

CRIMINALIZING FAKE SERVICE DOGS: HELPING OR HURTING LEGITIMATE HANDLERS?

By
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An increasing number of states are passing laws criminalizing the use of fraudulent service animals. This Article explores the potential impact of these laws on people with disabilities and the effectiveness of these laws for places of business who want to exclude fraudulent service animals. The Article considers the nature of fraudulent service animal use and the reasons people may use them, the difficulties in enforcing these state laws in light of the Americans with Disabilities Act, and the potential detrimental effects on the civil rights of people with disabilities using legitimate service animals. Based on this analysis, the Article proposes alternative approaches to address the problem of fraudulent service animal use, recommending an increase in legislative clarity and improved public education.

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I. INTRODUCTION

Widespread civil rights protection was first given to people with disabilities in 1990 with the passage of the Americans with Disabilities Act (ADA).¹ This Act protects the rights of people with disabilities to engage in the same daily activities as people without disabilities, such as working, traveling, attending school, shopping, enjoying entertainment, and living independently.² Some people with disabilities choose to use service animals, mostly dogs, to provide them with assistance in disability-related tasks. The ADA protects the rights of people with disabilities to use service animals; however, each state also continues to have statutes regulating service animals in some way, and new state-level legislation on service animals continues to be introduced and passed.³ This Article focuses predominantly on one aspect of state-level service animal regulation: the criminalization of fraudulent use of a service animal. Introduced as a way to reduce the number of non-disabled individuals calling their pets service animals to avoid no-pet policies, these statutes provide stiff penalties for those who would pass off their pets as service animals. The Article explores the potential problems posed by the enforcement of these criminal statutes for people with disabilities, those who own or manage places of public accommodation, and law enforcement agencies. It also provides alternative solutions to managing the ongoing issue of service animal fraud.

II. HISTORY OF SERVICE ANIMAL LAWS

A. *History of State Service Animal Laws*

States have been involved in service dog regulation since the 1930s, when guide dogs were first used in the United States.⁴ At that time, only a few states had laws granting access rights to people with guide dogs. Other states began to pass guide dog laws in the 1950s and 1960s.⁵ These laws initially applied only to guide dogs; no other type of service dog had yet been recognized.⁶ The states created a patchwork of laws in the absence of federal laws addressing dogs and disability

¹ RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 170 (Temple Univ. Press, 2d ed. 2001).

² *Id.* at 176.

³ *E.g.*, WASH. REV. CODE § 49.60.215(1) (2011) (declaring it an unfair practice to discriminate against “the use of a trained dog guide or service animal by a person with a disability”); Maureen Hayden, *Rules Seek to Curb Fake Service Dogs*, HERALD BULL. (Jan. 8, 2017), http://www.heraldbulletin.com/news/rules-seek-to-curb-fake-service-dogs/article_36ac99f6-d614-11e6-8627-efbcbfb49846.html [https://perma.cc/D8D5-C7C4] (accessed Apr. 9, 2017) (discussing that a proposed Indiana law would make it a crime to fraudulently represent a pet as a service dog).

⁴ SCOTCH, *supra* note 1, at 28–29.

⁵ *Id.*

⁶ Paul K. Longmore, *Elizabeth Bouvia, Assisted Suicide, and Social Prejudice*, in WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 149, 154 (Temple Univ. Press 2003).

rights. Federal regulations guaranteeing access for service dog handlers did not come until the ADA implementing regulations were released in 1991.⁷

Early state service animal statutes varied in how they defined guide dogs, and later, hearing dogs. Some of these state statutes imposed very specific regulations on guide or service dogs, including the color of their leash or collar. For hearing dogs, the required leash or collar color was usually orange⁸ or yellow.⁹ In New Hampshire, the required leash color for mobility dogs was blue and yellow.¹⁰ In addition, some states required service dogs to be from a recognized school, although a definition of “recognized school” is notably lacking.¹¹

Other areas of state regulation of service dogs have included laws criminalizing assault on or interference with service dogs,¹² laws providing for criminal charges for businesses that deny access to service

⁷ See Robert L. Adair, *Monkeys and Horses and Ferrets . . . Oh My! Non-Traditional Service Animals Under the ADA*, 37 N. KY. L. REV. 415, 415 (2010) (noting that the Department of Justice implemented service animal regulations, including defining “service animal,” in 1991); see also 28 C.F.R. § 36.104 (2016) (defining “service animal” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability”); 28 C.F.R. § 36.302(c)(1) (2016) (requiring public accommodations to “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability”).

⁸ *E.g.*, VA. CODE ANN. § 51.5-44 (2014) (“[E]very deaf or hearing-impaired person shall have the right to be accompanied by a dog trained as a hearing dog on a blaze orange leash.”). Despite changes in federal law to the contrary, the Commonwealth of Virginia retains a requirement that service animal users employ specific identifying equipment, including a blaze orange leash for hearing dogs. *E.g.*, 28 C.F.R. § 35.136(d) (2016) (providing that a service animal is only required to be “under the control of its handler” through either physical or communicative means); see also CONN. GEN. STAT. § 46a-64 (2012) (providing that a guide dog must wear “a harness or an orange-colored leash and collar . . .”). The current statute protects access rights only for service dogs with orange leashes or harnesses. *Id.*

⁹ 1988 Okla. Sess. Law Serv. 71 (West). This statute required a service dog to wear a yellow collar, and gave a narrow definition of “physically handicapped person.” *Id.* The statute was amended in 1998 to remove the requirement of a yellow collar, but retains the requirement that the handler be blind, physically handicapped, deaf or hard-of-hearing. OKLA. STAT. ANN. tit. 7, § 19.1 (West 1998).

¹⁰ N.H. REV. STAT. ANN. § 167-D:5 (1991). This statute required service animal handlers to use blue and yellow leashes. *Id.* The use of the blue and yellow leash probably stems from the early adoption of that color to identify hearing and other service dogs made at a 1987 meeting of the Assistance Dogs International organization. The current statute has removed this requirement. N.H. REV. STAT. ANN. § 167-D:1-10 (2015).

¹¹ *E.g.*, MINN. STAT. § 256C.02 (2005) (“The service dog must be capable of being properly identified as from a recognized school for seeing eye, hearing ear, service, or guide dogs.”); GA. CODE ANN. § 30-4-2 (2007) (“The guide dog or service dog must be identified as having been trained by a school for seeing eye, hearing, service, or guide dogs.”).

¹² All states except Alabama, Alaska, Iowa, Maryland, Montana, and West Virginia have statutes criminalizing assault on service animals. Rebecca F. Wisch, *Table of State Assistance Animal Laws*, ANIMAL LEGAL & HIST. CTR. (2016), <https://www.animallaw.info/topic/table-state-assistance-animal-laws> [https://perma.cc/DD2N-M5EA] (accessed Apr. 9, 2017).

dogs, laws regulating the training of guide dogs,¹³ and ‘white cane’ laws that grant right of way to people using guide dogs or white canes.¹⁴

B. History of Federal Service Animal Laws

The Americans with Disabilities Act of 1990 (ADA)¹⁵ was the first comprehensive civil rights law for people with disabilities. The implementing regulations for the ADA gave the first nationwide definition of service animals.¹⁶ Unlike some of the state laws described above, the 1992 regulations defined service animals broadly as “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability.”¹⁷ These regulations permitted a service animal to be of any species and did not require the animal to comply with specific identification requirements, come from a recognized school, or meet any other criteria established by state law, as long as the animal met the requirements of individual training and did work or performed tasks for a person with a disability.¹⁸ These regulations also broadened the class of people with disabilities who could use service animals. Under some state laws, service animals were only granted public access protections if they served people who had physical or sensory disabilities, and not those who had cognitive, psychiatric, or medical disabilities.¹⁹ The 1991 regulations did not limit the types of disabilities a person must have to gain access with a service animal to only physical and sensory disabilities; people with cognitive, psychological, medical, and other disabilities now had equal access to the use of a service animal as well.²⁰

A side effect of this broadened access for service animal handlers was an increased ease with which people could, either intentionally²¹ or mistakenly, declare their pets (of any species) to be service animals

¹³ CAL. BUS. & PROF. CODE § 7200.5 (Deering 2016). California alone has strict regulations impacting guide dog schools, but not schools training other types of service animals.

¹⁴ See, e.g., ALA. CODE § 21-7-6 (1975); ARIZ. REV. STAT. ANN. § 13-2910 (2012); OKLA. STAT. tit. 7, § 12 (2002).

¹⁵ 42 U.S.C. §§ 12101–12213 (1990) (amended 2008).

¹⁶ 28 C.F.R. § 36.104 (2010). I use the term ‘service animal’ throughout the Article instead of ‘service dog’ or other terms for consistency. State statutes use a variety of terms to refer to animals providing assistance to people with disabilities. See *infra* note 167 for a list of terms currently used in state statutes.

¹⁷ 28 C.F.R. § 36.104 (2010).

¹⁸ *Id.*

¹⁹ E.g., ARK. CODE ANN. § 20-14-308 (2003); CONN. GEN. STAT. § 46a-64 (2012); IDAHO CODE § 56-701A (2010); MASS. GEN. LAWS ch. 272, § 98A (2004); MINN. STAT. § 363A.19 (2013); MINN. STAT. § 256C.02 (2005).

²⁰ Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35694 (July 26, 1991) (to be codified at 28 C.F.R. pt. 35).

²¹ Stacy Fromgolds, *Confession: My “Service Dog” Is a Total Fraud*, PETFUL (Sept. 25, 2012), <http://www.petful.com/service-animal/service-dog-fraud/> [https://perma.cc/UK3L-TM5W] (accessed Apr. 9, 2017).

and demand access to businesses and public places.²² This was aided by the development of businesses that provide official-looking service animal identification and registration documents for a fee, without any verification of the animal's actual status as a service animal or the handler's disability.²³

While the expanded access for service animal handlers was a benefit to many, it also created some difficulties, particularly when people used species of animals other than dogs, such as snakes, pigs, and birds.²⁴ These concerns were considered when new regulations were published in 2010 after the passage of the ADA Amendments Act in 2008.²⁵ These regulations now define a service animal as a dog or miniature horse, addressing the problems posed by the use of unusual species and wild animals.²⁶ The comments on the regulations specifically reject the establishment of formal training standards or certification processes for service dogs.²⁷

III. THE PROBLEM OF UNTRAINED OR FRAUDULENT SERVICE ANIMALS

While the 2010 regulation changes prohibited the use of service animals other than dogs, they did not address the issue that state-level service dog fraud laws have been implemented to regulate people wrongly claiming their dogs are service dogs in order to take their dog into an area that normally does not allow dogs. These state laws make the practice of passing off a pet dog as a service dog a criminal act—a designation which may not appropriately characterize the intentions of all individuals who are inaccurately describing their dog as a service dog.²⁸ Well-meaning, but misinformed people may believe that their pet is, in fact, a service dog.

Some of the misunderstandings that can result in an individual incorrectly believing their dog is a service dog include: a misunderstanding of the task or work requirement; an incorrect definition of disability; a confusion of laws; the belief that dogs coming from a ser-

²² U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE MANUAL COMMENT 8-2.400I AMERICANS WITH DISABILITIES ACT TITLE III REGULATIONS (2010).

²³ For example, the National Service Animal Registry provides a "complete service animal certification kit" for \$64.95, and the U.S. Dog Registry provides certificate packages ranging from \$79 to \$199. NAT'L SERV. ANIMAL REGISTRY, <https://www.nsarco.com/> [<https://perma.cc/4AL5-9QWV>] (accessed Apr. 9, 2017); *Register Emotional Support Dog*, U.S. DOG REGISTRY, <http://usdogregistry.org/registration/register-emotional-support-dog/> [<https://perma.cc/2HXP-A556>] (accessed Apr. 9, 2017).

²⁴ DEP'T OF JUSTICE, TITLE II REGULATIONS 2010 GUIDANCE AND SECTION-BY-SECTION ANALYSIS AND RESPONSE TO PUBLIC COMMENTS SUBPART A (2010).

²⁵ *Id.*; see also 42 U.S.C. §§ 12101–12213 (2009) (amended 2008) (amending the ADA Act of 1990 to include a definition of a service animal).

²⁶ 28 C.F.R. § 35.104 (2016); 28 C.F.R. § 35.136 (2011).

²⁷ DEP'T OF JUSTICE, TITLE II REGULATIONS 2010 GUIDANCE AND SECTION-BY-SECTION ANALYSIS AND RESPONSE TO PUBLIC COMMENTS SUBPART B (2010).

²⁸ Wisch, *supra* note 12 (stating that some states make it a misdemeanor to misidentify an animal as a service animal).

vice dog school or trainer always meet the ADA standards; and the mistaken beliefs of medical personnel who may ‘prescribe’ a service dog without a complete understanding of relevant service dog laws.

A. Task Training

The requirement that service dogs must be “individually trained to do work or perform tasks”²⁹ is perhaps the most misunderstood requirement, and there is no lack of misinformation available on what constitutes work or tasks for the purposes of the ADA. Information available online contributes to this confusion. One article suggests that people with anxiety get service dogs because the presence of the dog is relaxing and draws attention from the person to the dog.³⁰ Another article suggests that work includes the dog “being a focal point” and reducing fear by its presence.³¹ An article listing potential tasks for PTSD service dogs includes “help with episodes of depression” and “provide companionship” as specific tasks.³² While it is possible that specific tasks could help with episodes of depression, helping generally, without specifically trained tasks or work, does not meet the ADA standard. The simple companionship or calming presence of the dog also does not qualify as a task or work. Other resources may speak only vaguely of task training and focus on the non-task benefits of a canine companion.³³ Additionally, vague terminology for tasks can confuse a prospective service dog handler. One commonly used, but vague, term for a task is ‘grounding.’³⁴ The Department of Justice specifically addressed the difficulty in defining this term in its comments on the 2010 regulations, noting that

[s]everal commenters . . . argu[ed] that grounding was not a “task” and therefore the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that “grounding” should not be included as an example

²⁹ 28 C.F.R. § 36.104 (2010).

³⁰ Paul Dooley, *19 Reasons to Get a Service Dog for Your Anxiety*, ANXIETY GURU (Aug. 22, 2015), <http://www.anxietyguru.net/19-reasons-to-get-a-service-dog-for-your-anxiety/> [https://perma.cc/BG5P-TGSW] (accessed Apr. 9, 2017).

³¹ Amy Brannan, *How Can a Psychiatric Service Dog Help?*, CANINE J. (updated May 12, 2014), <http://www.caninejournal.com/psychiatric-service-dog/> [https://perma.cc/K2C6-Q4LB] (accessed Apr. 9, 2017).

³² *PTSD Service Dog Training*, CANINES4HOPE, <http://www.canines4hope.com/post-traumatic-stress-disorder-dogs-ptsd-dog-training-florida.htm> [https://perma.cc/NX5L-ANKK] (accessed Apr. 9, 2017).

³³ *Service Dogs Empowering Kids with Autism*, PROJECT CHANCE, <http://www.projectchance.com/dogs.html> [https://perma.cc/5WYR-2X6Z] (accessed Apr. 9, 2017); Chris Colin, *How Dogs Can Help Veterans Overcome PTSD*, SMITHSONIAN MAG. (July 2012), <http://www.smithsonianmag.com/science-nature/how-dogs-can-help-veterans-overcome-ptsd-137582968/?no-ist> [https://perma.cc/9SQT-JUEK] (accessed Apr. 9, 2017).

³⁴ *Service Dog Task List (& Work!) for Psychiatric Service Dogs*, PSYCHIATRIC SERV. DOG PARTNERS (2015), <http://www.psychdogpartners.org/resources/work-tasks/work-task-list> [https://perma.cc/TN69-M2B8] (accessed Apr. 9, 2017).

of “work” because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.³⁵

The Department of Justice resolved this question of definition in its comments:

It is the Department’s view that an animal that is trained to “ground” a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person’s disability. It is the fact that the animal is trained to respond to the individual’s needs that distinguishes an animal as a service animal.³⁶

Despite the Department of Justice’s comments on the appropriate definition of the term ‘grounding,’ it is still used without explanation on sample lists of service dog tasks.³⁷ Another point of confusion arises when service dogs have a natural ability to alert to a medical condition, such as impending seizures or diabetic emergencies. The natural ability of the dog, while of great benefit, is not a result of individual training. Individual task training can be provided to these dogs to refine or alter the alert behavior, or to perform tasks related to the emergency, such as calling for help, but without this training, a dog acting by instinct would not qualify as a service dog under the ADA.

B. Professionally Trained Dogs

Service dog handlers may not be able to determine if service dogs placed with them actually meet the requirements for service dogs under the ADA. School-trained service dogs may not always meet behavior and training standards to be considered service dogs. One school was sued by a number of clients who claimed that dogs placed with them were not housebroken, did not respond to commands, and even bit a small child.³⁸ A diabetes alert dog school in Virginia was the

³⁵ DEP’T OF JUSTICE, TITLE II REGULATIONS 2010 GUIDANCE AND SECTION-BY-SECTION ANALYSIS AND RESPONSE TO PUBLIC COMMENTS SUBPART A (2010).

³⁶ *Id.*

³⁷ See, e.g., *FASD Assistance Dog*, 4 PAWS FOR ABILITY, <http://4pawsforability.org/fasd-assistance-dog> [<https://perma.cc/LHE4-C6U6>] (accessed Apr. 9, 2017) (describing grounding as a process in which “[t]he dogs serve as an emotional and sometimes physical anchor for a child who lives in a world that feels disorienting and confusing”); *Service Dog Task List (& Work!) for Psychiatric Service Dogs*, *supra* note 34 (listing grounding as an assistive behavior for anxiety symptoms).

³⁸ Harold Kruger, *Suit Criticizes How Pawsitive Trains Dogs for Special-Needs Children*, APPEAL-DEMOCRAT (June 13, 2014), http://www.appeal-democrat.com/news/suit-criticizes-how-pawsitive-trains-dogs-for-special-needs-children/article_89a73698-f2c3-11e3-a532-001a4bcf6878.html [<https://perma.cc/KT9J-EMFN>] (accessed May 19, 2017);

subject of twenty-six complaints to the Attorney General over allegations that the dogs they placed did not alert to blood sugar changes as promised.³⁹ Another diabetes alert dog school, in Missouri, was required to pay restitution to its clients and was barred from engaging in training diabetes alert dogs after the dogs they placed with clients failed to alert to blood sugar changes.⁴⁰ Receiving a dog from a service dog school is no guarantee the dog will behave appropriately or be trained to perform tasks or do work related to the handler's disability. It is not hard to see how a person determining whether their dog is a service dog could be confused, either by finding inaccurate information or receiving a dog from a service dog school that is not adequately trained.

C. Different Legal Definitions

Adding to this confusion are the differences in the definition of "service dog" between the three primary federal laws that address the access rights of service dog handlers. The ADA, as discussed above, defines a service dog as a dog that is individually trained to do work or perform tasks to assist a person with a disability.⁴¹ Untrained dogs that solely provide emotional support or companionship are not included in the ADA's access requirements. Businesses and places of public accommodation are not permitted to require documentation or certification of a service dog's training or the handler's disability.⁴²

Both the Air Carrier Access Act (ACAA)⁴³ and the Fair Housing Act (FHA) have different standards for designating which animals are given access and require different documentation to secure access to housing and aircraft. The ACAA does not specify a species requirement for service animals, but it permits the airline to evaluate if there are reasons that certain unusual species should not be allowed to fly.⁴⁴

Special Needs Family Claims They Were Given an Untrained Service Dog, ABC10 (Aug. 4, 2014), <http://sacramento.abc10.com/news/news/345493-special-needs-family-claims-they-were-given-untrained-service-dog> [<https://perma.cc/T64Z-7UAQ>] (accessed May 19, 2017). There are also documented instances of families paying thousands of dollars for untrained dogs. Aaron Eades, *Family Files Suit After Service Dog Scam*, ILLINOISHOMEPAGE.NET, <http://www.illinoishomepage.net/news/local-news/family-files-suit-after-service-dog-scam> [<https://perma.cc/23MA-7UXW>] (accessed Aug 24, 2016); Ryan Kocian, *\$15,000 Diabetic Alert Dog Vendors Called Frauds*, COURTHOUSE NEWS SERV. (July 30, 2015), <http://www.courthousenews.com/2015/07/30/15-000-diabetic-alert-dog-vendors-called-frauds.htm> (accessed Aug 24, 2016).

³⁹ *Diabetes Service Dog Not Properly Trained, Dissatisfied in Virginia-Based Company*, WPMT FOX 43 (Oct. 3, 2013), <http://fox43.com/2013/10/03/diabetes-service-dog-not-properly-trained-dissatisfied-in-virginia-based-company/> (accessed Mar. 26, 2017).

⁴⁰ *Missouri v. Heaven Scent Paws*, No. 08AC-CC00459 (Aug. 13, 2010).

⁴¹ 28 C.F.R. § 36.104 (2010).

⁴² *Id.* § 36.302(c)(6).

⁴³ Air Carrier Access Act, 14 C.F.R. § 382.117 (2009).

⁴⁴ 14 C.F.R. § 382.117(f) (2009) ("With respect to all other animals, including unusual or exotic animals that are presented as service animals (e.g., miniature horses, pigs, monkeys), as a carrier you must determine whether any factors preclude their traveling in the cabin as service animals (e.g., whether the animal is too large or heavy

The ACAA also permits the airline to request documentation from the service animal handler that their animal is a service animal.⁴⁵ In addition, psychiatric service animals are treated differently than service animals for other disabilities. Under the ACAA, psychiatric service animals are subject to increased documentation and advance notification requirements not required for other types of service animals.⁴⁶ In addition, the ACAA grants access to emotional support animals, which are animals, trained or untrained, that provide comfort and assistance by their presence and companionship.⁴⁷ Emotional support animals and psychiatric service animals share the same advance notification and documentation requirements.⁴⁸

The FHA⁴⁹ requires landlords and other housing providers to make reasonable accommodations to allow people with disabilities equal access to housing, including modifications to ‘no pet’ policies that allow people with disabilities to keep service animals.⁵⁰ For the purposes of the FHA, a service animal is defined as “an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.”⁵¹ Housing providers may require documentation of the disability and need for the animal if the disability and need is not obvious.⁵² These documentation requests are not limited to psychiatric service animals and emo-

to be accommodated in the cabin, whether the animal would pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country that is the flight’s destination). If no such factors preclude the animal from traveling in the cabin, you must permit it to do so.”)

⁴⁵ *Id.* § 382.117(d) (“As evidence that an animal is a service animal, you must accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal.”).

⁴⁶ *Id.* § 382.117(e).

⁴⁷ *Id.* § 382.117(e)(2).

⁴⁸ *Id.* § 382.117(e) (“If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation . . . on the letterhead of a licensed mental health professional . . .”).

⁴⁹ 42 U.S.C. §§ 3601–3619 (2012).

⁵⁰ See U.S. DEP’T OF HOUS. & URBAN DEV., FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS (2013), http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf [<https://perma.cc/29GK-TPX3>] (accessed Apr. 9, 2017) [hereinafter SERVICE ANIMALS] (“The reasonable accommodation provisions of [the FHA] must be considered in situations where persons with disabilities use (or seek to use) assistance animals in housing where the provider forbids residents from having pets or otherwise imposes restrictions on conditions relating to pets and other animals.”).

⁵¹ *Id.*

⁵² See *id.* (“Housing providers may ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and their disability-related need for an assistance animal. If the disability is readily apparent or known but the disability-related need for the assistance animal is not, the housing provider may ask the individual to provide documentation of the disability related need for an assistance animal.”).

tional support animals as seen in the ACAA, but can be required of anyone requesting a modification to a no-pet policy for a service animal so long as the disability or need for a service animal is not readily apparent.⁵³

With three different sets of definitions and standards in federal law, it is easy to see how a person could become confused. A person who, for example, has a service animal for the purposes of the ACAA and the FHA may not realize that a separate and more restrictive definition of service animal applies under the ADA.

D. Service Animal ‘Prescriptions’

Another factor that can complicate a correct understanding of the definition of service animals is the practice of medical providers ‘prescribing’ service animals for people with disabilities. A medical professional’s note is required for a psychiatric service animal or emotional support animal handler to fly under the ACAA, and it can provide the necessary proof for reasonable accommodations in housing under the FHA; however, a medical professional’s note or prescription is not even mentioned in the ADA.⁵⁴

Medical professionals may not understand the legal differences between service animals and emotional support animals due to the different ways service animals are defined in the three major federal statutes that apply to them. As a result, medical professionals may give confusing and incorrect information to a patient considering a service animal. An article in *Current Psychiatry* illustrates the confusion that can result from these different definitions. The article is in response to a patient’s request that her psychiatrist write a letter to her landlord stating she could keep her dog in an apartment that does not allow pets.⁵⁵ The article states the following:

[T]he ADA and many state statutes require that service dogs and some other animals be “certified” to perform their roles. Yet no federal or state statutes lay out explicit training standards or requirements for certification. Therapy Dogs International and Pet Partners are 2 organizations that provide certifications accepted by many agencies and organizations.⁵⁶

⁵³ See *id.* (“[D]ocumentation is sufficient if it establishes that an individual has a disability and that the animal in question will provide some type of disability-related assistance of emotional support. However, a housing provider may not ask a tenant or applicant to provide documentation showing the disability or . . . need for an assistance animal if the disability . . . is readily apparent or already known to the provider.”).

⁵⁴ See SERVICE ANIMALS, *supra* note 50, at 3–4, 5 (“[The only inquiries an ADA-covered facility may ask are:] (1) Is this a service animal that is required because of a disability? and (2) What work or tasks has the animal been trained to perform?”).

⁵⁵ Douglas Mossman, *Could ‘Rx: Pet Therapy’ Come Back to Bite You?*, CURRENT PSYCHIATRY (June 2014), <http://www.mdedge.com/currentpsychiatry/article/82674/practice-management/could-rx-pet-therapy-come-back-bite-you> (accessed Jan. 24, 2017).

⁵⁶ *Id.*

The author here is both misstating the ADA and confusing the roles of service animals and therapy animals.⁵⁷ While some states still have laws that require certification, those requirements are superseded by the ADA, which does not require any form of certification.⁵⁸ In addition, Therapy Dogs International⁵⁹ and Pet Partners⁶⁰ certify only therapy dogs, and do not offer service dog certification or registration.

One recent article in the publication *Independent Practitioner* also considers the issue of medical professionals ‘prescribing’ service animals and, like the article above, conflates and confuses the differences between service animals, emotional support animals, and therapy animals. The article incorrectly describes the ADA’s definition of a service animal, misstating both the training requirements and the species restrictions.⁶¹

The ADA defines emotional and psychological disability very broadly and does not require that animals purportedly used for emotional support have any specific training. The only requirement is that the animal be manageable in public. While one would not likely travel with a horse or dolphin, most other domestic animals would qualify as a so-called support animal. The ADA holds that any emotional or psychological condition preventing a person from performing normally on a day-to-day basis qualifies that person to use such an animal in public accommodations.⁶²

⁵⁷ See *What Is a Therapy Dog?*, AKC, <http://www.akc.org/events/title-recognition-program/therapy/about/> [<https://perma.cc/LYE7-K3RU>] (accessed Apr. 9, 2017) (“Therapy dogs are dogs who go with their owners to volunteer in settings such as schools, hospitals, and nursing homes. Therapy dogs are not service dogs. Service dogs are dogs who are specially trained to perform specific tasks to help a person who has a disability.”).

⁵⁸ See SERVICE ANIMALS, *supra* note 50, at 5 (“[An ADA] covered entity shall not require documentation, such as proof that the animal had been certified, trained, or licensed as a service animal.”).

⁵⁹ See *About TDI*, THERAPY DOGS INT’L, <http://www.tdi-dog.org/About.aspx> [<https://perma.cc/4AKQ-B8W9>] (accessed Apr. 9, 2017) (“Therapy Dogs International is a volunteer organization dedicated to regulating, testing, and registration of therapy dogs . . .”).

⁶⁰ See *Volunteer Policies and Procedures*, PET PARTNERS, <https://petpartners.org/volunteer/our-therapy-animal-program/volunteer-policies-procedures/> [<https://perma.cc/Y5MW-2D9U>] (accessed Apr. 9, 2017) (explaining that Pet Partners considers it a violation of their professional conduct standards for a handler of a Pet Partners certified animal to represent that animal as an assistance animal).

⁶¹ See Gerald P. Koocher, *Will Animal Assisted Therapies Put the Ethical Bite on You?*, INDEP. PRACTITIONER, Fall 2015, at 131 (explaining in an article published in 2015 that the ADA allows most domestic animals to qualify as a support animal but does not require such animals to have specific training). *But see, e.g.*, U.S. DEP’T. OF JUSTICE, ADA REQUIREMENTS: SERVICE ANIMALS, https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/F792-A2S7>] (accessed Apr. 9, 2017) (explaining that beginning in early 2011, the ADA would only recognize dogs as service animals and such dogs must be individually trained to do work or perform tasks for a person with a disability).

⁶² Koocher, *supra* note 61.

An additional avenue of confusion for people seeking information about service animals is the availability of online certifications and registries for service dogs as mentioned above, and the rise of online services that will provide letters from mental health professionals for people wanting an emotional support animal.⁶³ A person can obtain one of these letters by filling out an online questionnaire that is then reviewed by a mental health professional prior to issuing a letter.⁶⁴ While these services state that the letters are for emotional support animals, the descriptions they give and the laws they reference blur the line between emotional support animals and service animals.⁶⁵ The interpretation of the ADA given by some of these websites could lead a person to believe that they have access rights as a service dog handler, when, in fact, these rights only extend to housing and air travel.

Discussions about the laws that criminalize the use of unqualified animals as service animals present this issue as a problem created by selfish people who take “advantage of the disadvantaged,”⁶⁶ people who are liars,⁶⁷ unethical individuals,⁶⁸ and knowingly pass off their

⁶³ *What Is an Emotional Support Animal?*, EMOTIONAL SUPPORT PET, <http://www.emotionalsupportpet.com/> [<https://perma.cc/Q9W8-XVCQ>] (accessed Apr. 9, 2017); *ESA Certification for Your Emotional Support Animal*, ESA DOCTORS, <http://esadoctors.com/> [<https://perma.cc/33RM-U9Z8>] (accessed Apr. 9, 2017).

⁶⁴ *ESA Certification for Your Emotional Support Animal*, *supra* note 63.

⁶⁵ *See Identification for Your Support Animal WILL Reduce Conflicts!*, SERVICEDOGTAGS.COM, http://www.servicedogtags.com/emotional_support_animals.htm [<https://perma.cc/H4ZY-D83Y>] (accessed Apr. 9, 2017) (“The Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act protect the right of people with disabilities to keep emotional support animals”); *What Is the Americans with Disabilities Act?*, CERTAPET, <https://www.certapet.com/faq/americans-with-disabilities-act/> [<https://perma.cc/5XEG-EVJQ>] (accessed Apr. 9, 2017). CertaPet, the self-identified #1 Rated Emotional Support Animal Letter Service, says the following: “When the Americans with Disabilities Act (ADA) was implemented more than two decades ago, the protections offered for individuals utilizing animals for medical and emotional support were limited. Since that time, the provisions have been modified, providing a greater scope of protection for service animals (SAs) and emotional support animals (ESAs), as well as the individuals who own them or utilize their services. . . . Under ADA guidelines, in order to be considered an ESA, the owner must have a diagnosed psychological disability or condition, such as an anxiety or personality disorder, post-traumatic stress disorder (PTSD), or depression.” The author took the online questionnaire, was told she was a good candidate for an emotional support animal, and offered the chance to pay \$149.99 for a letter for housing, \$149.99 for a letter for the airlines, or \$199.99 for both.

⁶⁶ Bruce Maiman, *Frustrations of Service Dog Fraud*, SACRAMENTO BEE (Aug. 5, 2014), <http://www.sacbee.com/opinion/op-ed/article2605800.html> [<https://perma.cc/2FYR-MDVX>] (accessed Apr. 9, 2017).

⁶⁷ Stacey Cohen, *Fake Service Dog Registration Becomes a Crime in Florida*, CONSUMER AFFAIRS (July 7, 2015), <https://www.consumeraffairs.com/news/fake-service-dog-registration-becomes-a-crime-in-florida-070715.html> [<https://perma.cc/G7RL-ZGBR>] (accessed Apr. 9, 2017).

⁶⁸ Sue Manning, *Fake Service Dogs a Growing Problem*, NBC NEWS (Oct. 10, 2013), <http://www.nbcnews.com/health/fake-service-dogs-growing-problem-8c11366537> [<https://perma.cc/89BZ-VNZ2>] (accessed Apr. 9, 2017).

pets as service animals.⁶⁹ As described above, the use of unqualified animals as service animals may not be a deliberate act, but, instead, a problem created by misunderstood definitions, differences between the civil rights laws affecting service animals, and misinformation distributed in the medical community. Is criminalization truly the best way to address the ‘fake’ service dog problem?

IV. STATE CRIMINAL STATUTES

A. Descriptions

Currently, eighteen states have statutes addressing the fraudulent use of service animals.⁷⁰ Of these eighteen, New Jersey⁷¹ and Maine⁷² treat the issue as a civil matter. The remaining statutes make the use of an unqualified animal as a service animal a criminal violation ranging from a petty offense⁷³ to varying levels of misdemeanors.⁷⁴ The statutes in Missouri⁷⁵ and New York⁷⁶ allow violations to be pursued as either a criminal or a civil case, and Nebraska has included their fraud statute within their white cane law.⁷⁷

States with such laws differ in what they define as fraudulent use. Nebraska⁷⁸ and New Jersey⁷⁹ apply the law only to the fraudulent use of guide dogs and do not have statutes addressing the fraudulent use of other types of service animals. New Hampshire’s service animal fraud statute is similar, forbidding the use of a “collar, leash, vest, sign, or harness of the type which represents that the animal is a service animal, or service animal tag” on an animal that is not a service animal.⁸⁰ The New York statute only addresses false or improper identification tags that would identify an unqualified animal as a service animal.⁸¹ These statutes greatly restrict enforcement attempts by limiting misrepresentation to the presence or absence of a specific item of equipment placed on the service animal.

Other statutes approach the issue by addressing the disability, or lack of disability, of the handler and do not address the qualifications

⁶⁹ *Fake Service Dog Bill Proposed in Colorado*, KOAA.COM (Mar. 7, 2016), <http://www.koaa.com/story/31410679/fake-service-dog-bill-proposed-in-colorado> [<https://perma.cc/2SNR-E62X>] (accessed Apr. 9, 2017).

⁷⁰ Wisch, *supra* note 12.

⁷¹ N.J. STAT. ANN. § 10:5-29.5 (West 2006).

⁷² ME. REV. STAT. ANN. tit. 17, § 1314-A (2016).

⁷³ COLO. REV. STAT. § 18-13-107 (2017) (“A person shall not falsely impersonate an individual with a disability.”).

⁷⁴ These states are: California, Florida, Idaho, Kansas, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Texas, Utah, and Washington.

⁷⁵ MO. REV. STAT. § 209.204 (2005).

⁷⁶ N.Y. AGRIC. & MKTS. LAW § 118 (McKinney 2011).

⁷⁷ NEB. REV. STAT. § 28-1313(1), (3) (2016).

⁷⁸ NEB. REV. STAT. § 28-1313 (1977).

⁷⁹ N.J. STAT. ANN. § 10:5-29.5 (West 2006).

⁸⁰ N.H. REV. STAT. ANN. § 167-D:8 (2015).

⁸¹ N.Y. AGRIC. & MKTS. LAW § 118 (McKinney 2011).

of the claimed service animal. The Idaho statute states that “[a]ny person, not being a disabled person or being trained to assist disabled persons, who uses an assistance device or assistance dog in an attempt to gain treatment or benefits as a disabled person, is guilty of a misdemeanor.”⁸² Similarly, the Missouri statute makes it a crime for anyone who “knowingly impersonate[s] a person with a disability for the purpose of receiving the accommodations regarding service dogs under the Americans with Disabilities Act.”⁸³ In Nevada, the statute states that “[a]ny person other than a person who is blind who uses a service animal . . . is guilty of a misdemeanor.”⁸⁴ These statutes raise an additional concern for potential enforcement. Since these statutes base their service animal fraud laws on the impersonation of a person with a disability, the disability status of the handler, rather than the credentials of the animal, is the primary element of the case. Court rulings on whether an individual has a disability for the purpose of coverage under anti-discrimination statutes have, at times, interpreted the term ‘disability’ very narrowly. This is most dramatically shown in several Supreme Court cases decided prior to the ADA Amendments Act of 2008. Three cases that significantly narrowed the definition of disability under the ADA were *Sutton v. United Airlines, Inc.*,⁸⁵ *Murphy v. United Parcel Service, Inc.*,⁸⁶ and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.⁸⁷ While the ADA Amendments Act of 2008 clarified and broadened the definition of disability for the purpose of coverage under that Act,⁸⁸ there is no guarantee that a state court ruling on a service animal fraud case would define and interpret disability as it is currently understood in the ADA.

Both Michigan⁸⁹ and North Carolina⁹⁰ have enacted laws providing a method for service animal handlers to voluntarily apply for state-issued identification for their service animals or service animals in-training. While North Carolina bills its registration provisions as vol-

⁸² IDAHO CODE § 18-5811A (1997).

⁸³ MO. REV. STAT. § 209.204 (2005) (“Impersonates a person with a disability’ means a representation by word or action as a person with a disability or a representation of a dog by word or action as a service dog.”).

⁸⁴ NEV. REV. STAT. § 426.510 (2013).

⁸⁵ *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁸⁶ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999).

⁸⁷ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁸⁸ ADA Amendments Act of 2008, 42 U.S.C. §§ 12103, 12205a (2012); *see* U.S. DEP’T OF JUSTICE, FINAL REGULATORY ASSESSMENT, AG ORDER NO. 3702-2016, FINAL RULE AMENDMENT OF ADA TITLE II AND TITLE III REGULATIONS TO IMPLEMENT ADA AMENDMENTS ACT OF 2008, https://www.ada.gov/regs2016/final_rule_adaaa.html [<https://perma.cc/MN2X-GZNE>] (accessed Apr. 9, 2017) (stating that the ADA Amendments Act of 2008 clarified and broadened the definition of disability for the purpose of coverage under that Act).

⁸⁹ MICH. COMP. LAWS § 37.303 (2015).

⁹⁰ N.C. GEN. STAT. § 168-4.2 (2005).

untary,⁹¹ their state statute protecting the access rights of service animal handlers restricts access only to those who have registered their animal.⁹² In light of the laws criminalizing the use of an unqualified dog, these laws are of particular concern because they create two classes of service animal users in each state: those who register, and those who do not. In practice, the access rights of both classes should be identical, because the ADA does not allow places of public accommodation to require documentation of certification or training.⁹³ The creation, however, of these two classes may give rise to an assumption among places of public accommodation that service animal handlers who have not registered their animals are attempting to use an unqualified animal. The potential arises for increased police complaints against service animal handlers who do not pursue registration if their animals are seen as less likely to be legitimate service animals than those animals that have been registered. An employee of a place of public accommodation threatening to call the police if a legitimate, but unregistered service animal handler insists on access could interfere with the access rights of people with disabilities. Even those handlers with appropriately qualified service animals may choose to leave the business rather than have an encounter with law enforcement that could result in their arrest if law enforcement does not believe the service animal to be legitimate.⁹⁴

In addition to the potential effects of these laws on access for legitimate service animal handlers, these laws add an additional level of confusion for places of public accommodation attempting to navigate their obligations under the ADA and any relevant state laws. An

⁹¹ N.C. DEP'T HEALTH & HUMAN SERV., REGISTRATION APPLICATION OF SERVICE ANIMAL FOR PEOPLE WITH DISABILITIES, <https://www.ncdhhs.gov/document/registration-application-service-animal-people-disabilities> [<https://perma.cc/E3XG-Q5QD>] (accessed Apr. 9, 2017) ("Registering a service animal or a service animal in training is voluntary; registration is not required.")

⁹² N.C. GEN. STAT. § 168-4.2 (2005) ("Every person with a disability has the right to be accompanied by a service animal The person qualifies for these rights upon the showing of a tag, issued by the Department of Health and Human Services, under G.S. 168-4.3, stamped NORTH CAROLINA SERVICE ANIMAL PERMANENT REGISTRATION.")

⁹³ 28 C.F.R. § 36.302(c)(6) (2017) ("A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.")

⁹⁴ See, e.g., *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 839, 850 (9th Cir. 2004) (describing forced ejection from the event and threats of arrest); *Ascencio v. ADRU Corp.*, No. C 12-04884 WHA, 2014 WL 204212, at *1-2, *6 (showing plaintiffs forced to leave restaurant for fear of arrest); Jessica Chasmar, *Verizon Store Kicks Out Army Vet over Service Dog*, WASH. TIMES (Feb. 16, 2015), <http://www.washingtontimes.com/news/2015/feb/16/verizon-store-kicks-out-army-veteran-over-service/> [<https://perma.cc/7NDU-N5ZQ>] (accessed Apr. 9, 2017) (describing Army vet being forced to leave Verizon store); Christian Schaffer, *Man with Service Dog Forced to Leave Taco Bell*, ABC WMAR (May 1, 2013), <http://www.abc2news.com/news/region/howard-county/man-with-service-dog-forced-to-leave-taco-bell> [<https://perma.cc/993U-9WHA>] (accessed Apr. 9, 2017) (describing incident of man being forced to leave Taco Bell because of service dog).

owner or manager of a public accommodation who reads the text of North Carolina's laws protecting access rights for service dog handlers would see that only those handlers who had registered their dogs were entitled to protection under the law.

The intent of these voluntary registration programs is to verify that certain individuals and their chosen animal meet the standards for a service animal team. Under closer scrutiny, however, there remain many gaps in these laws that would allow people to register unqualified animals. For example, the North Carolina registration form asks about the nature of the applicant's disability, but does not require any verification of the disability.⁹⁵ A trainer must 'verify' the application with a description of the animal's skills, but the trainer is not required to possess any verifiable animal training education or experience.⁹⁶ In addition, if the animal is trained by its handler, the applicant need only provide a letter from a witness attesting to the animal's skills.⁹⁷ A successful applicant is registered without the registration authority actually seeing and verifying the animal's training and skill-set, or verifying the handler's disability. It is entirely possible that a registered animal still may not actually be a service animal.

The Michigan law provides a slightly greater amount of verification. The first part of the application requires a healthcare or rehabilitation professional to fill out a form in support of the application, and check one of three boxes identifying the reason the applicant qualifies to have a service animal.⁹⁸ These three boxes give the options that the service animal will do one or more of the following: "Perform tasks that will mitigate the effects of the applicant's disability[; Alert or provide the applicant with mobility assistance[; and] Improve the health and well-being of the applicant by mitigating a disabling condition."⁹⁹ The first two options raise no concerns, but the third one does. Despite some fine print on the form attempting to differentiate between service animals and comfort or emotional support animals, this option can easily be read as applying to animals that neither do work nor perform tasks. This is reinforced by the fact that this option is separated from the first option which states that the animal will perform tasks. To conform to the requirements of the ADA, the first option would need to be selected for all applicants for registration. The second portion of the Michigan registration process is for the applicant to complete an affi-

⁹⁵ *Service Animal Registration Form*, N.C. DIVISION VOCATIONAL REHABILITATION SERVICES, <https://www.ncdhhs.gov/document/registration-application-service-animal-people-disabilities> [<https://perma.cc/FX3E-WEYM>] (accessed Apr. 9, 2017).

⁹⁶ *Id.*

⁹⁷ *Service Animals Registration Instructions*, N.C. DIVISION VOCATIONAL REHABILITATION SERVICES, <https://www.ncdhhs.gov/document/registration-application-service-animal-people-disabilities> (accessed May 28, 2017).

⁹⁸ *Voluntary Service Animal Identification Application Part II*, MICH. DEP'T C. R., http://www.michigan.gov/documents/mdcr/service_animal_part_II-1-20-2016-Fillable_511576_7.pdf [<https://perma.cc/8877-U64F>] (accessed Apr. 9, 2017).

⁹⁹ *Id.*

davit confirming that the animal in question meets the description of a service animal in the ADA and in state law.¹⁰⁰ Since, as shown above, it could be simple for a person to mistakenly believe that their animal is a service animal, this affidavit provides no more validation of the status of the animal than the verbal affirmation of the handler when questioned by an employee of a place of public accommodation. It remains very possible for unqualified animals to be registered as service animals in Michigan.

V. ANALYSIS OF EXISTING LAWS

A. *Mens Rea* Requirements

Typically, the *mens rea* for crime, if the statute does not specify, is established by the courts.¹⁰¹ There are six states that specify a *mens rea* in their service dog fraud law. These states are Utah,¹⁰² Missouri,¹⁰³ New Mexico,¹⁰⁴ New York,¹⁰⁵ Florida,¹⁰⁶ and Nevada.¹⁰⁷ All of the states that give a *mens rea* requirement specify intent—the crime must have been committed intentionally, knowingly, or fraudulently. The remaining nine states do not provide a *mens rea* requirement in their service dog fraud statutes.¹⁰⁸

It is well established that states may, as a valid exercise of police power, make certain acts criminal without requiring a culpable state of mind.¹⁰⁹ “That the law-making body may make a prohibited act a crime, irrespective of the elements of intent or scienter, cannot be questioned From the laboratory of criminal jurisprudence we learn that when public policy requires, the legislature may prohibit certain conduct as unlawful, independent of any criminal intent or negligence.”¹¹⁰ And “it is settled law that in prohibitive statutes cover-

¹⁰⁰ *Voluntary Service Animal Identification Application Part III*, MICH. DEP’T C. R., http://www.michigan.gov/documents/mdcr/service_animal_part_III-1-20-2016-affidavit_511562_7.pdf [<https://perma.cc/9TC8-XQSA>] (accessed Apr. 9, 2017).

¹⁰¹ *Morissette v. United States*, 342 U.S. 246, 251 (1952); Model Penal Code § 2.02(1) (1985); Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. (2012) (noting that, when *mens rea* is unspecified, it is delegated to the courts to determine appropriate *mens rea*).

¹⁰² UTAH CODE ANN. § 62A-5b-106 (West 2007) (“Intentionally and knowingly . . .”).

¹⁰³ MO. REV. STAT. § 209.204 (2005) (“Knowingly . . .”).

¹⁰⁴ N.M. STAT. ANN. § 28-11-6 (2013) (“Knowingly . . .”).

¹⁰⁵ N.Y. AGRIC. & MKTS. LAW § 118 (McKinney 2011) (“Knowingly . . .”).

¹⁰⁶ FLA. STAT. § 413.08 (2015) (“Knowingly and willfully . . .”).

¹⁰⁷ NEV. REV. STAT. § 426.510 (2013) (“Fraudulently . . .”).

¹⁰⁸ These states are: Colorado, Idaho, Kansas, Michigan, Nebraska, New Hampshire, North Carolina, Texas, and Washington.

¹⁰⁹ *E.g.*, William A. Tilleman II, *It’s a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses Towards a New Classification Scheme*, 16 AM. J. CRIM. L. 279, 292–93 (1989). *See also*, Ted Sampson-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457, 1465 (2013).

¹¹⁰ *Hershorn v. People*, 108 Colo. 43, 50–51 (1941); *Landen v. United States*, 299 F. 75, 78 (6th Cir. 1924) (“It is settled that with regard to criminal prosecutions for those acts which are not mala in se, but which through legislative exercise of the police power

ing misdemeanors, where no provision is made as to intention, and the word 'knowingly' or other apt words are not employed to indicate that knowledge is the essential element of the crime, intention is not an element of the crime."¹¹¹ Absent a *mens rea* standard and a substantive body of law from which to draw, it is only possible to speculate as to whether a court would read a *mens rea* standard into these laws. Given the above cited nature of the common law, it is reasonable to infer that some, if not all, of the nine states lacking a *mens rea* requirement in their service dog fraud laws may determine that no culpable state of mind is necessary to convict a person of the crime.

If, however, *mens rea* was inferred into these statutes, and in those states where a culpable mental state is required, it may still be difficult to determine the existence of the required *mens rea*. There is also a population of service dog handlers for whom it could be very difficult, if not impossible, to determine their *mens rea* at the time they violated the statute. This could be the case for some people with mental illness, who may be able to possess the requisite *mens rea* at some times, but not at others. Other categories of potential service dog handlers who may at some or all times lack the ability to break the law intentionally or knowingly include people with Alzheimer's disease,¹¹² traumatic brain injuries, certain intellectual disabilities, and those with short- or long-term cognitive impairments resulting from the use of prescription medication for their disability. In addition, given the wide range of potential mistakes in interpretation of the law, proving the defendant had the necessary intent to commit a crime, and was not simply mistaken, would be difficult.

B. Disparate Impact on People with Non-Apparent Disabilities

People who have disabilities that are not readily apparent are likely to be impacted by these laws at a significantly higher rate than those with visible disabilities. A businessperson or bystander can easily understand why a person who is blind uses a guide dog, or why a person in a wheelchair uses a service animal. It may not be clear to others why a person who appears 'normal' would be using a service animal. The population of people with disabilities that are not readily visible is large and includes people with psychiatric disabilities, brain injuries, epilepsy, multiple sclerosis, and the numerous types of arthritis. Some of these people may choose a service dog to assist in their daily activities and may face a greater rate of conflicts with those who do not believe they have a disability. Biases against people who have

have become *mala prohibita*, no conscious intent to break any law is essential. The respondent need not even know that the law exists.").

¹¹¹ State v. Striggles, 202 Iowa 1318, 1320 (1926). See also State v. Turner, 78 Wash.2d 276, 281 (1970).

¹¹² Natalie Pompilio, *Healing Tails: Service and Therapy Dogs Can Transform the Lives of People with Neurologic Conditions Such as Epilepsy, Autism, and Multiple Sclerosis. Dog Owners and Other Experts Explain How*, 12 NEUROLOGY NOW 46, 48 (2016).

less apparent disabilities have been documented in a variety of circumstances where disability accommodations are grating, including in the workplace. “When a disability is invisible (e.g., depression or back pain), coworkers may not believe that the person who has the disability is actually disabled. Indeed, coworkers may question whether the person is faking the disability to get an accommodation if the disability is not readily apparent.”¹¹³ “People whose disabilities are invisible may even feel that they are unfairly blamed for ‘faking’ their disabilities in order to gain special privileges or advantages.”¹¹⁴

C. *Implicit Bias*

While some individuals may have conscious, or explicit, biases about people with disabilities, or certain types of disabilities, it can be far more difficult to detect the presence of biases that are not consciously held or expressed. This is known as implicit bias:

Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions.¹¹⁵

The presence or absence of implicit biases is measured by the Implicit Association Test (IAT). Implicit biases can impact any point in the legal process, from law enforcement decisions to prosecutorial decisions and jury selection. Research has demonstrated the presence of implicit bias against people with disabilities. In a review of thirteen studies examining implicit bias against people with physical disabilities, “the results of the IATs employed were suggestive of moderate to strong negative implicit attitudes towards individuals with physical disabilities.”¹¹⁶ The study found the same results when evaluating implicit biases against people with intellectual disabilities (ID) and Down Syndrome. “Across all three studies, results of the IATs were suggestive of moderate to strong negative implicit attitudes towards individuals with ID.”¹¹⁷

In addition to this research on physical and intellectual disabilities, implicit bias research has shown “that laypeople possess strong negative biases against mental illness. Studies show that people pos-

¹¹³ Adrienne Colella, *Coworker Distributive Fairness Judgments of the Workplace Accommodation of Employees with Disabilities*, 26 ACAD. MGMT. REV. 100, 108 (2001).

¹¹⁴ Sara Green et al., *Living Stigma: The Impact of Labeling, Stereotyping, Separation, Status Loss, and Discrimination in the Lives of Individuals with Disabilities and Their Families*, 75 SOC. INQUIRY 197, 206 (2005).

¹¹⁵ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

¹¹⁶ Michelle Clare Wilson & Katrina Scior, *Attitudes Towards Individuals with Disabilities as Measured by the Implicit Association Test: A Literature Review*, 35 RES. DEVELOPMENTAL DISABILITIES 294, 314 (2014).

¹¹⁷ *Id.* at 315.

sess both negative explicit and implicit attitudes and beliefs about people with mental illnesses and laypeople tend to associate the concepts 'bad,' 'blameworthy,' and 'helpless' with mental illness."¹¹⁸ These implicit biases can impact how people within the criminal justice system treat service animal users with mental illness.¹¹⁹

Potentially prejudicial stigma are not limited to those with psychiatric disabilities; there are other medical diagnoses and disabilities that also lack social acceptance, including fibromyalgia,¹²⁰ myalgic encephalomyelitis (chronic fatigue syndrome), and chronic Lyme disease. There is also confirmed bias against people who are overweight or obese,¹²¹ a condition which can be the result of certain disabilities and medical conditions, such as Cushing's Syndrome¹²² and Prader-Willi Syndrome,¹²³ or a side effect of medications used to treat a disability such as steroids¹²⁴ and seizure medication.¹²⁵

These implicit and explicit biases against people with disabilities, and especially against those with certain particularly stigmatized disabilities, raise the possibility that not only will people being tried under service dog fraud laws face discrimination from juries, they are also likely to have more contact with law enforcement. People with psychiatric disabilities already face a higher chance of being arrested for the same offense than someone without a psychiatric disability.¹²⁶ People with mental illnesses are already disproportionately over-represented in the criminal justice system and prison population.¹²⁷ They also tend to experience exacerbations of their disabilities, injure themselves or commit suicide, and become victims of violence significantly

¹¹⁸ John Pyun, *When Neurogenetics Hurts: Examining the Use of Neuroscience and Genetic Evidence in Sentencing Decisions Through Implicit Bias*, 103 CAL. L. REV. 1019, 1032 (2015).

¹¹⁹ Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN'S L. REV. 495, 496 (2014).

¹²⁰ *Fibromyalgia Misconceptions: Interview with a Mayo Clinic Expert*, MAYO CLINIC (2015), <http://www.mayoclinic.org/diseases-conditions/fibromyalgia/in-depth/fibromyalgia/art-20048097> [https://perma.cc/MH5A-CQ6E] (accessed Apr. 9, 2017).

¹²¹ Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 788 (2001).

¹²² E.J. Ross & D.C. Linch, *Cushing's Syndrome—Killing Disease: Discriminatory Value of Signs and Symptoms Aiding Early Diagnosis*, 320 LANCET 646, 646 (1982).

¹²³ Vanja A. Holm et al., *Prader-Willi Syndrome: Consensus Diagnostic Criteria*, 91 PEDIATRICS 398, 399 (1993).

¹²⁴ Vincent J. Canzanello et al., *Evolution of Cardiovascular Risk After Liver Transplantation: A Comparison of Cyclosporine-a and Tacrolimus (FK506)*, 3 LIVER TRANSPLANTATION & SURGERY 1 (2003).

¹²⁵ Hanne Dinesen et al., *Weight Gain During Treatment with Valproate*, 69 ACTA NEUROLOGICA SCANDINAVICA 65, 67 (1984).

¹²⁶ Linda A Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill.*, 39 AM. PSYCHOLOGIST 794, 794 (1984).

¹²⁷ *Law Enforcement Responses to Disabled Americans: Promising Approaches for Protecting Public Safety Before the S. Judiciary Subcomm. on the Constitution, Civil Rights, & Human Rights*, 113th Cong. (2014) (statement of Denise E. O'Donnell, Director Bureau of Justice Assistance, Office of Justice Programs).

more often than those without psychiatric disabilities.¹²⁸ Some may choose to identify their service animal as a ‘psychiatric service dog’ or a ‘PTSD service dog,’ making their particular disability more apparent towards those who hold implicit or explicit biases against people with psychiatric disabilities.

D. Determining Probable Cause in Service Animal Disputes

If law enforcement becomes involved in a service animal dispute under one of these state statutes, it will be difficult to determine whether probable cause exists to support an arrest. At the time of contact, the law enforcement officer will not have any means of verifying the presence or absence of a disability. Service dog handlers are not required to carry documentation of their disability,¹²⁹ and with many disabilities not being readily apparent to the casual observer, the fact that a person does not appear to have a disability does not establish, or even suggest, the absence of one. Places of public accommodation and state or local government representatives are not permitted to even inquire about the nature or type of the disability.¹³⁰ In addition, a service animal handler is not required to carry any verification or documentation of the animal’s training.¹³¹ A law enforcement officer cannot demand a handler produce documentation of disability or documentation of the animal’s training as a condition of access without violating the ADA. Since it is essentially impossible to make any determination about a service animal handler’s disability status and the training of the animal without violating the ADA, there is also no way a police officer can develop a factual basis on which to make a probable cause determination to arrest the service animal handler, or to seek a warrant for their arrest. This difficulty was noted by the court in *Hurley v. Loma Linda University Medical Center*, saying, “Indeed, ‘knowingly and fraudulently representing [oneself] . . . to be the owner of [a] . . . service dog’ is illegal in California, Cal. Penal Code § 365.7; but it is not clear how anyone is supposed to determine whether someone is violating the California law without violating the federal regulation.”¹³² This issue will lead to one of two problems in the enforcement of these statutes: either law enforcement personnel will base their determinations of probable cause on the presence or absence of a visibly apparent physical disability and people with not readily apparent disabilities will be arrested and detained despite the absence of a means of determining probable cause, or, to avoid civil

¹²⁸ *Law Enforcement Responses to Disabled Americans: Promising Approaches for Protecting Public Safety Before the S. Judiciary Subcomm. on the Constitution, Civil Rights, & Human Rights*, 113th Cong. (2014) (statement of Jay M. Quam, district court judge of Minnesota’s Fourth Judicial District).

¹²⁹ 28 C.F.R. § 36.302(c)(6) (2010).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Hurley v. Loma Linda Univ. Med. Ctr.*, No. CV12-5688 DSF OPX, 2014 WL 580202, at ¶ 62 (C.D. Cal. Feb. 12, 2014).

rights complaints under the ADA, law enforcement personnel will simply not enforce the law.

Another area of concern in the determination of probable cause is the potential after-effects of a probable cause determination in the states that base their service animal fraud statutes largely on the disability status of the handler. If law enforcement determines there is probable cause to believe that a person does not have a disability, that person, if arrested, may not be provided the legally required accommodations under Title II of the ADA. Since police departments have been repeatedly accused of Title II violations towards arrestees and detainees with obvious disabilities,¹³³ it is reasonable to assume that these violations would also occur when an arrestee or detainee with a disability was arrested on probable cause of not having a disability. If this occurred, it would open law enforcement agencies up to civil suits based on Title II violations from both the arrest itself and any subsequent actions that might violate the ADA.

E. Involvement in the Criminal Justice System

Given the difficulty of establishing probable cause in these situations and the lack of a *mens rea* requirement in many of the statutes, depending on how they are enforced, these laws may increase the number of defendants with disabilities in the criminal justice system. These may be disabled people with qualified service animals who were wrongfully arrested, or people with disabilities who were arrested when trying to gain access to a place of public accommodation with an

¹³³ U.S. Dep't of Justice, *Complaint No. 204-13-310 (2013)*, ADA.gov, <https://www.ada.gov/lawrence-arapahoe.htm> [<https://perma.cc/GM7T-M3VB>] (accessed May 19, 2017); U.S. Dep't of Justice, *Complaint No. 205-53-125 (2014)*, ADA.gov, https://www.ada.gov/erie_county/erie_county_sa.htm [<https://perma.cc/36SW-476M>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint No. 204-18-181 (2007)*, ADA.gov, <https://www.ada.gov/stlucieco.htm> [<https://perma.cc/GU8L-U7LX>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint No. 204-11-290 (2010)*, ADA.gov, <https://www.ada.gov/bonner.htm> (accessed Feb. 13, 2017); U.S. Dep't of Justice, *Complaint No. 204-13-311 (2013)*, ADA.gov, <https://www.ada.gov/englewood.htm> [<https://perma.cc/CW6L-G6YH>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint No. 204-14-143/204-14-144 (2013)*, ADA.gov, <https://www.ada.gov/new-haven/new-haven-sa.htm> [<https://perma.cc/SFC8-6842>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint No. 204-67-153 (2016)*, ADA.gov, https://www.ada.gov/columbia_pd/columbia_pd_sa.html [<https://perma.cc/W34Y-2HRE>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint Nos. 204-17M-279, -290, -295, -346, -361, -400 & -401 (2007)*, ADA.gov, <https://www.ada.gov/jacksonvillefla.htm> [<https://perma.cc/S98W-R6B8>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Elk Grove Village Police Dep't, IL (2008)*, ADA.gov, https://www.ada.gov/elk_grove.htm [<https://perma.cc/B7LN-9NRB>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *New York City Police Dep't, NY (2009)*, ADA.gov, <https://www.ada.gov/nypd.htm> [<https://perma.cc/37TF-VCNS>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Rochester Police Dep't, MI (2015)*, ADA.gov, https://www.ada.gov/rochester_pd_sa.html [<https://perma.cc/CZ2S-JJCK>] (accessed Apr. 9, 2017); U.S. Dep't of Justice, *Complaint No. 204-14-164 (2015)*, ADA.gov, https://www.ada.gov/wallingford_sa.html [<https://perma.cc/LS7H-346M>] (accessed Feb. 13, 2017). Since 2006, the Department of Justice has reached settlement agreements concerning ADA compliance with a number of police and sheriff departments, including, but not limited to those listed above.

unqualified animal. The potential impact of involvement in the criminal justice system for these individuals can be significant, and, in the case of an individual mistaken about the legitimacy of their service animal, disproportionately severe to the alleged crime.

The concerns begin with the arrest itself. In addition to the ADA Title II concerns discussed above and the impact on the service animal handler, there is also the issue of the impact of the arrest on the service animal.

About half of misdemeanor cases are dismissed.¹³⁴ In Chicago, the rate of dismissal has reached as high as 42%.¹³⁵ The majority of the misdemeanor charges that were dismissed or otherwise disposed of were dismissed within forty-eight hours of arrest.¹³⁶ Given the difficulty in showing probable cause in service animal fraud cases, the rate of dismissal is likely to be high in these misdemeanor cases as well. Even assuming, however, a person arrested for a misdemeanor charge of service animal fraud has the charges dismissed within forty-eight hours, there may still be a significant impact. As previously mentioned, if a service animal handler is arrested on suspicion of not having a disability, they may not be provided adequate disability-related accommodations during the arrest and any subsequent detention. This could lead to an exacerbation of physical, psychological, and developmental disabilities and illnesses. People with disabilities may be denied effective communications, access to medical care and prescribed medications, and the use of necessary mobility and communications devices.¹³⁷ During detention, people with disabilities are more likely to be the victim of physical or sexual assault than people without disabilities.¹³⁸

The detention of the suspected unqualified service animal is also of concern. If the handler does not have a friend or family member immediately available to take custody of the dog, the dog may be placed in an animal shelter or pound while the handler is detained. The threat of sending a handler's dog to the pound may also be used to discourage handlers with qualified service animals from attempting to access places of public accommodation.¹³⁹ The animal shelter environment is inherently stressful to dogs,¹⁴⁰ and an unaccustomed separa-

¹³⁴ JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* 130 (1987).

¹³⁵ Angela Caputo, *Charges Dismissed*, CHI. REP. (Nov. 4, 2013), <http://chicagoreporter.com/charges-dismissed/> [<https://perma.cc/DSS4-WRRT>] (accessed Apr. 9, 2017).

¹³⁶ IRWIN, *supra* note 134, at 130.

¹³⁷ *Id.* at 45, 72.

¹³⁸ Robert W. Dumond, *Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 the Prison Rape Elimination Act of 2003, the Symposium*, 32 J. LEGIS., 142, 150 (2006) (discussing the increased vulnerability of certain prisoners).

¹³⁹ *Hurley*, 2014 WL 580202, at ¶¶ 4, 76.

¹⁴⁰ Michael B. Hennessy et al., *Plasma Cortisol Levels of Dogs at a County Animal Shelter*, 62 PHYSIOLOGY & BEHAV. 485, 485 (1997).

tion from the handler in a strange environment also causes stress.¹⁴¹ The results of such stress, even for a short duration of time, can negatively impact both the health and the behavior of the service animal, potentially compromising its ability to function as a service animal in the future.¹⁴²

If a service animal is placed in a shelter while the handler is being detained, the handler may be required to pay a fee to reclaim their animal.¹⁴³ The total fee is often comprised of three things: a flat intake fee or fine, the daily boarding cost, and re-vaccinating, microchipping, and sterilization, if the animal was not already so. The vaccinations, microchipping, and sterilization are often required prior to the release of an animal back to the handler. For example, in the city of San Antonio, Texas, there is a \$50 intake fee, a \$10-per-day boarding fee, vaccination fees totaling \$26, a microchipping fee of \$5, and the requirement that the handler sterilize any unsterilized animal within thirty days.¹⁴⁴ This results in a cost of \$91, not including sterilization, if the animal is reclaimed in one day.¹⁴⁵ Some areas of the country have much higher fees. In Everett, Washington, the fee to reclaim a dog can be as high as \$375.¹⁴⁶ Since over a quarter of people with disabilities live under the poverty line, this cost could be prohibitive.¹⁴⁷ Owners can reclaim animals from shelters for a period of time set by statute, after which the animal is either placed for adoption or euthanized.¹⁴⁸

People with disabilities who are arrested for service animal fraud, rightfully or wrongfully, may face extended pre-trial detention because the high rate of poverty may result in an inability to post bond. “It is a

¹⁴¹ Veronika Konok et al., *The Behavior of the Domestic Dog (Canis Familiaris) During Separation from and Reunion with the Owner: A Questionnaire and an Experimental Study*, 135 APPLIED ANIMAL BEHAVIOUR SCI. (2011) (“Our findings show that at a strange place[,] normal dogs show these changes in the separation behavior, and even during a shorter period of separation.” (citation omitted)). It is worth noting the possibility that an animal could be held in a shelter as evidence in the fraud case.

¹⁴² Bonne Beerda et al., *Manifestations of Chronic and Acute Stress in Dogs*, 52 APPLIED ANIMAL BEHAVIOUR SCI. (1997) (discussing experiment that showed the longer the animal was subjected to these conditions, the higher the cortisol level rose which may lead to chronic stress in these animals, thus affecting their ability to be service animals).

¹⁴³ *Reclaim Your Pet: Has Your Pet Been Brought in to Animal Care Services?*, ANIMAL CARE SERVS. (2014), <http://www.sanantonio.gov/Animal-Care/What-We-Do-Services/Reclaim-Your-Pet> [<https://perma.cc/VB9J-HSSN>] (accessed Apr. 9, 2017).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Noah Haglund & Herald Writer, *Everett Animal Shelter Fees to Rise*, HERALDNET (Dec. 24, 2015), <http://www.heraldnet.com/news/everett-animal-shelter-fees-to-rise/> [<https://perma.cc/ME3A-DDGK>] (accessed Apr. 9, 2017).

¹⁴⁷ W. ERICKSON ET AL., 2013 DISABILITY STATUS REPORT MARYLAND 6 (2013).

¹⁴⁸ Patricia A. Bolen, *Lost and Found: Humane Societies' Rights and Obligations Regarding Companion Animal Ownership*, ANIMAL LEGAL & HIST. CTR. (2005), <https://www.animallaw.info/article/lost-and-found-humane-societies-rights-and-obligations-regarding-companion-animal-ownership> [<https://perma.cc/NQN5-H3MK>] (accessed Apr. 9, 2017).

frequent misunderstanding that people accused of misdemeanors, particularly non-violent misdemeanors, do not remain in jail during their case. In fact, people charged with misdemeanors frequently are detained pending trial, particularly if they are indigent.¹⁴⁹ The number of defendants who cannot make bail varies among jurisdictions, as does the length of time spent in jail. On the more extreme end, Human Rights Watch found that in New York City, 87% of defendants with bail amounts of \$1000 or less could not afford bail. These defendants spent, on average, sixteen days in jail.¹⁵⁰ This exposes people with disabilities to many of the concerns previously discussed, including a lack of access to disability-specific accommodations, and an increased risk of abuse. Additionally, a jail stay of more than a few days could result in the animal being impounded for a longer period of time, subjecting the animal to increased trauma from the shelter environment and separation from its owner.

Other concerns arise when a defendant is unable to afford bail. The inability to afford bail and the possibility of continued detention encourages innocent defendants to plead guilty to be released.¹⁵¹ A defendant who is not receiving necessary disability-related accommodations would have an even greater incentive to do whatever was necessary to secure a quick release from detention. An innocent defendant may have even more reason to accept a plea bargain if they have been denied the assistance of a public defender, or have been encouraged to proceed without one, despite being eligible for the services of a public defender.¹⁵² This does not even begin to address the social consequences of the detention of a person with disabilities. If the handler was, in fact, legitimately using a service animal, but pleaded guilty to avoid pre-trial detention, their ability to use a needed service animal in the future may be compromised.

The potential consequences of the enforcement of these statutes, even against those who were using animals not meeting the definition of a service animal, is excessive especially in light of the absence of a *mens rea* requirement in many of the statutes and the many possibilities for a reasonable person to make a mistake regarding the status of their animal.

In some states, the comparison between their service animal fraud law and service animal access denial law raises concerns about the balance of rights. In these states, the maximum penalty specified for attempting public access with an unqualified service animal exceeds the

¹⁴⁹ ROBERT C. BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE* 18–19 (2009).

¹⁵⁰ *New York City: Bail Penalizes the Poor*, HUMAN RIGHTS WATCH (Dec. 2, 2010), <https://www.hrw.org/news/2010/12/02/new-york-city-bail-penalizes-poor> [<https://perma.cc/HN8U-GBAM>] (accessed Apr. 9, 2017).

¹⁵¹ *The Price of Freedom*, HUMAN RIGHTS WATCH (Dec. 2, 2010), <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york#34bcda> [<https://perma.cc/HN8U-GBAM>] (accessed Apr. 9, 2017).

¹⁵² BORUCHOWITZ ET AL., *supra* note 149, at 16.

maximum penalty for denying access to legitimate service animals.¹⁵³ While places of public accommodation should have the ability to bar animals other than service animals from their places of business, the apparent prioritization over the protected civil rights of people with disabilities is incongruous. In North Carolina, Nevada, and California, using an unqualified service animal is a criminal offense, while denying public access to a qualified service animal is strictly a civil matter.¹⁵⁴ A notable example of the discrepancy in penalty between the statutes is provided in Utah's statutes. Misrepresenting an animal as a service animal is a Class B misdemeanor, with penalties of up to six months imprisonment and a \$1,000 fine.¹⁵⁵ Interfering with the public access of a qualified service animal is a Class C misdemeanor carrying penalties of up to ninety days imprisonment and a \$750 fine.¹⁵⁶

It is too early to determine the frequency with which people may be arrested, tried, and possibly convicted under the increasing number of service animal fraud laws.¹⁵⁷ State laws criminalizing denial of access to the handlers of qualified service animals have been in place longer, yet the record is largely devoid of cases, with only one appearing in Missouri.¹⁵⁸ There may, of course, have been other prosecutions that did not become part of the record, and a media search found only a small number.¹⁵⁹

VI. BETTER OPTIONS FOR CONTROLLING ACCESS

The goal of these laws is laudable. Poorly behaved, poorly trained, and/or aggressive animals have no place in places of public accommodation. They can pose a danger to other people and service animals, and potentially cause property damage or interfere with the operation of a business. Barring such animals from public places seems reasonable, and these laws are intended to provide protection for the public and for businesses. The laws as currently written do not, however, provide any additional protection for the public or for businesses than is already provided by law.

¹⁵³ These states are California, Colorado, Kansas, Nevada, North Carolina, and Utah.

¹⁵⁴ Wisch, *supra* note 12.

¹⁵⁵ UTAH CODE ANN. § 62A-5b-106 (West 2007); UTAH CODE ANN. § 76-3-301 (West 1995); UTAH CODE ANN. § 76-3-204 (West 1973).

¹⁵⁶ *Id.*

¹⁵⁷ One criminal report under California Penal Code § 365.7 is noted in *Lerma v. California Exposition and State Fair Police*; however, there is no record of the criminal case itself.

¹⁵⁸ *State v. Premier Serv. Corp.*, 765 S.W.2d 653 (Mo. Ct. App. 1989).

¹⁵⁹ *SC Motel Owner Charged for Refusing Room to Woman with Service Dog*, WYFF4 GREENVILLE (May 21, 2016), <http://www.wyff4.com/news/sc-motel-owner-charged-for-refusing-room-to-woman-with-service-dog/39659524> [https://perma.cc/J9CJ-S97J] (accessed Apr. 9, 2017); *Restaurant Owner Arrested in Service Dog Case; Advocates Say Some Still Ignorant of ADA Law*, ABC 15 (May 31, 2011), <http://wpde.com/features/community-news/restaurant-owner-arrested-in-service-dog-case-advocates-say-some-still-ignorant-of-ada-law> [https://perma.cc/CF65-GBEX] (accessed Apr. 9, 2017).

A. Education About Current Laws

The Americans with Disabilities Act's (ADA) implementing regulations have provisions for places of public accommodation to exclude service animals from their places of business when the animal acts inappropriately.¹⁶⁰ The ADA permits places of public accommodation to take this step even when the animal is an otherwise qualified service animal.¹⁶¹ A public accommodation can exclude any animal that is not on a leash or harness,¹⁶² is out of control,¹⁶³ or is not housebroken.¹⁶⁴ A service animal may also be excluded from a public accommodation if it is presenting a direct threat to the health or safety of others.¹⁶⁵ Following the ADA's guidelines, a place of public accommodation does not need to evaluate the legal status of the animal in question, but they can still take the necessary steps to protect their business and public safety.¹⁶⁶

B. Legislative Changes

A second approach that would assist with the problems created by unqualified service animals is for states to align their terminology and definitions of service animals with the definitions and terminology in the ADA. States currently use a wide variety of definitions and terms in defining which service animals are to be recognized by the state, and some states define a service animal differently in different statutes.¹⁶⁷ In Arizona, the definition of a service animal for the purpose of

¹⁶⁰ 28 C.F.R. § 36.302(c)(2)(i) (2012).

¹⁶¹ *Id.*

¹⁶² *Id.* § 36.302(c)(4) (“A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal’s safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler’s control . . .”).

¹⁶³ 28 C.F.R. § 36.302(c)(2)(i) (2012).

¹⁶⁴ *Id.* § 36.302(c)(2)(ii).

¹⁶⁵ *Id.* § 36.208. The Department of Justice’s guidance accompanying this regulation supports its applicability to service animals that pose a direct threat to the health and safety of others.

¹⁶⁶ It is worth noting that only Florida, Michigan, and Iowa have laws permitting a service animal to be excluded if it is a threat to the health and safety of others, and the Iowa law mentions this exclusion only in the setting of swimming pools.

¹⁶⁷ In addition to the common terms “service animal,” “assistance dog,” and “service dog,” some terms used to refer to dogs defined as “service animals” in the ADA include “personal assistance animal” (Rhode Island) (42 R.I. GEN. LAWS § 42-87-3 (2013)), “guide dog” (Vermont, for all types of service animals) (VT. STAT. ANN. tit. 13, § 355 (2016)), “Leader dog” or “Three-unit service dog team” (Virginia) (VA. CODE ANN. § 3.2-6588 (2008)), “support dog,” “independence dog,” and “assistive animal” (Iowa) (IOWA CODE § 216.11 (2010)), “signal dog” (Arizona) (ARIZ. REV. STAT. ANN. § 11-1024 (2016)), “support animal” (Delaware) (DEL. CODE ANN. tit. 25 § 5141 (2016)), “hearing ear dog” (Illinois) (740 ILL. COMP. STAT. 13/5 (2000)), “qualified service animal” and “qualified service dog” (New Mexico) (N.M. STAT. ANN. § 28-11-2 (2013)).

civil rights and discrimination laws is consistent with the ADA;¹⁶⁸ however, for a service animal to be protected under the criminal injury and interference with a service animal statute, the service animal must have completed a formal training program and be trained in tasks that assist its handler with a productive lifestyle.¹⁶⁹ Kentucky groups service animals for people with disabilities along with bomb and narcotic detection dogs, police patrol dogs, and search and rescue dogs.¹⁷⁰ In Montana, service animals are not limited by any species restrictions.¹⁷¹ North Carolina uses the term “assistance animal” in the statute prohibiting assault on a service animal,¹⁷² but uses the term “service animal” when discussing access rights.¹⁷³ Ohio defines a service dog specifically to mean a dog that assists a person with a mobility impairment. It also specifically defines guide and hearing dogs, but does not define any other type of service animal.¹⁷⁴ New York defines a service animal as a dog when it addresses licensing, identification, and control of dogs¹⁷⁵ and when it addresses the rights of persons with disabilities,¹⁷⁶ and defines a service animal as “any animal” when it addresses offenses against service animals and handlers.¹⁷⁷ Also worth noting is the requirement for ownership of a service animal in some laws. In Virginia, the definition of a hearing dog states that it is a dog trained to alert its owner to sounds.¹⁷⁸ Arizona, in its law addressing criminal injury to a service animal, defines a service animal as an animal that assists its owner in activities of daily living.¹⁷⁹ This presents an issue because not all service animal handlers own their animals. Some service animal schools maintain ownership of the

¹⁶⁸ ARIZ. REV. STAT. ANN. § 11-1024 (2016) (“‘Service animal’ means any guide dog, signal dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing assistance in a medical crisis, pulling a wheelchair or fetching dropped items.”).

¹⁶⁹ ARIZ. REV. STAT. ANN. § 13-2910 (2012) (“‘Service animal’ means an animal that has completed a formal training program, that assists its owner in one or more daily living tasks that are associated with a productive lifestyle and that is trained to not pose a danger to the health and safety of the general public.”). The phrase “productive lifestyle” is not defined.

¹⁷⁰ KY. REV. STAT. ANN. § 525.010 (West 2007).

¹⁷¹ MONT. CODE ANN. § 49-4-203 (1997).

¹⁷² N.C. GEN. STAT. § 14-163.1 (2009).

¹⁷³ N.C. GEN. STAT. § 168-4.2 (2005).

¹⁷⁴ OHIO REV. CODE ANN. § 955.011 (West 2011).

¹⁷⁵ N.Y. AGRIC. & MKTS. LAW § 108(22) (McKinney 2011) (“‘Service dog’ means any dog that has been or is being individually trained to do work or perform tasks for the benefit of a person with a disability . . .”).

¹⁷⁶ N.Y. CIV. RIGHTS LAW § 47-b (McKinney 2014) (“The term ‘guide dog’, ‘hearing dog’ or ‘service dog’ shall mean a dog . . .”).

¹⁷⁷ N.Y. PENAL LAW § 242.00 (McKinney 2014) (“‘Service animal’ shall mean any animal that has been partnered with a person who has a disability and has been trained or is being trained, by a qualified person, to aid or guide a person with a disability.”).

¹⁷⁸ VA. CODE ANN. § 51.5-40.1(2014) (“‘Hearing dog’ means a dog trained to alert its owner by touch to sounds of danger and sounds to which the owner should respond.”).

¹⁷⁹ ARIZ. REV. STAT. ANN. § 13-2910 (2012).

animal for the entire working life of the individual, and others retain ownership for a period of time after which the handler can apply for ownership of the animal.¹⁸⁰

These differences in terminology, between different states, between state and federal definitions, and within a state's own statutes create confusion for those trying to determine their obligations as a place of public accommodation or their rights as a person with a disability who uses a service animal.

States can also modify their service animal access laws to comply with the ADA to reduce confusion. Since states cannot enforce laws that would restrict access rights protected by the ADA, there is no practical purpose to maintaining laws that conflict with the ADA. As certain state laws are currently written, a place of public accommodation or prospective service animal handler may read their state's law and become confused about the access rights of service animal handlers. This can create a conflict in two ways. The first, and perhaps most obvious, is the risk of places of public accommodation denying access to service animal handlers because they have not complied with a state access law, such as North Carolina's registration requirement or Connecticut's orange leash requirement.¹⁸¹ The second conflict occurs when state laws may broaden the definition of service animal, or remove the circumstances under which a business owner may properly exclude a service animal. For example, in Delaware's equal accommodation statute, a service animal is described as "any animal" with no restriction given on breed.¹⁸² Illinois likewise does not restrict the species of service animals, defining a service animal as "any animal trained to assist a physically impaired person in one or more daily life activities."¹⁸³ The North Carolina statute specifically notes that a service animal need not be a dog. "The term 'assistance animal' is not limited to a dog and includes any animal trained to assist a person with a disability."¹⁸⁴

Consistency of definition needs to be achieved not only at the state level, but also at the federal level. Achieving such consistency does not require a reduction in any of the currently available protections for the use of animals to mitigate aspects of disability. Currently, the Fair Housing Act (FHA) recognizes the ownership of animals by people with disabilities as reasonable accommodations for housing purposes.¹⁸⁵

¹⁸⁰ *E.g.*, *Current Clients and Graduates*, LEADER DOGS, <http://www.leaderdog.org/current-clients> <https://perma.cc/XV2H-94ZW> (accessed Apr. 9, 2017) (explaining that Leader Dogs transfers ownership to the handler automatically after one year); *The Experience*, CANINE COMPANIONS FOR INDEPENDENCE, <http://www.kintera.org/site/c.cdKGIRNqEmG/b.4011035/> [<https://perma.cc/KAT6-S5JX?type=image>] (accessed Apr. 9, 2017) (maintaining training school's ownership of the animal, even after placement).

¹⁸¹ N.C. GEN. STAT. § 168-4.3 (2016); CONN. GEN. STAT. § 46a-44 (2016).

¹⁸² DEL. CODE ANN. tit. 6, § 4502 (2014).

¹⁸³ 740 ILL. COMP. STAT. § 13/5 (2000).

¹⁸⁴ N.C. GEN. STAT. § 14-163.1 (2009).

¹⁸⁵ 24 C.F.R. § 100.204 (2016).

The FHA does not, however, make a distinction between individually task trained service animals meeting the ADA definition, and untrained emotional support animals that would not have protection under the ADA.¹⁸⁶ This lack of distinction can create confusion, because the use of an animal that would qualify as a reasonable accommodation as to housing under the FHA would not qualify as a reasonable accommodation in places of public accommodation under the ADA.

Additional clarity could be obtained by modifying the classifications of service and emotional support animals and the requirements for documentation and advance notification. A psychiatric service animal handler must currently abide by the same requirements as the handler of an emotional support animal, not by the requirements of other service animal handlers. To increase the consistency of definitions between the federal laws applying to service animal handlers, psychiatric service animals should be classified with other service animals for the purposes of documentation and notification. The separate designation for emotional support animals could be maintained. The current additional documentation and notification requirements for psychiatric service animals provides the airlines no additional protection against fraudulent animals as it currently stands; it is no easier to judge the legitimacy of a service animal for a psychiatric condition than it is to judge the legitimacy of a service dog for any non-apparent disability. Creating a separate class for psychiatric service animals with additional requirements demonstrates a bias against people with psychiatric disabilities and serves no practical purpose.

VII. CONCLUSION

The state service animal fraud laws are undoubtedly written and passed with the best of intentions to address the legitimate concern of the use of unqualified service animals in public places. On first look, these laws appear to be a good solution to the problem, attempting to dissuade fraudulent use of unqualified animals and thereby benefiting the public at large as well as people with disabilities with legitimate service animals. On deeper analysis, however, it becomes clear that the problem is complex and that criminalizing the use of unqualified service animals poses problems for the enforcement and effectiveness of these laws, as well as raising potential civil rights issues for people with disabilities. A multi-faceted approach to the problem of the use of unqualified service animals is likely to be more effective, combining legislative efforts to reduce potential confusion with educational information directed towards those who may advise people with disabilities about the status of their animal as a service animal.

¹⁸⁶ *Overlook Mut. Homes Inc. v. Spencer*, 666 F. Supp. 2d 850, 859 (S.D. Ohio 2009).