deadly.<sup>15</sup> Part of this attribution is owed to their association with dogfighting. Such thinking is echoed in many of the court decisions regarding BSL. Courts have agreed with evidence presented by the state purporting to show that the breed

possesses inherent characteristics of aggression, strength, viciousness and unpredictability not found in any other breeds of dogs . . . . Pit bull terriers

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<sup>12</sup> See KAREN DELISE, *THE PIT BULL PLACEBO: THE MEDIA, MYTHS AND POLITICS OF CANINE AGGRESSION* 97–99 (2007), [https://www.friendsofthedog.co.za/uploads/6/0/9/1/6091047/-230603563\\_pit\\_bull\\_placebo.pdf](https://www.friendsofthedog.co.za/uploads/6/0/9/1/6091047/-230603563_pit_bull_placebo.pdf) [<https://perma.cc/7D6F-PE8Y>] (accessed Sept. 2, 2018) (detailing media coverage and society’s turn against the breed, including instances of other breeds attacking but the news reports still mentioning pit bulls in some fashion).

<sup>13</sup> A study by the National Canine Research Center looked at media reporting of each of four dog attacks that occurred during a four-day period in 2007. JANIS BRADLEY, ANIMALS AND SOCIETY INSTITUTE, *DOG BITES: PROBLEMS AND SOLUTIONS* 9 (rev. 2014), [https://www.nationalcanineresearchcouncil.com/sites/default/files/Dog-Bites-Problems-and-Solutions-2nd-Edition\\_0.pdf](https://www.nationalcanineresearchcouncil.com/sites/default/files/Dog-Bites-Problems-and-Solutions-2nd-Edition_0.pdf) [<https://perma.cc/HL69-XW7F>] (accessed Sept. 2, 2018). Their study found that the incident involving a pit bull was reported in over 230 media outlets nationwide. *Id.* The other three attacks implicating different breeds of dogs were each reported in two or fewer local news sources, despite the fact that each of these three attacks was more serious than the fourth involving a pit bull, and one of them resulted in a child fatality. *Id.*

<sup>14</sup> *Fatality Data Collection Method*, DOGSBITE.ORG, <https://www.dogsbite.org/dog-bite-statistics-fatality-citations-data-collection.php#news-reports> [<https://perma.cc/G6RC-MKQF>] (accessed Sept. 2, 2018).

<sup>15</sup> It is worth noting that many statements about pit bulls are reminiscent of those historically used to denigrate Black Americans: “Pit bulls have large mouths and funny looking lips.” “[They have] broad-skulls . . . [and] muscular bodies.” “It is wise to cross the street when approached by a pit bull.” “Pit bulls are lazy until you try to take something away from them.” “Mixed breed pit bulls are more intelligent, kind, and gentle than full-breeds.” Kevin Maillard, *Are Pitbulls the Black People of Dogs?*, THE FACULTY LOUNGE (Feb. 21, 2008), <http://www.thefacultylounge.org/-2008/02/are-pitbulls-th.html> [<https://perma.cc/SWX6-A8G9>] (accessed Sept. 2, 2018); E.M. Swift, *The Pit Bull Friend and Killer: Is the Pit Bull a Fine Animal, as Its Admirer’s Claim, or Is it a Vicious Dog, Unfit for Society?*, SPORTS ILLUSTRATED (July 27, 1987), <http://www.si.com/-vault/1987/07/27/115813/the-pit-bull-friend-and-killer-is-the-pit-bull-a-fine-animal-as-its-admirers-claim-or-is-it-a-vicious-dog-unfit-for-society> [<https://perma.cc/AC82-QUP2>] (accessed Sept. 2, 2018) (“[pit bulls] will literally fight until they’re dead;” quoting a San Diego Judge: “a pit bull . . . is the closest thing to a wild animal there is in a domesticated dog,” asking, “Are these dogs ‘loaded handguns’ or ‘a time bomb?’”); see also Elana Pisani, *Pit Bull Discrimination – A People Problem?*, GLOBAL ANIMAL (July 10, 2015), <http://www.globalanimal.org/2015/07/10/pit-bull-discrimination-a-people-problem/> [<https://perma.cc/T7XH-HGRH>] (accessed Sept. 2, 2018) (noting the change in perception of pit bulls in the 1980s). In addition, it has been suggested that “black colored pit bulls are [more] aggressive.” *Black Pit Bull Dogs – Are They Really Popular?*, AMERICAN BULLY DAILY (Jan. 30, 2016), <http://americanbulldaily.com/pit-bull-dogs/black-pit-bull-breeds-information/> [<https://perma.cc/U5Y8-8GKJ>] (accessed Sept. 2, 2018).

have been known to be friendly and docile at one moment, willing to sit on your lap and lick your face, and the next moment to attack in a frenzied rage . . . They have exceptionally strong bites, possibly twice the strength of bites of other dogs. They can grip cyclone fencing and tear it from its mounting, and have been known to destroy sheet metal panels by ripping them apart with their teeth.<sup>16</sup>

In popular culture, pit bulls are rumored to have “locking jaws” capable of inflicting serious physical damage.<sup>17</sup> While there is a paucity of scientific evidence to support such claims, each has contributed to a kind of hysteria surrounding the dogs. Some have likened pit bull maulings to urban shark attacks—incredibly rare but widely reported.<sup>18</sup>

However, a second cultural narrative exists—one that holds that while pit bulls themselves may not be inherently more dangerous than other dogs, it is their owners that somehow make them more dangerous—by being careless or not controlling them or actively training them to fight. The historical context of pit bulls and their relationship to the Black community supports such a reading.

### III. HISTORICAL BACKGROUND

In the early 20th century, pit bulls were considered “prototypical American pets.”<sup>19</sup> They appeared in recruiting posters for both World War I and World War II, nicknamed “America’s Dog.”<sup>20</sup> The first dog to receive an army medal was a pit bull.<sup>21</sup> Featured in *The Little Rascals* and *Buster Brown* ads—pit bulls, known as “nanny dogs” for their affectionate disposition and tolerance towards children—were part of Americana.<sup>22</sup>

<sup>16</sup> Garcia, 767 P.2d at 359.

<sup>17</sup> See Arin Greenwood, *10 Stereotypes About Pit Bulls That are Just Dead Wrong*, HUFFINGTON POST (July 28, 2014, 8:00 AM), [http://www.huffingtonpost.com/arin-greenwood/pit-bull-myths\\_b\\_5623555.html](http://www.huffingtonpost.com/arin-greenwood/pit-bull-myths_b_5623555.html) [https://perma.cc/FWT5-8EKK] (accessed Sept. 2, 2018) (refuting the popular myth that pit bulls have “locking jaws”).

<sup>18</sup> See DELISE, *supra* note 12, at 113 (debunking the comparison of pit bull bites to shark attacks).

<sup>19</sup> Erin Tarver, *The Dangerous Individual(s) Dog: Race, Criminality and the ‘Pit Bull’*, *Culture, Theory and Critique* 273, 281 (2013).

<sup>20</sup> *What Happened to America’s Dog?*, PATCH (Oct. 26, 2015, 5:04 PM), <http://patch.com/virginia/lorton/what-happened-americas-dog-1> [https://perma.cc/79MK-ESDT] (accessed Sept. 2, 2018).

<sup>21</sup> Sergeant Stubby remains the only dog ever to be nominated for military rank. When Sergeant Stubby passed away, he was honored in the *New York Times* with a lengthy obituary. He is preserved at the Smithsonian Museum in Washington, D.C. and as the mascot of Georgetown University. *Stubby of A.E.F. Enters Valhalla*, N.Y. TIMES (Apr. 4, 1926), <http://www.ct.gov/-mil/cwp/view.asp?a=1351&q=257958> [https://perma.cc/8XTQ-3B9Q] (accessed Sept. 2, 2018).

<sup>22</sup> Jim Gorant, *What Happened to Michael Vick’s Dogs . . .*, SPORTS ILLUSTRATED (Dec. 23, 2008), <http://www.si.com/more-sports/2008/12/23/vick-dogs> [https://perma.cc/JT2N-ED7P] (accessed Sept. 2, 2018). Theodore Roosevelt and Woodrow Wilson owned pit bulls, as well as other American heroes, such as Helen Keller and Laura Ingles Wilder. *What Happened to America’s Dog?*, *supra* note 20.

Though once a favorite family dog, the pit bull breed began to fall into disrepute beginning in the 1980s.<sup>23</sup> A series of reports on rising crime rates surfaced during this period, connecting “attacks by ‘pit bulls’ to gang violence by urban youths.”<sup>24</sup> By 1987, law enforcement announced that, “Street dope dealers and street gangs have gone to pit bulls.”<sup>25</sup> Pit bulls were swept up into the War on Drugs, with studies reporting that “in two out of three narcotics raids, pit bulls were used as the guard dogs.”<sup>26</sup> Through this line of media narrative, pit bulls themselves became “carriers of the contagion of criminality.”<sup>27</sup> “The American pit bull terrier has become a reflection of ourselves that no one cares very much to see,” one author wrote.<sup>28</sup> These dogs came to represent a very different America from the one they portrayed decades earlier, splashed in red, white, and blue on draft recruiting posters.<sup>29</sup>

This perception was buttressed by pit bulls’ primacy within the hip-hop music scene—a “strongly racialized genre” in the United States, as well as abroad.<sup>30</sup> They appeared in music videos and were featured as cultural symbols of “‘urban ghettos’ and ‘Afro-American

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<sup>23</sup> Tarver, *supra* note 19, at 281.

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

<sup>25</sup> Swift, *supra* note 15 (also recommending “[that because] it is virtually impossible to tell a docile pit bull from a mean one . . . jumping up to rip out your throat . . . your best bet is to pass a fast judgment on its owner”). Other articles from this time period also lay blame on pit bulls’ “irresponsible, often criminal, owners.” *Id.* This relationship of guilt by association is evidenced in court opinions as well, one suggesting that “a more thorough analysis . . . would demonstrate that the danger posed is the result of some dog owners, including drug dealers . . . deliberately increas[ing] the dog’s aggression . . . .” *Toledo v. Tellings*, 871 N.E.2d 1152, 1159 (Ohio 2007) (O’Conner, J., concurring).

<sup>26</sup> Swift, *supra* note 15. This study was conducted in Los Angeles County.

<sup>27</sup> Tarver, *supra* note 19, at 281. Cohen and Richardson analyzed the portrayal of pit bull owners in each *New York Times*’ piece published between 1987–2000. They found that these individuals were consistently characterized as “the dregs of society.” Judy Cohen & John Richardson, *Pit Bull Panic*, 36 J. POPULAR CULTURE 285, 287 (2002). Articles published during this time period suggest that pit bulls were used in the commission of violent crimes such as rape and armed robbery, “in effect taking the place of a weapon.” Swift, *supra* note 15. They also suggest that demand for these animals surged because of the negative media attention they received: “Suddenly, any thug or wannabe thug knew what kind of dog to own. Many of these people didn’t know how to train or socialize or control the dogs, and the cycle fed itself.” Gorant, *supra* note 22.

<sup>28</sup> Swift, *supra* note 15.

<sup>29</sup> See Appendix I.

<sup>30</sup> Tarver, *supra* note 19, at 281. In 2000, France passed a law calling for a special unit of K-9 police forces “whose primary responsibility was to monitor the behavior of pit bulls . . . in French housing projects occupied primarily by non-white people . . . .” *Id.* Pitbull is also the stage name of rap artist, Armando Christian Pérez. In his biography, “Pitbull: Mr. Worldwide,” the rapper explains that he chose this name because, “(Pitbulls) bite to lock. The dog is too stupid to lose. And they’re outlawed in Dade County (Florida) [where he is from]. They’re basically everything that I am. It’s been a constant fight.” Lisa Respers France, *Pitbull: 5 Surprising Facts About the Superstar*, CNN (June 21, 2014), <http://www.cnn.com/2014/06/20/showbiz/celebrity-news-gossip-pitbull-cnn-spotlight/> [<https://perma.cc/8WRT-NF9V>] (accessed Sept. 2, 2018).

lifestyles.”<sup>31</sup> The dogs were popular where hip-hop music was popular—a relationship developed through proximity and association.<sup>32</sup> The Ohio Supreme Court reasoned that pit bulls were dangerous in part because they are “found largely in urban settings where there are crowded living conditions and a large number of children present.”<sup>33</sup> Fear of crime and Black urban youths spread to pit bulls, creating a “metonymic feedback-loop [that has come to] characterise the relationship between pit bulls, Blackness, and the perception of criminality . . . .”<sup>34</sup> The breed seemed likely to be saturated with connotations of “black crime” and “black music” in the minds of many Americans.<sup>35</sup> These relationships were crystalized by the Michael Vick case.

“They move out of the ghetto, but the ghetto is still in them,” one of Vick’s neighbors told reporters.<sup>36</sup> His sentiments were echoed by many in the mainstream media.<sup>37</sup> The story received significant attention,<sup>38</sup> in part, because of Vick’s celebrity status—but it also solidified pit bulls’ status as “the dogfighting dog” and cemented cultural associations that had been building for decades between pit bulls and

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<sup>31</sup> Tarver, *supra* note 19, at 281. In the Ohio Supreme Court decision upholding breed-specific bans, the Court cited testimony that “Toledo police officers fire their weapons in the line of duty at pit bulls more often than they fire weapons at people and all other breeds of dogs combined . . . .” *Tellings*, 871 N.E.2d at 1157. In addition, they agreed with findings that, “[P]it bulls are frequently shot during drug raids because pit bulls are encountered more frequently in drug raids than any other dog breed.” *Id.*

<sup>32</sup> Kerry Lauerman, *It’s Time to Stop Demonizing Pit Bulls*, WASH. POST (May 20, 2016), <https://www.washingtonpost.com/news/animalia/wp/2016/05/20/pit-bull-rescue-mission-restoring-a-bad-dogs-good-name/> [<https://perma.cc/3XCL-MPMH>] (accessed Sept. 2, 2018).

<sup>33</sup> *Tellings*, 871 N.E.2d at 1157.

<sup>34</sup> Tarver, *supra* note 19, at 282. Interestingly, it was during this time of increased media reporting on pit bulls and their owners that journalists popularized new terms such as “wilding” to describe criminal violence carried out by ‘packs’ or ‘wolfpacks’ of Black and Latino youth. *Id.* (citing Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 *YOUTH & Soc’y* 3–30 (2002)). See also media reporting on the “Central Park Five.”

<sup>35</sup> These perceptions seem to be perpetuated even by advocacy groups who oppose breed legislation. In 2008, the ASPCA ran a campaign that seemed likely to be targeting Black and Latino owners by placing graffiti inspired ads in Harlem and the Bronx depicting a man and his pit bull, with the slogan, “Show your boy you got his back. Fix your dog, it’s all good.” Marissa Brassfield, *ASPCA’s Street Art-Inspired Campaign*, Trendhunter (Oct. 29, 2008), <http://www.trend-hunter.com/trends/aspca-graffiti-ad> [<https://perma.cc/6FKE-ZZEN>] (accessed Sept. 2, 2018) (Appendix II).

<sup>36</sup> Tarver, *supra* note 19, at 278. (citing Pamela C. Laucella, *Michael Vick: An Analysis of Press Coverage on Federal Dogfighting Charges*, *J. OF SPORTS MEDIA* 35, 47 (2010)).

<sup>37</sup> Earl Ofari Hutchinson, *Ghetto Dog Fighting—The Latest Urban Legend*, HUFFINGTON POST (Sept. 5, 2007), [https://www.huffingtonpost.com/earl-ofari-hutchinson/ghetto-dog-fightingthe-la\\_b\\_63143.html](https://www.huffingtonpost.com/earl-ofari-hutchinson/ghetto-dog-fightingthe-la_b_63143.html) [<https://perma.cc/VM78-N26A>] (accessed July 5, 2018).

<sup>38</sup> In December 2009, *Sports Illustrated* named Michael Vick and the dog fighting investigation as one of the top ten sports news stories of the 2000s. *Top 10 Sports Scandals of the Decade*, *SPORTS ILLUSTRATED* (Dec. 22, 2009), <http://www.si.com/more-sports/2013/12/13/scandals> [<https://perma.cc/2FWQ-XTZ3>] (accessed Sept. 2, 2018).

African American culture.<sup>39</sup> Vick put a face on the crime of dogfighting—a Black one.<sup>40</sup>

This change coincided with new legal restrictions surrounding pit bulls. Local and state laws prohibiting the ownership of certain breeds of dogs have become increasingly common. While some residents of these localities have experienced bites from pit bull dogs, other communities have implemented bans as preventative measures.

#### IV. DOG BITES OVER TIME

Historical reporting shows that the “most dangerous breed of dog” changes over time. From the 1860s to the 1890s, bloodhounds were cited as the culprit in the majority of dog attacks.<sup>41</sup> In the 1960s and 70s, that title applied to German shepherds.<sup>42</sup> Some of the discrepancy in terms of number of bites reported may be attributed to the relative popularity of different dog breeds at different times. Still, many of these breeds, once considered to be the most dangerous, are quite popular today, though they no longer carry a reputation as “dangerous dogs.” It is unlikely that German shepherds changed their behavior markedly beginning in the 1980s, when pit bulls began developing a negative reputation. However, they are not generally included in breed-specific legislation today.<sup>43</sup> In addition, pit bulls were widely popular at times when other dogs were considered the most dangerous—undermining suggestions that there is a linear or scientific movement towards identifying the most dangerous dogs.<sup>44</sup> Instead, many

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<sup>39</sup> Gorant, *supra* note 22.

<sup>40</sup> This has not always been true. Historically, many dog fighters were white ‘gentlemen breeders.’ Swift, *supra* note 15. Today, many dog-fighting rings are primarily white. *The Color of Dog Fighting*, BADRAP BLOG (May 10, 2011), <http://badrap-blog.blogspot.com/2011/05/color-of-dog-fighting.html> [https://perma.cc/ZEL5-4NDA] (accessed Sept. 2, 2018). Still, these are not the images pervasive in media depictions of dog fighting. Swift, *supra* note 15. For example, in 2011, *The Today Show* featured a video promoting the Humane Society of the United States’ “End Dogfighting Program.” Wayne Pacelle, *End Dogfighting Program in the Spotlight Today*, THE HUMANE SOC’Y: A HUMANE NATION (May 10, 2011), <http://blog.humanesociety.org/wayne/2011/05/end-dogfighting-today-show.html> [https://perma.cc/ZEK5-9RKA] (accessed Sept. 2, 2018). The video juxtaposes fighting imagery with interviews with young, Black males. The Humane Society program targeted “street fighting in inner city Chicago neighborhoods.” *End Dogfighting*, HUMANE SOC’Y, [http://www.humanesociety.org/issues/dogfighting/end\\_dogfighting.html](http://www.humanesociety.org/issues/dogfighting/end_dogfighting.html) [https://perm-a.cc/NR9A-M7U3] (accessed Sept. 2, 2018).

<sup>41</sup> DELISE, *supra* note 12, at 21.

<sup>42</sup> See *id.* at 78 (stating that after *The Adventures of Rin Tin Tin* show, the German shepherd’s popularity rose in the 1960s and 1970s, which subsequently caused new issues with aggression).

<sup>43</sup> See *Breed Specific Legislation FAQ*, DOGSBITE.ORG (Oct. 1, 2017) <https://www.dogsbite.org/legislating-dangerous-dogs-bsl-faq.php> [https://perma.cc/WR5P-KHR9] (accessed Sept. 2, 2018) (detailing through survey which breeds of dogs are named in the 860 exiting city regulations, German shepherd is not listed).

<sup>44</sup> See *The History of Pit Bulls*, LOVE-A-BULL, <http://love-a-bull.org/resources/the-history-of-pit-bulls/> [https://perma.cc/8SWV-NYCP] (accessed Sept. 2, 2018) (detailing the



critics of breed-specific legislation have suggested that breeds that are considered the most dangerous are not based on statistics but popular wisdom informed by media reporting. In the 1880s, there was public outcry over bloodhounds. Today, that dog is pit bulls.<sup>45</sup>

## V. BREED-SPECIFIC LEGISLATION TODAY

In recent years, the momentum for breed-specific legislation slowed. Studies commissioned in Great Britain and Spain found that their pit bull bans had “no effect at all on stopping dog attacks.”<sup>46</sup> The Spanish study went on to conclude that: “the breeds most responsible for bites—both before and after the bans—were those not covered by it, primarily German shepherds.”<sup>47</sup> In 2003, Prince George’s County, Maryland formed a task force to conduct one of the most comprehensive studies in America to date.<sup>48</sup> The study concluded that despite spending over \$250,000 per year on enforcement, rounding up, and destroying banned dogs, “public safety had not improved as a result of the ban.”<sup>49</sup> The commission recommended that the ban be repealed. The Centers for Disease Control and Prevention made the same recommendation in 2000, calling breed legislation, “inappropriate” after looking at twenty years of historical data.<sup>50</sup> President Obama, in a statement, also denounced such regulations as, “largely ineffective and often a waste of public resources.”<sup>51</sup> These findings have caused some communities to reconsider their breed-specific bans; however, many more remain in place.

## VI. PERCEPTIONS ABOUT OWNERSHIP

Though cultural connections appear to exist between pit bulls and minority groups, no previous research has sought to measure these correlations quantitatively. As part of this study, participants were given photos of six dogs of different breeds against a grass background. Each participant was asked to answer a series of three questions regarding the dog breed pictured: (1) Who do you think is the most likely owner of this breed of dog—male or female? (2) Who do you think is the most likely owner of this breed of dog—a white person, black or African American person, American Indian person, Asian person, Hispanic

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history of the ‘Pit Bull’ in America, including through the periods of the early 20th century when German shepherds were villainized); *see supra* notes 41–42.

<sup>45</sup> See Emily Weiss, *Rising from the Pit*, ASPCA<sub>PRO</sub> (May 19, 2017), <https://www.aspcapro.org/blog/2017/05/19/rising-pit> [<https://perma.cc/NX56-STFC>] (accessed Sept 2, 2018) (detailing that 40% of dogs euthanized in shelters are “Pit Type” dogs).

<sup>46</sup> Campbell, *supra* note 2, at 39.

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

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

<sup>49</sup> *Id.* Miami reported that breed-specific legislation cost the city more than \$600,000 per year to enforce. Greenwood, *supra* note 17.

<sup>50</sup> The American Bar Association has also said that it does not favor breed-specific legislation. Greenwood, *supra* note 17.

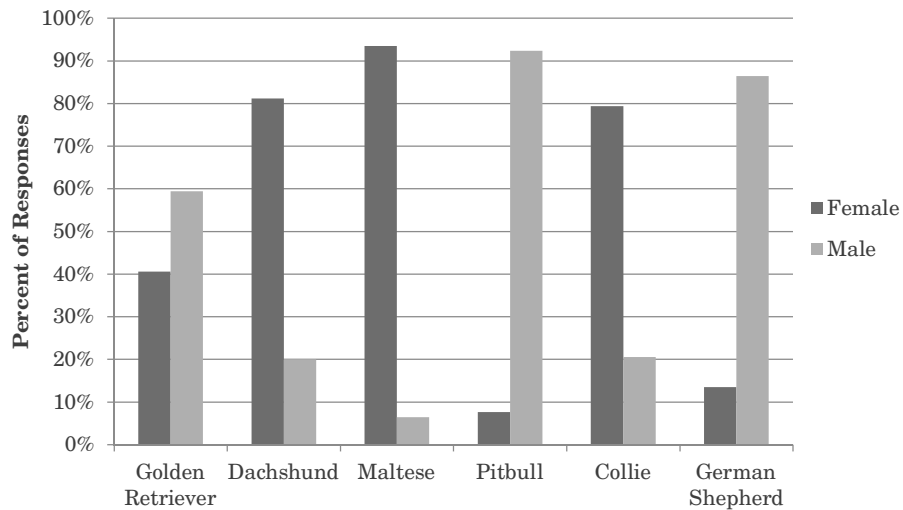
<sup>51</sup> *Id.*



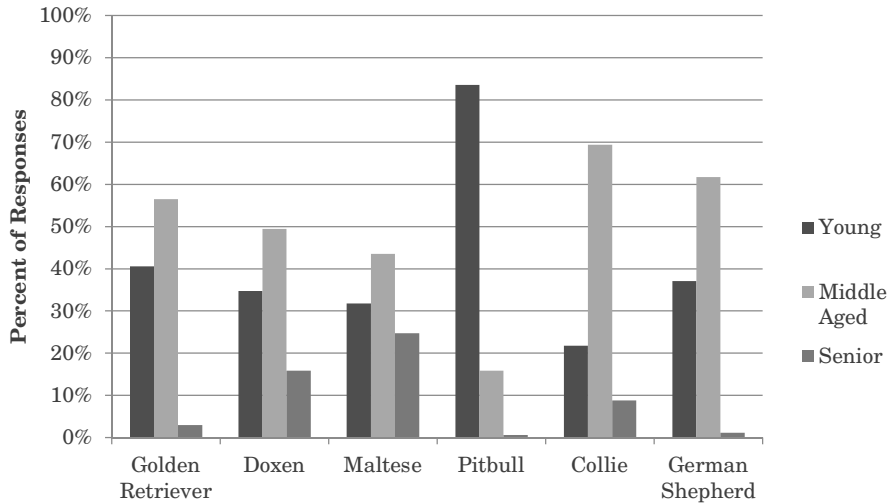
more likely to be owned by younger people (84%), with 16% middle-aged owners, and <1% senior owners.

	Golden Retriever	Dachshund	Maltese	Pit Bull	Collie	German Shepherd
Female	69	138	159	13	135	23
Male	101	32	11	157	35	147
<b>Total</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>
White	151	135	134	57	156	139
Black	6	13	12	82	4	19
American Indian	3	2	1	1	1	3
Asian	6	11	14	2	7	4
Hispanic	3	5	7	27	1	4
Other	1	4	2	1	1	1
<b>Total</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>
Young	69	59	54	142	37	63
Middle-Aged	96	84	74	27	118	105
Senior	5	27	42	1	15	2
<b>Total</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>	<b>170</b>

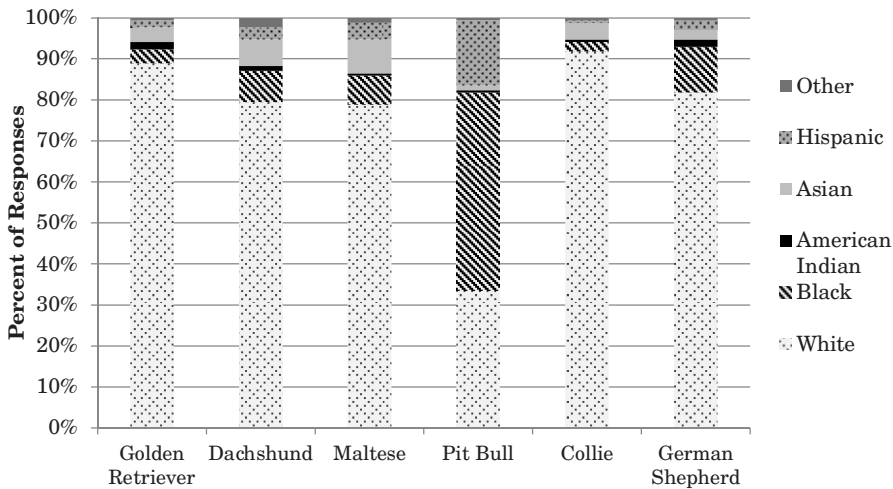
Perceived Distribution by Gender



Perceived Distribution by Age



Perceived Distribution by Race

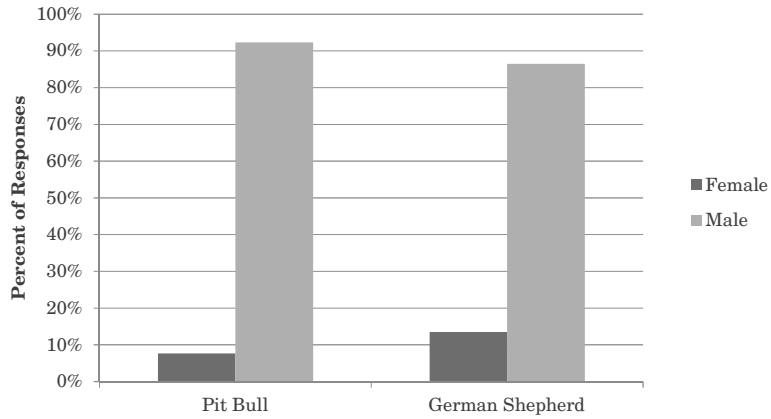


German shepherds were included in the survey, in part, because they were widely considered one of the most dangerous breeds of dog prior to 1980 when pit bulls assumed that title.<sup>57</sup> Yet, they are not commonly included in breed-specific bans today. As a result, they were intended to serve as foil to pit bulls—in that they were frequently perceived as dangerous but have not been legislated against to the same extent. The results suggest that while German shepherds and pit bulls are alike inasmuch as they are both perceived as being owned predominantly by males (86% and 92%, respectively) and as being overwhelm-

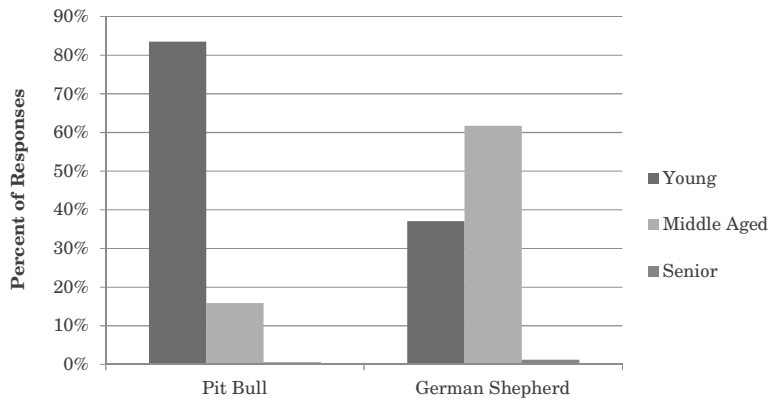
<sup>57</sup> DELISE, *supra* note 12, at 73–78.

ingly owned by young or middle-aged owners (98% and 99%, respectively), the two breeds vary significantly in terms of owner race.

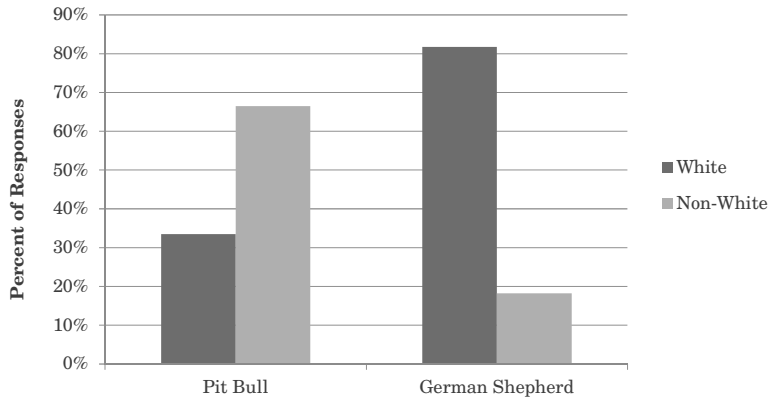
Perceived Gender Distribution



Perceived Age Distribution



Perceived Racial Distribution



The study showed that 82% of participants considered a white person to be the most likely owner of a German shepherd, while for pit bulls that number was just 34%.<sup>58</sup> These results, though not conclusive, may provide insight as to why German shepherds, which were cited for the majority of dog bites for decades, are generally not included in bans against dangerous dogs today.<sup>59</sup> These findings corroborate the theory that breed bans may be motivated by factors outside the scope of the dog's behavior. In addition, they show that the legislation is likely not intended to target all dogs with predominately male or younger owners, as German shepherds and pit bulls look somewhat similar in these other respects. However, the racial connotations of each breed vary substantially. These findings are consistent with idea that pit bulls are being targeted, in part, due to racial bias and variables beyond the risk posed by the dogs themselves.

It is important to note that while this study attempts to measure perceptions of pit bull ownership, there is no comprehensive data on actual ownership currently available.<sup>60</sup> However, if the true distribution of pit bull ownership resembles the perceived distribution illustrated here, it may provide the basis for a legal challenge to breed-specific laws.

## VII. LEGAL CHALLENGES AND THE FAIR HOUSING ACT

The Fair Housing Act ("FHA"), passed in the wake of Dr. Martin Luther King Jr.'s assassination, begins with a pronouncement that captures the spirit of the law: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout

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<sup>58</sup> Ironically, German shepherds, a favorite dog among police, were often used as a weapon against Black protesters in the 1960s. Joshunda Sanders, *Healing Fraught History of African Americans and Dogs*, THEBARK.COM (June 2014), <http://thebark.com/content/healing-fraught-history-african-americans-and-dogs> [https://perma.cc/G5P2-ZWGM] (accessed Sept. 2, 2018). They are featured in many of the iconic photographs from the Civil Rights Era. *Id.* There have been reports that police officers continue to use dogs more when dealing with minorities. In the 1980's, the Los Angeles Sheriff's Department allegedly referred to "young blacks as 'dog biscuits.'" *Id.*

<sup>59</sup> DELISE, *supra* note 12, at 89. Of the 1,089 cities that currently impose some sort of breed-specific legislation, only six of these ordinances include German shepherd dogs. *Estimated U.S. Cities*, *supra* note 1.

<sup>60</sup> Measuring actual ownership of dogs poses many challenges. There is limited census data regarding pet ownership, and none that includes specifics about breed. Ownership data collected through pet stores, breeders, or shelters would likely have biases associated with the sample of individuals choosing that means of obtaining a pet. Dog registrations or licensing programs would be the obvious choice; however, a large percentage of dogs are not licensed, and low-income families are less likely to register their pets due to the fees imposed. Some authors have suggested that the majority of pit bulls are unlicensed, meaning such an approach would be unlikely to yield a representative sample. Swift, *supra* note 15. In addition, individuals may misrepresent the breed of their animal to avoid stigma or legal restrictions already in place. Because of the myriad of challenges associated with obtaining unbiased ownership data, there are currently no reliable estimates of owner demographics by breed. Gathering such data may require something akin to going door to door.

the United States.”<sup>61</sup> In adopting the FHA, Congress recognized that, despite existing statutory prohibitions against certain forms of explicit discriminatory conduct, “local ordinances with the same effect, although operating more deviously in an attempt to avoid the Court’s prohibition, were still being enacted . . . .”<sup>62</sup> The FHA provided a mechanism to challenge these subtler but equally harmful practices.

Generally, claims of discrimination require some showing of intent. However, courts have long allowed claims under the FHA based solely upon disparate impact of the practice on the protected class, absent any evidence of discriminatory animus.<sup>63</sup> These disparate impact claims have been allowed despite the lack of explicit statutory language providing for such a method of proof.<sup>64</sup> In 2013, the Department of Housing and Urban Development (“HUD”), the agency charged with enforcing the FHA, promulgated a rule “formaliz[ing] its long-held recognition of discriminatory effects liability under the Act . . . .”<sup>65</sup> In addition, “[F]or purposes of providing consistency nationwide, [the HUD] formalize[d] a burden-shifting test for determining whether a given practice has an unjustified discriminatory effect, leading to liability under the Act.”<sup>66</sup>

Although HUD and each of the eleven federal courts of appeal that considered the issue recognized the disparate impact theory under the FHA in some form, there was still uncertainty as to whether such a claim would be upheld by the Supreme Court. However, in 2015, the Court finally weighed in on the issue. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, (“ICP”), the Court formally recognized disparate impact claims under the Fair Housing Act.<sup>67</sup> The Court held that the FHA’s text and expansive purpose were consistent with this more generous theory of liability.<sup>68</sup> The opinion explicitly approved of disparate impact claims against “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justifica-

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<sup>61</sup> 42 U.S.C. § 3601 (2006).

<sup>62</sup> 114 CONG. REC. 2699 (1968) (statement of Sen. Mondale); Michael G. Allen, et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 156 (2014).

<sup>63</sup> Allen et al., *supra* note 62, at 156.

<sup>64</sup> Despite the uniform acceptance of disparate impact claims under FHA, courts applied various analytical approaches and differing burdens to prove these claims. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,461 & nn.12–16 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (hereinafter “HUD’s Final Rule”).

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

<sup>66</sup> *Id.*

<sup>67</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507, 2510 (2015).

<sup>68</sup> *See id.* at 2521–22 (stating that the FHA text supports disparate impact claims because there are exemptions from it which would be superfluous if the FHA itself didn’t allow disparate impact claims, and the FHA’s purpose is to eradicate discriminatory practices from the housing sector).

tion.”<sup>69</sup> Such suits, the Court explained, “reside at the heartland of disparate-impact liability.”<sup>70</sup> Kennedy’s opinion went on to note that, “[r]ecognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”<sup>71</sup>

Since the enactment of the FHA, courts have applied the disparate impact analysis to a wide range of practices believed to harm protected groups disproportionately.<sup>72</sup> “These practices include exclusionary zoning ordinances, the administration of Section 8 vouchers, lending practices, mortgage insurance policies, landlord and housing provider reference policies, occupancy restrictions, and the demolition and siting of subsidized housing.”<sup>73</sup> The Supreme Court’s recent opinion rests on the importance of applying this statute broadly to curb “the denial of housing opportunities on the basis of ‘race, color, religion, or national origin.’”<sup>74</sup>

Breed-specific legislation is a facially neutral law. Without a window into the mind of legislators, there can be no smoking gun showing intent to discriminate against minority groups.<sup>75</sup> In fact, there may be

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

<sup>70</sup> *Id.* at 2522.

<sup>71</sup> *Id.* at 2511–12.

<sup>72</sup> See Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 422 (2013) (chronicling every appellate FHA case over the past forty years in Appendix A).

<sup>73</sup> Allen et al., *supra* note 62, at 157. See Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUM. L. REV. Sidebar 106, 107–08 (2015) (describing how initially, the FHA claims tended to focus on actions by municipalities and public housing authorities. Whether the FHA regulated purely private, as opposed to public, conduct soon became an area of dispute. In particular, whether the FHA applied to private sector homeowner’s insurance underwriting policies was the subject of judicial disagreement); Matthew Jordan Cochran, *Fairness in Disparity: Challenging the Application of Disparate Impact Theory in Fair Housing Claims Against Insurers*, 21 GEO. MASON U. CIV. RTS. L.J. 159, 162–63 (2011) (responding to a case finding that a homeowner’s insurance allegedly discriminatory denial of insurance was not actionable under the FHA’s disparate impact test, HUD promulgated a new regulation specifically interpreting the FHA to forbid the practice of “[r]efusing to provide . . . property or hazard insurance . . . for dwellings or providing such services or insurance differently because of [a person’s protected status]”); *Id.* at 163 (citing 24 C.F.R. § 100.70(d)(4) (2010)). This rule leaves no doubt that private insurers are subject to FHA claims. Thus, in addition to a claim against a municipality for requiring additional property insurance if a household had a ‘banned’ breed, a claim could also be made against any insurer that requires additional coverage due to a household having a specific breed of dog under the same theory).

<sup>74</sup> *Inclusive Cmty. Project*, 135 S. Ct. at 2510.

<sup>75</sup> Because of this lack of overt discrimination, breed-specific legislation could not support a challenge under the standards of the Equal Protection Clause, which requires a showing of intent. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the Court noted that its decisions “have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact.” *Id.* at 239. The Court



no intent to discriminate. However, the FHA demands that we consider results, rather than just intentions—that we seek to counter all prejudices, not merely conscious ones.<sup>76</sup> If actual ownership of pit bull dogs resembles the perceived ownership demographics measured in this study, such disparities may give rise to a cognizable claim under the FHA’s disparate impact standard. Regardless of whether lawmakers’ decisions in enacting breed-specific laws were colored by prejudice and a perception that minority groups are more likely to own this breed, owners may be able to challenge the laws that disproportionately affect people of a protected class.<sup>77</sup>

Breed-specific legislation acts as a barrier to entry, preventing pit bull owners from settling in cities and neighborhoods. It also forces current residents to make an unhappy choice between giving up their pet and giving up their home.<sup>78</sup> These breed bans function like any occupancy restriction or exclusionary zoning ordinance. They limit the pool of potential residents and exclude individuals from neighborhoods where they have made their home. If people of color do, in fact, own pit bulls at disproportionate rates, they fall clearly within the purview of the statute’s protection. Just as clearly, breed-specific bans may be described as “housing restrictions that unfairly exclude minorities from certain neighborhoods.”<sup>79</sup> Nevertheless, to overturn breed-specific laws, plaintiffs would first need to meet the balancing test set forth by HUD and sanctioned by *ICP*.

With the Supreme Court’s approval, litigants now have a clear path forward to use the FHA to address a rule or policy that, while neutral on its face, has an adverse effect on members of a protected

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indicated, however, that seriously disproportionate impact can be relevant to determining whether the state has invidiously discriminated in violation of the Constitution. The Court noted, “It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.” *Id.* at 242. However, such is likely not the case here, where proponents maintain that a legitimate public safety interest is being served. Intentional discrimination is also key to the Court’s determination that the state has unconstitutionally discriminated against a religious group in violation of the Free Exercise Clause. In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993), the Court found the city had targeted a religious group and noted, “Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”

<sup>76</sup> See *Inclusive Cmty. Project*, 135 S. Ct. at 2511–12 (“The results-oriented phrase . . . permits plaintiffs to counteract unconscious prejudices and disguised animus . . .”).

<sup>77</sup> The procedural guidelines for statistically illustrating disparate impact claims are still developing. It is not specified whether such a showing must employ national or local data—both have been accepted.

<sup>78</sup> This decision is complicated by the fact that surrendering your pit bull to a shelter, especially in jurisdictions employing breed-specific bans, carries a significant risk that the dog will not leave the shelter. An estimated 93% of pit bulls are euthanized. *Pit Bulls and Euthanasia Rates*, SAVE-A-BULL (Nov. 12, 2015), <http://saveabullmn.org/pit-bulls-and-euthanasia-rates/> [https://perma.cc/7P3Q-TEST] (accessed Sept. 2, 2018).

<sup>79</sup> *Inclusive Cmty. Project*, 135 S. Ct. at 2511.

class.<sup>80</sup> HUD's Final Rule, now formalized by the Court, sets forth a burden shifting analysis to establish such a claim. First, "the plaintiff must identify a policy, attributable to the defendant that has a 'substantially greater adverse impact on minority tenants.'"<sup>81</sup> The Rule provides that the plaintiff must show that the practice "results in, or would predictably result in, a discriminatory effect upon [people of] a protected class."<sup>82</sup> Statistical evidence is typically used to support such a claim. Then, if the plaintiff satisfies this initial showing, the burden of proof shifts to the defendant to prove that the practice in question "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."<sup>83</sup> HUD requires that, "a legally sufficient justification must be supported by evidence and may not be hypothetical or speculative."<sup>84</sup> Finally, if the defendant satisfies its burden to justify the practice, the plaintiff may still establish liability by "proving that the substantial, legitimate, nondiscriminatory interests . . . could be served by another practice that has a less discriminatory effect."<sup>85</sup> HUD's Rule makes clear that the defendant has a burden to show that its practice was truly "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and that other alternatives are ineffective or unworkable.<sup>86</sup> Where a reasonable alternative exists that carries a less discriminatory effect, plaintiffs succeed on their claim of disparate impact.

Plaintiffs would need to show that the defendant municipality's breed-specific regulation had a "discriminatory effect" on them.<sup>87</sup> To this end, they might show that they were forced to give up their pets or were unable to move to certain neighborhoods because of the regulation. In addition, plaintiffs would need to show that the ban has a "substantially greater adverse impact on minorit[ies] . . ." <sup>88</sup> For example, to support such a showing, plaintiffs must present data on pit bull ownership indicating that people of color are relatively more likely to own these breeds.<sup>89</sup> Next, assuming the data supported such a claim, the municipality would likely argue that breed bans are necessary to protect the public's health and safety interest. Defendants may make

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<sup>80</sup> 1 JOHN P RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2:29 (2017).

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

<sup>82</sup> *Id.* (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, *supra* note 64).

<sup>83</sup> Housing and Urban Development, 24 C.F.R. § 100.500(c)(2) (2013).

<sup>84</sup> 24 C.F.R. § 100.500(b)(2).

<sup>85</sup> 24 C.F.R. § 100.500(c)(3).

<sup>86</sup> 24 C.F.R. § 100.500(c)(2). The ICP court describes this burden as the defendant's having to prove that its challenged policy is "necessary to achieve a valid interest," which is probably just a semantic difference from the rule but that remains to be seen. Schwemm, *supra* note 73, at 121 (quoting *Inclusive Cmty's. Project*, 135 S. Ct. at 2523).

<sup>87</sup> RELMAN, *supra* note 80.

<sup>88</sup> *Id.*

<sup>89</sup> Approximately 39% of U.S. residents own dogs. This number is 45% for white Americans, 26% for Hispanic Americans, and 20% for Black Americans. *Gauging Family Intimacy: Profile of Pet Owners*, *supra* note 53.

other arguments regarding property value or property damage, but the government's showing would ultimately come down to an argument that pit bulls are more dangerous than other breeds. To support their claim, the municipality would need to present data and testimony indicating that pit bulls are responsible for a greater majority of attacks, and thus the only way to serve the government's safety interest is to legislate against these dogs preemptively. In addition, the municipality must show that no other means of serving this safety interest is workable—in this case, showing that there is no other way of identifying dangerous dogs through methods such as behavioral testing—that muzzling, higher-fencing, or other regulations would not adequately mitigate the risk.<sup>90</sup>

If the municipality were able to make such a showing, plaintiffs must then argue that alternatives to breed-specific legislation exist that would serve the state's public safety interests while precipitating a less discriminatory effect.<sup>91</sup> Plaintiffs might argue that other ordinances would be equally effective at reducing aggression in dogs: Mandatory sterilization of male dogs, harsher penalties for coaching animals to fight, stricter confinement regulations or leash laws all might be put forward as means of reducing the number of bites.<sup>92</sup> Other forms of behavioral assessment may be more sensitive than a flat prohibition based on breed. In addition, some experts have suggested employing community-based approaches for marking and identifying potentially dangerous dogs based on their exhibiting warning signs of problematic behavior. In theory, plaintiffs could even argue that a ban on all dogs would serve the government's safety interest more effectively than the current ban while triggering a less discriminatory effect.

The municipality would argue that each of these measures would either not effectively serve its safety interest or be otherwise unworkable due to difficulties associated with enforcement. This may prove an uphill battle, especially where other municipalities currently implement some of the suggested measures. Ultimately, the court would decide whether the defendant satisfied its burden in showing a "substantial, legitimate, nondiscriminatory interest" for the legislation and that no reasonable alternatives exist.<sup>93</sup>

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<sup>90</sup> RELMAN, *supra* note 80.

<sup>91</sup> 24 C.F.R. § 100.500(c)(3).

<sup>92</sup> The American Veterinary Medical Association estimates that intact male dogs account for 70–76% of bites. *A Community Approach to Dog Bite Prevention (Abstract)*, AM. VETERINARY MED. ASS'N. (June 2001), <https://www.avma.org/Advocacy/StateAndLocal/Pages/dogbite-summar-y.aspx> [<https://perma.cc/CPB8-8WNA>] (accessed Sept. 2, 2018); Neutering male dogs has been known to reduce displays of aggression. Richard E. Schimel, *Tracey v. Solesky: The Court of Appeals of Maryland Mounts the Pit-Bully Pulpit*, 46-APR MD. B.J. 58, 64 (2013) (discussing the neutering of male dogs as "shown to reduce dominance-related aggression").

<sup>93</sup> RELMAN, *supra* note 80.

## VIII. CRIMINAL BACKGROUND CHECKS: AN ANALOGY

In reviewing existing FHA case law for analogous practices, one line of cases seems particularly instructive. Mandatory “criminal background checks by housing providers” are considered a new “frontier i[n] the application of the disparate impact standard.”<sup>94</sup> This practice “has received increased attention by civil rights advocates in recent years given the undeniable racial dimension to mass incarceration in the United States and its devastating impact on people of color and their communities.”<sup>95</sup> Some housing providers refuse to rent to individuals who have criminal records for the stated purpose that they are seeking to provide a safer residential area. Such a practice has a vastly disproportionate impact on minorities, who are incarcerated at higher levels. A state-by-state analysis of incarceration suggests that, “African Americans [a]re incarcerated at a rate 5.6 times higher than whites, and Hispanics [a]re incarcerated at 1.8 times the rate of whites.”<sup>96</sup> “Restricting access to housing—as well as employment and public benefits—on the basis of a criminal record will therefore have a disproportionate impact on African Americans and Latinos” because these groups are incarcerated, and incarcerated in prison, at rates that are exceptionally disproportionate to their representation in the general population.<sup>97</sup>

In light of last year’s Supreme Court decision, HUD issued new guidelines on the application of the FHA on the use of criminal background checks by housing providers in April of 2016.<sup>98</sup> HUD set forth a detailed and extensive list that providers must follow to restrict housing access on the basis of an individual’s criminal record:

- A policy that excludes applicants because of prior arrests without convictions will not satisfy a housing provider’s burden.
- A blanket prohibition on persons with criminal convictions will not satisfy the housing provider’s burden without considering:
  - when the conviction occurred;
  - what the underlying conduct was; or
  - the applicant’s conduct since the conviction.
- A criminal background policy must distinguish between conduct that poses a risk to other residents and property and conduct that does not.
- The court should consider the nature and severity of the applicant’s conviction and the amount of time that has passed since the criminal conduct occurred when determining if the housing provider satisfies its burden.

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<sup>94</sup> Allen et al., *supra* note 62, at 190.

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

<sup>96</sup> *Id.* at 191.

<sup>97</sup> *Id.*

<sup>98</sup> Because the new HUD guidelines are only a few months old, there has not been any reported case law interpreting them yet.

- Broad categorical exclusions are more likely to be discriminatory than individual fact-specific assessments that consider relevant mitigating information beyond what is contained in a criminal record.<sup>99</sup>

HUD's guidelines sternly caution housing providers that any use of criminal background information in making housing decisions will be closely scrutinized and allowed only under narrow circumstances. It should be noted, however, that while these guidelines are couched in terms of guidelines to housing providers, they would apply equally to restrictions imposed by municipalities—the second major area of FHA enforcement.<sup>100</sup>

Though criminal record restrictions provide an imperfect analogy to breed-specific legislation, the two share much in common. Each tends to look more like a broad categorical exclusion rather than an individual fact-specific assessment that considers relevant mitigating information.<sup>101</sup> Perhaps the oldest criticism of breed-specific legislation is the adage that not all dogs are vicious, and blanket bans fail to even attempt an individual assessment. In addition to overbreadth, pit bull ownership is ostensibly a less reliable indicator of danger posed to the community than the presence of a criminal record. As a result, restrictions on providers' ability to discriminate on the basis of criminal history—despite the well-established connection to public safety based on recidivism rates—suggests that communities implementing pit bull bans would face an uphill battle in terms of preserving these laws in the face of a discriminatory effect. Finally, the HUD regulations offer protections to individuals even though they have broken the law in the past. Where pit bull owners face a similar set of restrictions, their only indiscretion was choosing a disfavored breed. The extent of new regulations limiting the use of criminal background checks, with their clear nexus between the policy and an articulable safety interest, bodes poorly for the legality of breed-specific bans. The HUD's new guidelines might serve as a roadmap for those looking to challenge such laws.

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<sup>99</sup> Practical Law Real Estate, *HUD Issues Guidance on FHA Liability and Criminal Background Checks*, THOMSON REUTERS (Apr. 19, 2016), [https://uk.practicallaw.thomsonreuters.com/w-001-8986?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/w-001-8986?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) [<https://perma.cc/NN29-S43M>] (accessed Sept. 2, 2018).

<sup>100</sup> RELMAN, *supra* note 80, at § 2:24. One of the principal areas of litigation following ICP is expected to be in challenges to “landlords’ screening devices based on an applicant’s prior criminal record.” Schwemm, *supra* note 73, at 12508. Additionally, “restrictions on housing opportunities by municipalities and others based on preferences for local residents or those connected with local residents” is another expected area of post-ICP litigation. *Id.* Breed-specific legislation arguably operates to keep local residents in place by making it more difficult for non-residents to enter the community.

<sup>101</sup> U.S. DEP’T OF HOUSING AND URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (Apr. 4, 2016), [https://portal.hud.gov/hudportal/documents/-huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](https://portal.hud.gov/hudportal/documents/-huddoc?id=HUD_OGCGuidAppFHASandCR.pdf) [<https://perma.cc/33ZC-RPAF>] (accessed Sept. 2, 2018).

## IX. CONCLUSION

At this time, more research is needed to flush out the relationships put forward in this paper. However, even if true ownership data does not reflect the perceptions about pit bull owners illustrated here, such results are still telling in terms of cultural biases. Regardless of whether minorities are more likely to own these animals in practice, the perception that they are may still be a driving force behind the laws, coloring the decisions of legislators. While such findings would not be sufficient to challenge the legislation legally, it would still serve to inform discussion of breed-specific laws from an moral standpoint. However, if the relationship between pit bulls and people of color, documented here, exists in practice, it may provide these owners with a means of overturning such laws. In light of new Supreme Court precedent and strong regulations put forth by the Department of Housing and Urban Development, municipalities might prove increasingly unable to defend breed-specific bans.

Recently, breed legislation made headlines in Little Rock, Arkansas where eleven-year-old Ahmeha Simmon's service dog was taken from her backyard by authorities after being reported by a neighbor. "[S]he just wants her dog," the girl's mother explained, "[but] I simply can't afford to pack up my family and move us to a town where pit bulls are allowed."<sup>102</sup> In considering the larger context of breed-specific laws, perhaps she should not have to.

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<sup>102</sup> Leesa Smith, *Assistance Pit Bull Taken From 11-Year-Old Girl*, KIDSPOT.COM (Mar. 10, 2016), <http://www.kidspot.com.au/parenting/real-life/in-the-news/assistance-pit-bull-taken-from-11-year-old-girl> [<https://perma.cc/7PWF-WLQW>] (accessed Sept. 2, 2018).

## APPENDIX I



Star Patcher, *What Happened to America's Dog?* (Oct. 26, 2015), <http://patch.com/virginia/lorton/what-happened-americas-dog-1>.

## APPENDIX II



Marissa Brassfield, *ASPSA's Street Art-Inspired Campaign*, Trendhunter.com (Oct. 29, 2008), <http://www.trendhunter.com/trends/aspcagraffiti-ad>.