

## SUSPICIOUS SPECIES

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Service dogs and emotional support animals provide crucial assistance to people with disabilities in many areas of life. As the number of these assistance animals continues to grow, however, so does public suspicion about abuse of law and faking the need for such accommodations. Legislators have been directly reactive to this moral panic, and the majority of states have passed laws to combat the misrepresentation of pets as assistance animals. Consequently, people with disabilities who use service dogs feel the need to signal compliance to avoid harassment, questioning, or exclusion from spaces that do not allow pets. Taking an empirical law and psychology approach, this Article concerns itself with the possible sources of the phenomenon of misrepresentation, which I term “assistance-animal disability con.” The Article also discusses the stigmatizing consequences of the suspicion surrounding faking the need to use assistance animals for the disability community. The Article shows

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that 1) people with disabilities who use service dogs signal their protected status using extra-legal norms that did not originally appear in federal legislation. They use accessories that indicate legality such as vests and choose breeds of dogs that have traditionally been associated with service; 2) the public has been most trusting of these visible signs of compliance in

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the form of vests indicating the authenticity of a service dog; 3) in return, the legal system at the state level has adopted those extra-legal norms and translated them into black letter law through a reciprocal model of rulemaking; and 4) the psychological mechanism of “bounded ethicality” can explain people’s engagement with assistance-animal disability con. People who misrepresent their pets as assistance animals seem to not see their acts as unethical or illegal because the victims in the situation, people with disabilities, remain unrecognized in these people’s eyes. Based on these original findings, this Article argues for legal reform and for the use of tools from the field of behavioral psychology to restore trust in the practice of employing assistance animals to support the needs of millions of Americans with disabilities. The suggested analysis extends beyond disability law, offering a deeper understanding of the relationship between social norms, new laws, and ethical decision-making.

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## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	5
II.	THE CONSEQUENCES OF AMBIGUOUS LEGAL CATEGORIES . . . . .	15
	A. Taxonomy of Assistance Animals, Restricted Environments, and Governing Legislation . . . . .	18
	1. Taxonomy of Assistance Animals . . . . .	20
	2. Restricted Environments and Governing Legislation . . . . .	29
	B. Media Portrayal, Moral Panic, and Legal Reactions . . . . .	38
	C. Bounded Ethicality and the Psychology of Committing Assistance-Animal Disability Con . . . . .	50
III.	INFORMAL SIGNS OF COMPLIANCE: BREEDS AND VESTS . . . . .	58
	A. Establishing Trust through Signs of Compliance . . . . .	58
	B. Empirically Testing the Role of Informal Signs of Compliance: A Survey Experiment . . . . .	70
	1. The Experimental Design and Hypotheses . . . . .	70
	2. The Research Population . . . . .	74
	3. Findings . . . . .	76
	C. Discussion . . . . .	82
	1. Small Dogs, Less Apparent Disabilities, and the Disability Hierarchy . . . . .	82
	2. Vests as Visible Signs of Compliance . . . . .	86
	3. When Informal Becomes Formal . . . . .	91
IV.	PRACTICAL AND THEORETICAL IMPLICATIONS: THE FUTURE OF REGULATING ASSISTANCE ANIMALS . . . . .	95
	A. Ethical Nudges—Combating Bounded Ethicality . . . . .	96

B. Centralized Permit System for Assistance Animals . . . . .	101
C. Enforcement of the Rules by Gatekeepers of Public Accommodations . . . . .	111
V. CONCLUSION. . . . .	115

## I. INTRODUCTION

Over the last few years, we all seem to have encountered many more animals accompanying people with disabilities in public spaces (such as theaters, restaurants, offices, schools, and medical institutions), in apartment buildings, and aboard airplanes. Reactions to this phenomenon by legislators, courts, policy makers, and popular media outlets have been focused on two questions: how to differentiate the “real” service dog from the “pet in disguise” and how to stop the supposedly massive number of people who are abusing disability law.<sup>1</sup>

Accurate statistics on the number of assistance animals, service dogs, or emotional support animals in the United States are impossible to obtain because there is no mandated national registry or permit system.<sup>2</sup> Estimates from the past six years have ranged from tens of thousands to more than 100,000 service dogs in America.<sup>3</sup> This obviously complicates

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<sup>1</sup> See infra Section II.B.

<sup>2</sup> See infra Part IV.

<sup>3</sup> According to a 2012 survey by the American Humane Association, at that time “[t]here [were] approximately 20,000 service dogs in the U.S., which includes 10,000 guide dogs,” American Humane Association, U.S. Pet (Cat and Dog) Population Fact Sheet, <https://studylib.net/doc/8273062/us-pet—dog-and-cat—population-fact-sheet> (last visited

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May 21, 2021) [<https://perma.cc/64XS-HH8H>]. In the six years since that survey, however, there have been reports of a growing number of service dogs used, specifically psychiatric service dogs and medical alert dogs. See Beth Teitell, Service Dogs Barred, Doubted, and Deeply Treasured, BOS. GLOBE (Sept. 18, 2013, 6:26 AM), <https://www.bostonglobe.com/lifestyle/2013/09/18/the-growing-number-dogs-assisting-people-with-invisible-conditions-causing-conflict-and-some-cases-confrontation/igPnUBYHa97K07ccBGJJVJ/story.html> [<https://perma.cc/PGJ5-ZSJF>] (alerting to increasing number of service dogs' handlers who live with non-apparent disabilities); Mariko Yamamoto, Mayllyne T. Lopez & Lynette A. Hart, Registrations of Assistance Dogs in California for Identification Tags: 1999–2012, PLOS ONE 1, 10 (2015) (reporting on the increase in the number of service dogs voluntarily registered through the California system, especially psychiatric service dogs); Barbara Handelman, Service Dogs: Ethics and Education, INT'L ASS'N ANIMAL BEHAV. CONSULTATIONS J. (June 2016), <https://iaabcjournal.org/service-dogs-ethics-education-part-two-certification-common-sense> [<https://perma.cc/ZT5Q-LNYP>] (stating a growing demand for service dogs). A 2014 California legislative report gives an a much larger estimate of 100,000 to 200,000 service dogs. CAL. SENATE BUS. PROS. & ECON. DEV. COMMITTEE, FAKE SERVICE DOGS, REAL PROBLEM OR NOT? HEARING ON THE POSSIBLE USE OF FAKE SERVICE DOGS AND FAKE IDENTIFICATION BY INDIVIDUALS TO OBTAIN SPECIAL ACCESS TO HOUSING, PUBLIC PLACES OR AIRPORTS/AIRLINES FOR THEIR ANIMAL, BACKGROUND PAPER 7 (Feb. 24, 2014), <https://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/Background%20Paper%20for%20Fake>

questions about misrepresentation of a pet as an assistance animal in order to take them into spaces that generally prohibit pets. Weak enforcement mechanisms that make it rather easy to get away with such wrongdoing also contribute to lack of data on the scope of this socio-legal phenomenon<sup>4</sup> I term “assistance-animal disability con.”<sup>5</sup>

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%20Service%20Dog%20Hearing%20(2–14–14).pdf [https://perma.cc/89TP-UL6Y]. In 2018, Assistance Dogs International, a volunteer membership organization for service dog training programs, reported that there were 15,573 services dogs certified by them in North America. See Assistance Dogs International, 2018 Fact Sheet, ASSISTANCE DOGS INT’L (2018), [https://assistancedogsinternational.org/clientuploads/Media/2018\\_ADI\\_Fact\\_Sheet\\_FINAL.pdf](https://assistancedogsinternational.org/clientuploads/Media/2018_ADI_Fact_Sheet_FINAL.pdf) [https://perma.cc/QDE2–3C7G].

4. Research on the gap between the “law on the books” and the “law in action,” which can be explained by the differentiation and convergence between social and legal norms, has been one of the main endeavors of the law and society movement. STEWART MACAULAY, LAWRENCE M. FRIEDMAN & ELIZABETH MERTZ, *LAW IN ACTION: A SOCIO-LEGAL READER* 14–15 (2007); Lawrence M. Friedman, The Law and Society Movement, 38 *STAN. L. REV.* 763, 775 (1986).

5. This Article is the third installment in a series of papers covering the socio-legal phenomenon of fear of the disability con, in other words, the moral panic about people using “fake disabilities” to exploit disability rights, anywhere from academic accommodations to parking privileges. See generally Doron Dorfman, Fear of the Disability Con, 53 *LAW & SOC’Y REV.* 1051 (2019) [hereinafter Dorfman, Fear of the Disability Con]; Doron

Although laypeople and gatekeepers (usually business owners who are in charge of enforcing the law) typically look out for signs of compliance with the law, no official gear (vests, harnesses, or tags) or issued ID guarantees the legitimacy of a service dog or an emotional support animal.<sup>6</sup> Nevertheless, official-looking gear and IDs sold by private for-profit vendors (mostly online) have become ubiquitous.<sup>7</sup> Putting a vest on an assistance dog is thus an extra-legal norm that has become ingrained with handlers of legitimate assistance dogs and with those who put vests on their pets.<sup>8</sup>

The complex relationship between social norms, new laws, and ethical decision-making has been of interest to legal scholars since the early 1990s.<sup>9</sup> This relationship raises a series of broad questions.

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Dorfman, [Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights, 10 U.C. IRVINE L. REV. 557 (2020) [hereinafter: Dorfman, [Un]Usual Suspects].

<sup>6</sup>. See infra Part III.

<sup>7</sup>. See infra Section III.A.

<sup>8</sup>. See infra Section III.C.2.

<sup>9</sup>. Many see the study of extra-legal norms among Shasta County ranchers as marking the inception of interest in social norms among modern-day legal scholars. See generally Robert C. Ellickson, Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County, 38 STAN. L. REV. 623, 624 (1986); see also Robert C. Ellickson, Law and Economics Discovers Social Norms, 27 J. LEGAL STUD. 537, 542–43 (1998) (describing an “explosion of scholarly interest in [social] norms.”).

These include questions about the process through which norms become translated into black letter law;<sup>10</sup> about the social response to these norms;<sup>11</sup> about psychological mechanisms that cause people to comply with legal and extra-legal norms;<sup>12</sup> about the ways in which laypeople signal their compliance;<sup>13</sup> and about which signs others find to be trustworthy.<sup>14</sup> This interdisciplinary Article investigates those central questions as they relate to assistance-animal disability con.

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<sup>10</sup>. Lauren B. Edelman, Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law, 97 AM. J. SOCIO. 1531, 1542–43 (1992); Lauren B. Edelman, Stephen Petterson, Elizabeth Chambliss & Howard S. Erlanger, Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma, 13 LAW & POL'Y 73, 76 (1991); MATTHIAS BAIER, SOCIAL AND LEGAL NORMS: TOWARDS A SOCIO-LEGAL UNDERSTANDING OF NORMATIVITY 62–63 (2016); see infra Section III.C.3.

<sup>11</sup>. ERIC A. POSNER, LAW AND SOCIAL NORMS 2–3 (2000); see infra Section II.B.

<sup>12</sup>. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 5–6 (1990). See generally Amir N. Licht, Social Norms and the Law: Why Peoples Obey the Law, 4 REV. L. & ECON. 715 (2008); infra Section II.C.

<sup>13</sup>. See infra Part III.

<sup>14</sup>. Michael Bacharach & Diego Gambetta, Trust in Signs, in TRUST IN SOCIETY 148, 150 (Karen S. Cook, ed., 2001); Richard A. Posner, Social Norms, Social Meaning, and Economic Analysis of Law: A Comment, 27 J. LEGAL STUD. 553, 553–54 (1998); see infra Section III.A. For description and discussion of the experimental design, see Sections III.B and III.C.

To explore how the suspicion of assistance-animal disability con affects the legal system, public opinion, and the lives of disabled individuals who use service dogs, I use a mixed-methods empirical approach.<sup>15</sup> I present a quantitative analysis of data from an original experimental survey conducted with a representative sample of the US population ( $N = 1,000$ ), along with systematic analysis of state legislation, and with qualitative data from 47 in-depth interviews<sup>16</sup> conducted with

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<sup>15.</sup> See infra Section III.B.

<sup>16.</sup> The interview sample consisted of thirty-one women and fifteen men, all between the ages of twenty-one and seventy-two and living independently (that is, not in an institutional setting) in the San Francisco Bay Area. This area holds significance as the birthplace of the Independent Living and Disability Rights Movements. Although no sampling methods were used to ensure that this group is representative of the disability community in the United States or even the Bay Area, the diversity within the sample did help foreground a wide spectrum of voices not often heard on a topic rarely addressed in academia. I conducted most of the interviews from January to March 2016. I later conducted more interviews in April and May 2018. I recruited the interviewees using multiple methods: through personal connections and by attending two fairs organized by local disability services organizations and support groups. The interviews averaged around 30 minutes and were semi-structured; they were conducted in person, recorded, and later transcribed. The interviewees received \$10 or \$15 gift cards as a token of appreciation.

people with disabilities.<sup>17</sup> The quantitative analysis helps provide empirical basis for analyzing the phenomenon of assistance-animal disability con. The use of interview data throughout the Article helps bring to the forefront voices rarely heard in academic legal writing.

Findings from the experimental survey demonstrate that a vest placed on a dog is strongly perceived as a sign of compliance with the law and that it is a stronger indicator of trust in the legitimate use of a dog than is the dog's breed (when presenting a small dog vs. a Labrador).<sup>18</sup> In other words, the public is on the lookout for formal signs of compliance that help authenticate the type of dog (pet or assistance animal) and the identity of the handler as a person with disabilities.

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<sup>17</sup>. Twelve interviewees were service dogs' handlers. In terms of disabilities: sixteen interviewees were living with physical disabilities (such as paraplegia), eight had learning disabilities (such as dyslexia, ADD/ADHD), seven had sensory disabilities (blind or deaf individuals), six were living with mental disabilities (such as schizophrenia, anxiety disorders or bipolar depression), seven were living with chronic illness or chronic pain (such as fibromyalgia, Addison's disease or adult-onset asthma), two were neurodiverse (autistic or on the autistic spectrum), and one interviewee was living with life-threatening allergies. Fourteen interviewees had more than one type of disability.

<sup>18</sup>. See infra Part III.

The “moral panic” regarding fake assistance animals directly affected the way in which the law developed regarding this issue.<sup>19</sup> Since 2016, prohibitions about misrepresenting a pet as a service dog began to appear in criminal and civil legislation across the country.<sup>20</sup> I show that as of February 2020, forty-two states have such a prohibition enacted or proposed.<sup>21</sup> Interestingly, although vests and other gear do not appear in the original federal assistance animal legislation, the informal norm of using vests to signal legitimacy has been formalized into the law of fifteen states which specifically prohibit the improper use of vests (or other gear).<sup>22</sup> This process showcases how law reacts to informal visible signs of compliance and how it adapts to those signs. Another way in which the moral panic affected the legal treatment of assistance animals is with an amendment to the Air Carrier Access Act (“ACAA”), ratified in December 2020, allowing airlines to prohibit entry of any animal that

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<sup>19</sup>. Moral panic is a term coined by sociologist Stanley Cohen to describe a situation where a “condition, episode, person or group of people emerges to become defined as a threat to societal values and interests.” Cohen emphasized the important role the media plays in enforcing moral panics. See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 9 (1972). For a discussion on the media’s role in exacerbating the public fear of people faking the need for an assistance animal, see infra Section II.B.

<sup>20</sup>. See infra Section III.C.3.

<sup>21</sup>. See infra Section III.C.3.

<sup>22</sup>. See infra Section III.C.3.

is not a service dog aboard planes.<sup>23</sup> This amendment was approved following extensive lobbying by airlines and extensive media coverage of a slew of suspicious species in aircraft cabins.<sup>24</sup>

In addition, this Article discusses the psychological mechanism of “bounded ethicality,” one that prevents people from candidly assessing their acts’ lack of ethics.<sup>25</sup> This mechanism seems to be at the heart of the phenomenon of assistance-animal disability con, as there is a distance between the people engaging in it and the true victims of this fraud: disabled persons, who remain unrecognized in the eyes of the wrongdoers.<sup>26</sup>

The discussion highlights how the legal treatment of assistance-animal disability con reflects a hierarchy within the disability community.<sup>27</sup> It alludes to the marginalization of people with mental disabilities and chronic illnesses, whose disabilities are usually considered less visible, compared with people with more clear physical or sensory disabilities.<sup>28</sup> The greater suspicion and further regulation of small service dogs is therefore another manifestation of the hurdles people with less apparent disabilities encounter when trying to exercise their rights.<sup>29</sup>

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23. See infra notes 119–126 and accompanying text.

24. See infra notes 152–160 and accompanying text.

25. See infra Section IV.A.

26. See infra Section IV.A.

27. See infra Section III.C.1.

28. See infra Section III.C.1.

29. See infra Section III.C.1.

I conclude by introducing three solutions to the assistance-animal disability con problem that would help restore trust in disability laws addressing this issue and in the institution of assistance animals.<sup>30</sup> These solutions include the following: the use of “ethical nudges” to make potential wrongdoers understand the ethical ramifications of their acts and prevent them from engaging in disability con,<sup>31</sup> the creation of a centralized permit system,<sup>32</sup> and increased enforcement by gatekeepers at places of public accommodation.<sup>33</sup> In addition to those solutions, this Article calls for action against vendors who sell unofficial accessories (such as vests or IDs) and thus contribute to the backlash against the use of assistance animals.<sup>34</sup>

The Article proceeds as follows: Part II presents the legal framework on the use of assistance animals, discussing the legislation and major court decisions on the issue and establishing the different taxonomies of service animals and the rules regarding their use. It then explores the reaction of the legal system to the moral panic surrounding assistance-animal disability con. Part III introduces two informal signs of compliance that drive people’s suspicion about possible abuse of the law by misrepresenting pets as service dogs. It also explains the experimental survey conducted for this study and presents its results.

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<sup>30</sup>. See infra Part IV.

<sup>31</sup>. See discussion infra Section IV.A.

<sup>32</sup>. See discussion infra Section IV.B.

<sup>33</sup>. See discussion infra Section IV.C.

<sup>34</sup>. See infra Section IV.B.

Part IV discusses the results and implications of the experimental survey, the insights obtained through the interviews, and the results of a content analysis of existing legislation across the country. Part V presents the practical implications for addressing the phenomenon of assistance-animal disability con and the consequent public disbelief in the practice of using assistance animals that follows.

## II. THE CONSEQUENCES OF AMBIGUOUS LEGAL CATEGORIES

In a New Yorker article from October 2014, Patricia Marx pointed out a relatively new illegal phenomenon, one that fits into other common “illegalities”: nondisabled people were presenting their pets as assistance animals so they could take them to public places that do not usually allow four-legged companions.<sup>35</sup> She wrote:

What a wonderful time it is for the scammer, the conniver, and the cheat . . . . [T]he able-bodied adults who drive cars with handicapped license plates, the parents who use a phony address so that their child can attend a more desirable public school . . . [t]he latest group to bend the law is pet owners.<sup>36</sup>

Marx’s piece was the first wave in what would become an ocean of news stories reporting the misuse of laws covering the use of assistance

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<sup>35.</sup> See Patricia Marx, Pets Allowed—Why Are So Many Animals Now in Places Where They Shouldn’t Be?, NEW YORKER (Oct. 13, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed> [<https://perma.cc/8D8T-WU3H>].

<sup>36.</sup> Id.

animals.<sup>37</sup> Many of these stories share the same cynical, dismissive, suspicious tone on the topic.<sup>38</sup>

Marx claimed to expose the “absurdities” of the legal regime governing the use of assistance animals through a “social experiment” she conducted.<sup>39</sup> Equipped with a letter she received from a healthcare professional, Marx traveled around New York City with different exotic animals, such as a thirteen-inch turtle, a snake, a turkey, a pig, and an alpaca, which she presented as her emotional support animals.<sup>40</sup> She reported her experience dining at restaurants, visiting a museum, boarding the train, and going to the airport with her wildlife companions.<sup>41</sup>

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<sup>37.</sup> For a description of the media coverage of the phenomenon, see infra Section II.B.

<sup>38.</sup> See, e.g., Farah Stockman, People Are Taking Emotional Support Animals Everywhere. States Are Cracking Down, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html> [<https://perma.cc/EL45-TFYN>]; Ellen Eldridge, Fake Service Animals and Why Airline Passengers Are Upset, CHI. TRIB. (Nov. 15, 2016, 8:35 AM), <http://www.chicagotribune.com/lifestyles/travel/ct-fake-service-animals-on-planes-20161115-story.html> [<https://perma.cc/P28H-SRKK>]; Christopher Mele, Is That Dog (or Pig) on Your Flight Really a Service Animal?, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/travel/service-animals-planes.html> [<https://perma.cc/UQ95-2HQ8>].

<sup>39.</sup> See Marx, supra note 35.

<sup>40.</sup> Id.

<sup>41.</sup> Id.

She concludes that “fortunately for animal-lovers who wish to abuse the law, there is a lot of confusion about just who and what is allowed where.”<sup>42</sup> Erroneously reported, however, was the actual legal regime that governs assistance animals—and emotional support animals in particular.<sup>43</sup>

Marx correctly observes that great confusion exists among the courts,<sup>44</sup> and among the public in general,<sup>45</sup> regarding what differentiates a protected category of an animal that provides some kind of assistance to alleviate disability-related symptoms from an ordinary pet. High levels of uncertainty and bewilderment stem from the fact that the use of assistance animals is governed by a complex, and often overlapping, mosaic of legislation covering different types of assistance animals in various areas of life.<sup>46</sup> This Part will provide a guide to the different types

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<sup>42.</sup> Id.

<sup>43.</sup> Five years later, in 2019, another news story in a major media outlet made the same legal mistake and by that contributed to the moral panic around assistance animals. See infra note 60 and accompanying text.

<sup>44.</sup> See Christopher C. Ligatti, No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act, 35 T. MARSHALL L. REV. 139, 153 (2010).

<sup>45.</sup> See Regina Schoenfeld-Tacher, Peter Hellyer, Louana Cheung & Lori Kogan, Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs, 14 INT’L J. ENV’T RSCH. & PUB. HEALTH 1, 9 (2017).

<sup>46.</sup> See discussion infra Section II.A.2.

of assistance animals, the legislation that governs the various walks of life, and environments that allow for the use of each type of animal.

#### A. Taxonomy of Assistance Animals, Restricted Environments, and Governing Legislation

The term “assistance animals” includes three distinct categories that are often mistakenly collapsed together:<sup>47</sup> service dogs (a category that only includes canines and rarely miniature horses),<sup>48</sup> emotional support animals (a category that can include any type of animal),<sup>49</sup> and therapy animals.<sup>50</sup> Distinctions between these categories are important in the regulation of these animals’ public presence.

Under federal law, people with physical, mental, sensory, or chronic disabilities are allowed to bring service dogs, but not emotional support animals, to public places.<sup>51</sup> This rule falls under the principle of “reasonable modification” of “no pets” policies at places of public accommodation,<sup>52</sup> a broadly defined category under the Americans

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<sup>47.</sup> See discussion infra Section II.A.

<sup>48.</sup> See discussion infra Section II.A.1.

<sup>49.</sup> See discussion infra Section II.A.1.

<sup>50.</sup> See discussion infra Section II.A.1.

<sup>51.</sup> Frequently Asked Questions About Service Animals and the ADA, DEP’T OF JUST. (July 20, 2015), [https://www.ada.gov/regs2010/service\\_animal\\_qa.html](https://www.ada.gov/regs2010/service_animal_qa.html) [<https://perma.cc/9GW4-8ACN>] [hereinafter Frequently Asked Questions].

<sup>52.</sup> Id.

with Disabilities Act (“ADA”)<sup>53</sup> aimed at accommodating people with disabilities. This rule operates despite public health concerns some might raise regarding the presence of animals in places that serve food or in medical clinics.<sup>54</sup> In other words, disability antidiscrimination law trumps those public health concerns in situations where a service dog is needed as an accommodation.<sup>55</sup> People with disabilities can keep assistance animals (whether service dogs or emotional support animals) in their homes (regardless of their landlord’s pet policy) and until the 2020 ACAA amendment could also bring both types into the plane cabin.<sup>56</sup> Therapy animals, however, are used for treatment in hospitals

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<sup>53</sup>. 42 U.S.C. § 12181(7).

<sup>54</sup>. Frequently Asked Questions, supra note 51.

<sup>55</sup>. Aparna Nair, “His Dog is His ‘Eye’”: The Guide Dog in Public Spaces in Transit, 1930–1970, ALL OF US (Nov. 4, 2019), <http://allofusdha.org/editorial/his-dog-is-his-eye-the-guide-dog-in-public-spaces-and-in-transit-1930–1970/> [<https://perma.cc/XG72–6QG7>] (pointing to the fact that “[t]he guide dog also had to confront pre-existing constructions of dogs in public spaces as vectors of rabies, threats to urban sanitation and public health as well as a possible agents of injury, perceptions which had often ossified into law.”).

<sup>56</sup>. See Jacque Brennan & Vinh Nguyen, Service Animals & Emotional Support Animals, ADA NAT’L NETWORK, <https://adata.org/publication/service-animals-booklet> (last visited May 21, 2021) [<https://perma.cc/F9GP-L97R>].

and long-term care facilities and are only allowed in those types of institutions.<sup>57</sup>

These distinctions, which admittedly are not intuitive, are not clear to the public<sup>58</sup> or to decision-makers such as judges and legislators.<sup>59</sup> Filling in the blank in the public's consciousness is an avalanche of media stories reporting a ridiculous havoc-wreaking parade of suspicious species that includes birds, reptiles, and rodents.<sup>60</sup>

In this Section, I first provide a summary explanation of each category and then set out the legal framework for each.

## 1. Taxonomy of Assistance Animals

The service animal category is the most restricted and narrowest. First, a service animal can only be a dog,<sup>61</sup> or in rare instances, a

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<sup>57</sup>. For a detailed discussion, see infra Section II.A.

<sup>58</sup>. See Schoenfeld-Tacher et al., supra note 45, at 9.

<sup>59</sup>. See Ligatti, supra note 44, at 153 (arguing that “[c]onfusion regarding the issue of emotional support animals as reasonable accommodations has intensified in recent years . . . . This confusion is the result of inconclusive case law and regulatory guidance susceptible to misinterpretation.”).

<sup>60</sup>. Hugo Martin, Emotional Support Animals Snap, Bark and Cause Disruptions, Most Flight Attendants Say, L.A. TIMES (Sept. 15, 2018, 10:00 AM), <http://www.latimes.com/business/la-fi-travel-briefcase1-emotional-support-animals-20180915-story.html> [<https://perma.cc/TSB3-2NG9>].

<sup>61</sup>. 28 C.F.R §§ 35.104, 36.104, (2020).

miniature horse.<sup>62</sup> This has not always been the case, however. When the ADA regulations implementing Title III—prohibiting discrimination in all places of public accommodation, including privately owned businesses<sup>63</sup>—were first implemented in 1991, the definition of a service dog was much broader and included “any guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.”<sup>64</sup> Nevertheless, in 2008, the Department of Justice (“DOJ”) decided to limit the definition:

[The] Department [of Justice] believed, at the time [when the original Title III regulations were passed], that leaving the

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<sup>62.</sup> Id. § 36.302(C)(9); see also Mihir Zaveri, Miniature Horses Are Welcome on Alaska Airlines (But No Snakes, Please), N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/business/alaska-airlines-horses.html> [<https://perma.cc/SU3S-37D9>]. For a review of changes in the definition of what constitutes a service animal, see Rebecca J. Huss, Why Context Matters: Defining Service Animals Under Federal Law, 37 PEPPI. L. REV. 1163, 1174–77 (2009).

<sup>63.</sup> Title III prohibits disability discrimination “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).

<sup>64.</sup> Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 33,594 (July 26, 1991).

species selection up to the discretion of the person with a disability was the best course of action. Due to the proliferation of animals used by individuals, including wild animals, the Department believes that this area needs some parameters. Therefore, the department is proposing to eliminate certain species from coverage even if the other elements of the definition [of a service animal] are satisfied.<sup>65</sup>

The DOJ allowed itself to make this move, as it recognized other situations outside the context of public accommodation, like in housing or transportation, where animals of different species could be recognized as emotional support animals and be allowed.<sup>66</sup> Those situations would be then governed by other federal agencies' regulations.<sup>67</sup> This decision led to the creation of a less restricted second category, emotional support animals, discussed next.

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<sup>65.</sup> Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508, 34,516 (June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

<sup>66.</sup> See id.

<sup>67.</sup> Id.; see also Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,195 (Sept. 15, 2010) (to be codified at 28 C.F.R. pts. 35–36) (“The Department’s position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and DOT regulations allow emotional support animals or comfort animals.”).

Second, a training requirement exists for service dogs. They “are individually trained to do work or perform tasks for people with disabilities.”<sup>68</sup> The service dog tasks can be related to multiple types of disabilities: from guide dogs for people with visual impairments (aka seeing eye dogs); hearing dogs (aka sign dogs) that help alert people with hearing impairments; dogs that protect people with chronic conditions who are prone to seizures, allergic reactions, or diabetes; or dogs that calm people with PTSD during anxiety attacks.<sup>69</sup> The training requirement is extremely broad, as the dog does not need to be professionally trained, and there is no preferred means of training.<sup>70</sup> Eva (forty-five),<sup>71</sup> who trains service dogs, explained:

Some trainers work with positive methods, and other trainers work with punishment methods . . . . Whatever the trainers think works best, that’s what they use . . . . Some schools give

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<sup>68</sup>. 28 C.F.R. § 36.104 (2020); Frequently Asked Questions, supra note 51, at 1.

<sup>69</sup>. See, e.g., 28 C.F.R. § 36.104 (2020); Frequently Asked Questions, supra note 51, at 1. For a compelling read on the experience of using a service dog who can detect seizures that stem from epilepsy and the science behind this training, see Aparna Nair, The Seizure Dog, WELLCOME COLLECTION (Mar. 12, 2020), <https://wellcomecollection.org/articles/XjrhkhEAACMABY-e> [<https://perma.cc/Q5MD-4LZ2>].

<sup>70</sup>. Frequently Asked Questions, supra note 51, at 2.

<sup>71</sup>. All names used in this Article are pseudonyms to protect the anonymity of the interviewees.

out certificates for their dogs proving that they [the dogs] have mastered the training program that this school specifically chose . . . but those are not [regulated through] state or federal guidelines. They are just individual school guidelines, and each school has its own guidelines.

In C.L. v. Del Amo Hospital, the Ninth Circuit reinforced this rule regarding this breadth of the training requirement. The court emphasized that there is no legal requirement for a certain credential, certification, or formal training in order to determine whether a canine is a real trained service dog.<sup>72</sup> Rather, “the statute defines a service dog by the outcome of training—what the dog is capable of doing to ameliorate an individual’s disability.”<sup>73</sup>

Service dogs address multiple types of disabilities by performing a wide range of services.<sup>74</sup> Other than being a trainer, Eva lives with

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<sup>72</sup> C.L. v. Del Amo Hosp., Inc., No. 19–56074, 2021 U.S. App. LEXIS 9235, at \*24–27 (9th Cir. Mar. 30, 2021).

<sup>73</sup> Id. at \*20; see also Bronk v. Ineichen, 54 F.3d 425, 430–31 (7th Cir. 1995); Riley v. Bd. of Comm’rs of Tippecanoe Cnty., No. 14-CV-00063, 2017 WL 4181143, at \*5 (N.D. Ind. Sept. 21, 2017); Green v. Hous. Auth. of Clackamas Cnty., 994 F. Supp. 1253, 1255–56 (D. Or. 1998); Cordoves v. Miami-Dade County, 92 F. Supp. 3d 1221, 1230 (S.D. Fla. 2015); Rose v. Springfield–Greene Cnty. Health Dep’t, 668 F. Supp. 2d 1206, 1214–15 (W.D. Mo. 2009).

<sup>74</sup> See generally Philip Tedeschi, Aubrey H. Fine & Jana I. Helgeson, Assistance Animals: Their Evolving Role in Psychiatric Service

multiple disabilities and has a service dog of her own that is trained to alert and respond to seizures and PTSD symptoms, and also to help her with symptoms of fibromyalgia. The dog opens the cabinets or the refrigerator, fetches her medications, and even relieves her pain by snuggling up to her and sharing its body warmth. Eva's disabilities are all invisible. Her service dog is a highly intelligent, small, white, and fluffy Cairn Terrier and Italian Greyhound mix. It is far from the image of a Labrador, Golden Retriever, or German Shepherd, which all have been traditionally thought of as guide dogs for blind individuals, the original kind of service dogs.<sup>75</sup>

In sum, the law regards service animals as akin to assistive equipment that enables people with disabilities to navigate the world.<sup>76</sup>

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Applications, in HANDBOOK ON ANIMAL-ASSISTED THERAPY THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE 421 (Aubrey H. Fine ed., 3d ed. 2010).

<sup>75.</sup> See, e.g., DICKSON HARTWELL, DOGS AGAINST DARKNESS: THE STORY OF THE SEEING EYE 121–23 (1960); Gerald A. Fishman, When Your Eyes Have a Wet Nose: The Evolution of the Use of Guide Dogs and Establishing the Seeing Eye, 48 SURV. OPHTHALMOLOGY 452, 453 (2003). Today, most dogs trained as guide dogs are Labrador Retrievers. See STEPHEN KUUSISTO, HAVE DOG, WILL TRAVEL: A POET'S JOURNEY 111 (Simon & Schuster eds., 2018); ROD MICHALCO, THE TWO-IN-ONE: WALKING WITH SMOKIE, WALKING WITH BLINDNESS 132–33 (1999).

<sup>76.</sup> Kelly Oliver, Service Dogs: Between Animal Studies and Disability Studies, 6 PHILOSOPHIA 241, 242 (2016). As disability rights advocate

This is despite the fact that at least from an animal rights standpoint, animals (unlike hearing aids, prostheses, or wheelchairs) have interests of their own that needs to be taken into consideration.<sup>77</sup> With service

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Haben Girma (who is Deafblind and uses a guide dog) emphasizes when told that service dogs give individuals with visual impairments “freedom and independence”: “My freedom and independence come from me. My confidence comes from within. Choosing to partner with a guide dog is a choice. It’s not better or worse than a cane, just different . . . . But then, walking with a dog feels amazing. Maxine [the dog] moves smoothly through space, gliding around obstacles with ease. A cane would need to first make contact with an obstacle before I could walk around it. Also, holding the harness for a long time doesn’t exhaust my arm the way holding a cane does. With additional eyes and ears, the dog offers more environmental feedback, more safety while crossing streets, more security navigating the world.” HABEN GIRMA, HABEN: THE DEAFBLIND WOMAN WHO CONCURRED HARVARD LAW 183 (1st ed. 2019); see also Haben Girma, Guide Dogs Don’t Lead Blind People. We Wander As One, in DISABILITY VISIBILITY: FIRST PERSON STORIES FROM THE TWENTIETH FIRST CENTURY 101–03 (Alice Wong ed., 2020) (“People assume guide dogs lead blind people, and once upon a time I thought so, too [until getting Maxine in 2010] . . . . In 2018, Maxine died of cancer. I missed her intensity, and the loss still pains me. I also knew I could not, would not, go back to life with only a cane. I was without my partner of nearly a decade, but I was not without direction . . . . Now we [Haben and her new guide dog Mylo] travel as one.”).

<sup>77</sup>. I thank Kristen Stilt and Justin Marceau for this point. For a

animals, the law clearly emphasizes the functionality the dog provides to the disabled individual over the emotional component of the relationship between the two.<sup>78</sup> This is reversed when talking about the next category, emotional support animals, wherein the animal does not provide any functionality to the human, and the only component in the relationship emphasized by law is the emotional one.

Emotional support animals are a less restrictive category compared with that of service dogs. An emotional support animal can be a pet of any kind that resides with a person, and it does not need to be trained.<sup>79</sup> An emotional support animal provides companionship, relieves loneliness, and sometimes helps with certain phobias and anxieties, but it does not have special training to perform tasks assisting people with disabilities.<sup>80</sup>

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discussion on the complex ways in which shared systems and ideologies oppress both disabled humans and nonhuman animals, see SUNAURA TAYLOR, *BEASTS OF BURDEN: ANIMAL AND DISABILITY LIBERATION* 57–61 (2017).

<sup>78.</sup> Oliver, supra note 76, at 242–43; Ani B. Satz, Animals as Living Accommodations, 24 *ANIMAL L. REV.* 1, 2, 7 (2018) (referring to service animals as ‘living accommodations’). Interestingly, renowned British disability theorist Dan Goodley uses the connection between disabled individuals and assistance animals to show how disability opens up possibilities for thinking about desire for connection as a human condition. DAN GOODLEY, *DISABILITY AND OTHER HUMAN QUESTIONS* 50 (1st ed. 2021).

<sup>79.</sup> Satz, supra note 78, at 7–8.

<sup>80.</sup> See Huss, supra note 62, at 1177–80; Brennan & Nguyen, supra

It should be emphasized that people with mental disabilities or with chronic illnesses can use service dogs that are known as psychiatric dogs—and are not emotional support dogs.<sup>81</sup> A dog trained for a task (such as sensing an anxiety attack or coaxing someone with clinical depression out of bed at a specified time in the morning), is a qualified service dog.<sup>82</sup> “If the dog’s mere presence provides comfort, that would not be considered a service dog, according to the ADA.”<sup>83</sup>

Therapy animals are animals of any kind that are used for hospital and nursing home visitations for animal-assisted therapy,<sup>84</sup> and are

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note 56 (explaining how the practical operation of the statute and rule).

<sup>81</sup>. Brennan & Nguyen, supra note 80.

<sup>82</sup>. Frequently Asked Questions, supra note 51, at 1. For a recent study showcasing the benefits of service dogs for people with PTSD, see Kerri E. Rodriguez et al., Defining the PTSD Service Dog Intervention: Perceived Importance, Usage, and Symptom Specificity of Psychiatric Service Dogs for Military Veterans, 11 FRONTIERS. PSYCH. 1, 12 (2020). See also C.L. v. Del Amo Hosp., Inc., No. 19–56074, 2021 U.S. App. LEXIS 9235, at \*29 (9th Cir. Mar. 30, 2021) (“Service dogs in particular have been ‘associated with clinically significant reductions in [PTSD] symptoms’ compared to usual care alone).

<sup>83</sup>. Id.; see also Kristin M. Bourlana, Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals, 48 U. LOUISVILLE L. REV. 197, 204–05 (2009).

<sup>84</sup>. Katherine A. Kruger & James A. Serpell, Animal-Assisted Interventions in Mental Health: Definitions and Theoretical Foundations,

primarily trained and overseen by a nonprofit organization called Pet Partners (formally known as the Delta Society).<sup>85</sup> Therefore, generally, therapy dogs are only allowed in those types of facilities and do not have other privileges regarding places they may be taken (except in Kansas and Rhode Island, which do offer some access privileges to therapy dogs).<sup>86</sup> Accordingly, the rest of the analysis in this Article will only refer to service dogs and emotional support animals which are found in public spaces and interact with the public.

## 2. Restricted Environments and Governing Legislation

Service dogs are covered by the ADA, which regulates the public sphere and the workplace.<sup>87</sup> The definition of a service animal first appeared in the ADA Title III regulations, relating to any place of public accommodation, published in 1991 by the DOJ.<sup>88</sup> The definition and requirements were amended in 2010, following a notice of proposed

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in HANDBOOK ON ANIMAL-ASSISTED THERAPY: THEORETICAL FOUNDATIONS AND GUIDELINES FOR PRACTICE 33, 35 (Aubrey H. Fine ed., 3d ed., 2010).

<sup>85.</sup> About Us, PET PARTNERS—THERAPY PETS & ANIMAL ASSISTED ACTIVITIES, <https://petpartners.org/about-us/> [<https://perma.cc/B6LZ-3S94>].

<sup>86.</sup> Rebecca J. Huss, Hounds at the Hospital, Cats at the Clinic: Challenges Associated with Service Animals and Animal-Assisted Interventions in Healthcare Facilities, 40 U. HAW. L. REV. 53, 96–97 (2018).

<sup>87.</sup> Id. at 59.

<sup>88.</sup> See 28 C.F.R § 36.302 (2020).

rulemaking and many public requests for clarification.<sup>89</sup> Similar regulations on service animals under Title II of the ADA, pertaining to local and government services, were also amended at that time.<sup>90</sup> Both amended regulations came into force in March 2011.<sup>91</sup> The DOJ received so many questions about these regulations<sup>92</sup> that, in 2015, it published a technical assistance manual under the title “Frequently Asked Questions About Service Animals and the ADA.”<sup>93</sup>

Section 504 of the Rehabilitation Act, a precursor to the ADA that governs federally funded institutions, is another legal source that allows service dogs in such institutions (such as public schools, universities, or hospitals).<sup>94</sup> In 2007, the United States Court of Appeals for the Eleventh

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<sup>89</sup>. U.S. DEP’T OF JUST., *AMERICANS WITH DISABILITIES ACT TITLE III REGULATIONS: NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES* 80 (2010).

<sup>90</sup>. *Id.* at 1; 28 C.F.R. § 35.104 (2020).

<sup>91</sup>. 28 C.F.R. § 36.101 (2020) (implementing 2011 Title III regulations); 28 C.F.R. § 35.101 (2020) (implementing 2011 Title II regulations).

<sup>92</sup>. Michelle Diament, Justice Department Clarifies Service Animal Rules, *DISABILITY SCOOP* (July 31, 2015), <https://www.disabilityscoop.com/2015/07/31/justice-service-animal-rules/20516/> [<https://perma.cc/C2PB-7MZD>].

<sup>93</sup>. Frequently Asked Questions, *supra* note 51.

<sup>94</sup>. 34 C.F.R. § 104.44(b) (2020); see also *Alexander v. Choate*, 469 U.S. 287, 299–300 (1985) (prohibiting construing benefit classes such that they deny otherwise qualified disabled individuals access to benefits

Circuit awarded compensation for emotional distress under Section 504 to a blind woman whose guide dog was not permitted beyond the main waiting room in an MRI clinic where her son had been admitted.<sup>95</sup> Ten years later, in 2017, the Supreme Court decided that the ADA protects the use of service dogs in a school setting even if a lawsuit had not first been exhausted under the Individuals with Disabilities Education Act, which typically governs education-related issues.<sup>96</sup> In 2021, an arbitrator awarded \$1.1 million as compensation to a blind guide dog handler from California who showed sixty instances in which she was harassed by Uber drivers or was denied rides because she used a service dog.<sup>97</sup> The arbitrator determined that “the ADA imposes a non-delegable duty on the operator of a Title III-covered transportation system to make its

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to which they would otherwise be entitled); *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 961–62 (E.D. Cal. 1990) (requiring an accommodation to permit use of a service animal under § 504); Sandea L. Buhai, Preventing the Abuse of Service Animal Regulations, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 771, 782 (2016).

<sup>95.</sup> *Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1204 (11th Cir. 2007).

<sup>96.</sup> See *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755–56 (2017).

<sup>97.</sup> *Irving v. Uber Technologies Inc.*, Am. Arb. Ass’n Case No. 01–18–0002–7614 (2021) (Gerber, Arb.), [https://www.courthousenews.com/wp-content/uploads/2021/04/Irving\\_Uber-ArbAWARD.pdf](https://www.courthousenews.com/wp-content/uploads/2021/04/Irving_Uber-ArbAWARD.pdf) [<https://perma.cc/GA62-R4DN>]

services nondiscriminatory, even if provided by a sub-contractor such as a driver.”<sup>98</sup>

Neither the ADA regulations nor Section 504, both federal laws, include any type of enforcement mechanism for ensuring that a service dog fits the legal criteria, in other words, being a trained dog or miniature horse that performs specific tasks for their handler.<sup>99</sup> As mentioned, there is no requirement for a type of training,<sup>100</sup> and there is no requirement for registration of a service dog, any kind of identification, or any special gear such as a tag, vest, harness, or ID.<sup>101</sup>

The service dog category is the only one covered under the ADA.<sup>102</sup> This means that emotional support animals and therapy dogs are not required to be allowed in places that provide public accommodation.<sup>103</sup>

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<sup>98</sup>. Id.

<sup>99</sup>. Frequently Asked Questions, supra note 51, at 1; 34 C.F.R. § 104.44(b) (2020).

<sup>100</sup>. C.L. v. Del Amo Hosp., Inc., No. 19–56074, 2021 U.S. App. LEXIS 9235, at \*24–27 (9th Cir. Mar. 30, 2021).

<sup>101</sup>. Yamamoto et al., supra note 3, at 3.

<sup>102</sup>. Title II and Title III regulations, 28 C.F.R. §§ 35.104, 36.104 (2020).

<sup>103</sup>. Similar to the ADA idea, the regulation “acknowledges, however, that, in rare circumstances, accommodation of service animals may not be required because a fundamental alteration would result in the nature of the goods, services, facilities, privileges, or accommodations offered or provided, or the safe operation of the public accommodation would be jeopardized.” This exception can concretely relate to museums. See U.S.

Contrast that fact with the picture Marx tried to paint in her infamous New Yorker piece, in which she described bringing exotic animals she presented as emotional support animals to the public sphere.<sup>104</sup> Nevertheless, emotional support animals have some protection in housing and until recently in air travel.

The federal Fair Housing Act (“FHA”) was originally passed as part of the Civil Rights Act of 1968 with the intention of eliminating discrimination in housing on account of race, color, national origin, and gender.<sup>105</sup> In 1988, the FHA was amended to extend the antidiscrimination mandate for people with disabilities as well.<sup>106</sup> Although the DOJ and the U.S. Department of Housing and Urban Development (“HUD”) are jointly responsible for the enforcement of the FHA,<sup>107</sup> HUD is responsible

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DEP’T OF JUST., supra note 89, at 255.

<sup>104.</sup> Five years later, another New York Times story made the same legal error when referring to emotional support animals when stating that “the number of people claiming they have a right to live with animals for their mental health—as well as to take them onto planes and into restaurants and stores—has been growing rapidly.” See Stockman, supra note 38.

<sup>105.</sup> 42 U.S.C §§ 3601–3606.

<sup>106.</sup> H.R. Rep. No. 100–711, at 13 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, at 2174.

<sup>107.</sup> U.S. DEP’T OF JUST. & U.S. DEP’T OF HOUS. & URB. DEV., REASONABLE ACCOMMODATIONS UNDER THE ACT (May 17, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf) [<https://perma.cc/7VAT-W677>].

for administering the FHA.<sup>108</sup> According to the FHA, discrimination is refusing to make reasonable modifications to rules, policies, practices, or services, when such modifications might be necessary to afford equal opportunity to use and enjoy a dwelling.<sup>109</sup> HUD regulations and case law make it clear that a reasonable modification could be waiving a “no-pet policy” to allow assistance animals in housing.<sup>110</sup> After much confusion within the courts on the question of whether HUD regulations only cover trained service dogs or also nontrained emotional support animals,<sup>111</sup> HUD made it clear that the FHA covers both, thus embracing a broader definition of protected assistance animals than the ADA does.<sup>112</sup> A

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<sup>108.</sup> 42 U.S.C. § 3608(a).

<sup>109.</sup> 42 U.S.C. § 3604(f)(3)(B).

<sup>110.</sup> 24 C.F.R. § 100.204(b) (2020); *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc.*, 778 F. Supp. 2d 1028 (D.N.D. Mar. 30, 2011) (“[T]he FHA encompasses all types of assistance animals regardless of training, including those that ameliorate a physical disability and those that ameliorate a mental disability.”); Rebecca J. Huss, Re-Evaluating the Role of Companion Animals in the Era of the Aging Boomer, 47 AKRON L. REV. 497, 526–27 (2014).

<sup>111.</sup> Ligatti, supra note 44, at 153; Tara A. Waterlander, Some Tenants Have Tails: When Housing Providers Must Permit Animals to Reside in “No-Pet” Properties, 18 ANIMAL L. 321, 351 (2012) (critiquing two of the then commonly cited precedents not considering emotional support animals as accommodations).

<sup>112.</sup> U.S. DEP’T OF HOUS. & URB. DEV., FHEO-2013–01, SERVICE ANIMALS

housing provider may ask an individual whose disability is not readily apparent to submit reliable documentation about his or her disability and the need for a service or an emotional support animal.<sup>113</sup> That said, a housing provider cannot ask an individual to provide “detailed or extensive information or documentation of a person’s physical or mental impairments” that could infringe on the tenant’s right to privacy.<sup>114</sup> According to the FHA, a housing provider need not make a dwelling available to any person whose tenancy constitutes a direct threat to the health or safety of other individuals or whose tenancy would result

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AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 2 (2013).

<sup>113.</sup> Id. at 3; *Overlook Mut. Homes Inc. v. Spencer*, 415 F. App’x. 617, 622 (6th Cir. 2011) (determining that a housing corporation was entitled to seek additional information on a child’s disability since the initial application from his parents, the tenants, lacked diagnosis).

<sup>114.</sup> U.S. DEP’T OF HOUS. & URB. DEV., supra note 112, at 4. As of July 2020, new amendments to Florida law have been put in place to prevent the misrepresentation of pets as emotional support animal, FLA. STAT. § 760.27(2) (2020), the state statute prohibits “a health care practitioner from providing information regarding a person’s need for an emotional support animal without having personal knowledge of that person’s need for the animal.” S.B. 1084, 2020 Leg., Reg. Sess. (Fla. 2020). It also prohibits the falsification of information or other fraudulent misrepresentation in this regard. FLA. STAT. § 817.265.

in substantial physical damage to the property of others.<sup>115</sup> In 2014, the Nebraska Federal District Court applied this rule to allow emotional support dogs in college dorms,<sup>116</sup> a move that generated major media attention.<sup>117</sup> In January 2020, HUD published a notice providing landlords with a set of best practices for complying with the FHA when assessing requests for reasonable accommodations or modifications to keep assistance animals in housing.<sup>118</sup> This includes the information that a

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<sup>115.</sup> 42 U.S.C. § 3604(f)(9); Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834, 63837 (Oct. 27, 2008) (to be codified at 24 C.F.R. pt. 5).

<sup>116.</sup> United States v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974, 975 (D. Neb. 2013). For further discussion of the case, see Katherine R. Powers, Dogs in Dorms: How the United States v. University of Nebraska at Kearney Illustrates a Coverage Gap Created by the Intersection of Fair Housing and Disability Law, 47 CREIGHTON L. REV. 363 (2014).

<sup>117.</sup> Jan Hoffman, Campuses Debate Rising Demands for ‘Comfort Animals,’ N.Y. TIMES (Oct. 4, 2015), <http://www.nytimes.com/2015/10/05/us/four-legged-roommates-help-with-the-stresses-of-campus-life.html> [<https://perma.cc/JT89-TSCW>]; Andy Thomason, U. of Nebraska at Kearney to Pay \$140,000 in Therapy-Dog Lawsuit, CHRON. HIGHER EDUC. (D.C.) (Sept. 3, 2015), <https://www.chronicle.com/blogs/ticker/u-of-nebraska-at-kearney-to-pay-140000-in-therapy-dog-lawsuit> [<https://perma.cc/C4CQ-RTS2>].

<sup>118.</sup> U.S. DEP’T OF HOUS. & URB. DEV., FHEO-2020–01, ASSESSING A PERSON’S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION

landlord may need to know from a healthcare provider about a tenant's need for an assistance animal in housing.<sup>119</sup>

In regard to air travel, the ACAA, enacted in 1986, prohibits commercial airlines from discriminating against passengers with disabilities.<sup>120</sup> The ACAA was enacted in response to the Supreme Court decision in Department of Transportation v. Paralyzed Veterans of America.<sup>121</sup> The Court ruled that Section 504 of the Rehabilitation Act did not apply to the services provided by commercial airlines despite the government subsidies the airlines receive.<sup>122</sup> There was therefore a need for specific legislation protecting the rights of disabled passengers as air travel has become increasingly popular.<sup>123</sup>

The ACAA regulations require an airline carrier to allow a service dog that accompanies a person with disabilities in the cabin of the plane.<sup>124</sup> With regard to emotional support animals, prior to December 2020, the airline was required to allow such animals in the cabin if it

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UNDER THE FAIR HOUSING ACT (2020).

<sup>119</sup>. Id.

<sup>120</sup>. 49 U.S.C. § 41705(a).

<sup>121</sup>. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 612 (1986); Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1268 (10th Cir. 2004).

<sup>122</sup>. 477 U.S. at 612.

<sup>123</sup>. DAVID PETTINICCHIO, POLITICS OF EMPOWERMENT: DISABILITY RIGHTS AND CYCLE OF AMERICAN POLICY REFORM 118 (2019).

<sup>124</sup>. 14 C.F.R. § 382.117(a) (2020).

were presented with recent (no more than a year old) documentation by a mental health professional.<sup>125</sup> An airline was never obligated to have “unusual” animals (such as reptiles, ferrets, rodents, and spiders) on board.<sup>126</sup> Similar to the FHA, an airline could also refuse to have an animal in the cabin if “it possesses a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, [or] whether it would be prohibited from entering a foreign country that is the flight’s destination.”<sup>127</sup> An amendment to the ACAA, which I will discuss next, put an end to the practice of allowing emotional support animals in aircraft cabins.

As we shall see in the next Sections, suspicion against the use of assistance animals is not new. These days, however, the media portrayal of the suspicious species and the moral panic around them tend to influence the way the legal response is shaped.

## B. Media Portrayal, Moral Panic, and Legal Reactions

In 1886 Atlanta, a thirty-six-year-old man by the name of William Jasper Franklin, who was not able to walk and was paralyzed on his left side, was a fairly well-known figure.<sup>128</sup> He used to lie or sit in a

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<sup>125.</sup> Id. § 382.117(e).

<sup>126.</sup> Id. § 382.117(f).

<sup>127.</sup> Id.

<sup>128.</sup> Historic Oakland, Historic Oakland Cemetery’s ‘Goat Man’ Gets a Final Footnote, HIST. OAKLAND FOUND. BLOG (Nov. 5, 2015), <http://oaklandcemetery.com/historic-oakland-cemeterys-goat-man-gets-a-final-footnote/> [<https://perma.cc/VT8K-C4MR>].

wagon that was drawn by a goat and beg strangers for money.<sup>129</sup>

Franklin and his goat were considered a nuisance by some people who complained about them to the officials at the city council.<sup>130</sup> As a result, a new ordinance that prohibited the pair from entering the city center was enacted.<sup>131</sup> This was a personalized form of the unsightly beggar ordinances, known as the ugly laws, which swept across the nation in the late nineteenth century, preventing disabled beggars from appearing in public.<sup>132</sup> As disability studies scholar Susan Schweik notes:

Franklin's goat played the role of what we now call a "service animal" . . . . The fact that the goat was barred as a nuisance serves to remind us that laws regulating whether, when, and how animals may appear in public have often . . . resulted in isolation and exclusion of disabled people.<sup>133</sup>

Fast-forward 130 years, and we are dealing with a complex mosaic of legislation regarding assistance animals in the public sphere, one that can easily cause confusion among the public.<sup>134</sup> In addition, as with other types of disability cons, the media play a significant role in perpetuating the notion of widespread abuse of the ADA regulations.<sup>135</sup>

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129. Id.

130. Id.

131. SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 99 (2009).

132. Id.

133. Id.

134. See Marx, supra note 35.

135. Dorfman, Fear of the Disability Con, supra note 5, at 1060.

Memorable stories include a turkey,<sup>136</sup> a hamster,<sup>137</sup> a squirrel,<sup>138</sup> and a peacock<sup>139</sup> presented as emotional support animals in attempts to board a plane and fly in the cabin. Those stories have drawn massive media attention, which might have been their original purpose. For example, Dexter the peacock belonged to a New York City-based photographer and performance artist who used the bird for installations, photos, and

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<sup>136.</sup> Jelisa Castrodale, Passenger Takes Turkey on Delta Flight as Emotional Support Animal, and Now We're So Confused, USA TODAY (Jan. 12, 2016, 4:00 PM), <https://www.usatoday.com/story/travel/roadwarriorvoices/2016/01/12/passenger-takes-turkey-on-delta-flight-as-emotional-support-animal-and-now-were-so-confused/83290688/> [<https://perma.cc/5D2B-B4R8>].

<sup>137.</sup> Daniella Silva & Anthony Cusumano, Hamster Flushed Down Toilet After College Student's Pet Denied Flight on Spirit Airlines, NBC NEWS (Feb. 8, 2018, 5:21 PM), <https://www.nbcnews.com/storyline/airplane-mode/hamster-flushed-down-toilet-after-college-student-s-pet-denied-n846116> [<https://perma.cc/B46U-WK9K>].

<sup>138.</sup> Louis Casiano, 'Emotional Support' Squirrel Gets Passenger Removed from Frontier Flight, FOX NEWS (Oct. 10, 2018), <https://www.foxnews.com/travel/emotional-support-squirrel-gets-passenger-removed-from-frontier-flight> [<https://perma.cc/HRS5-L3DG>].

<sup>139.</sup> Associated Press, Woman Denied Emotional Support Peacock on United Flight, CBS NEWS (Jan. 31, 2018, 11:28 AM), <https://www.cbsnews.com/news/woman-denied-emotional-support-peacock-on-united-flight/> [<https://perma.cc/K7PQ-4BCB>].

other artistic purposes while maintaining a social media profile for the animal.<sup>140</sup> The artist might not have been able to get her bird into the aircraft's cabin, but she arguably has benefited greatly from its new celebrity status.<sup>141</sup>

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<sup>140.</sup> River Donaghey, The 'Support Peacock' That Couldn't Get on a Flight Has a Fire Instagram, VICE (Jan. 30, 2018, 4:30 PM), [https://www.vice.com/en\\_us/article/59w7nq/the-support-peacock-that-couldnt-get-on-a-flight-has-a-fire-instagram-vgtrn](https://www.vice.com/en_us/article/59w7nq/the-support-peacock-that-couldnt-get-on-a-flight-has-a-fire-instagram-vgtrn) [<https://perma.cc/W5SD-W69K>].

<sup>141.</sup> See id. Following the media frenzy regarding suspicious species dominating public spaces and airplanes in particular, David Leonhardt, New York Times columnist, wrote:

One day, we may all owe a debt of gratitude to Dexter the peacock . . . . The last few weeks may have brought a turning point. First Delta and then United—following L’Affaire Dexter—announced stricter rules, requiring certification of animal training. Ultimately, I hope the Department of Transportation creates a fairly strict uniform rule for all airlines.

David Leonhardt, Opinion, It's Time to End the Scam of Flying Pets, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/flying-pets-scam-peacock.html> [<https://perma.cc/8HA3-XWEY>]; see also Lindsey Bever & Eli Rosenberg, United Changed Its Policy for Emotional-Support Animals. That Peacock Still Can't Board, WASH. POST (Feb. 1, 2018, 2:35 PM), <https://www.washingtonpost.com/news/animalia/wp/2018/01/30/a-woman-tried-to-board-a-plane-with-her-emotional-support-peacock-united-wouldnt-let-it-fly/> [<https://perma.cc/46V6-JY9S>];

One of the interviewees for this research, Erica (twenty-four), who lives with narcolepsy and anxiety and uses a service dog that alerts her to panic attacks and also performs deep pressure therapy (“DPT”) to calm her down, noted this:

I was reading an article about that event, and the woman who tried to bring her peacock [on the plane], she had called the airline beforehand to sort of get permission to bring this peacock, and they had told her “no.” So she knew before she walked into that airport [that] they would not allow her to do it, so in my opinion, again just my opinion, I think she was just doing it for the publicity.

Aimee (forty-nine), a service dog handler who lives with PTSD and severe anxiety said, “[w]ell the turkey thing that just happened. It has caused a lot of negative press, which is part of this [suspicion].” Tom (forty-three) is an attorney living with depression and learning disabilities and is HIV positive. He represented Aimee in a disability discrimination lawsuit related to her service dog and has a psychiatric service dog himself. Pointing out Marx’s article, he said this:

There is a horrible New Yorker article. [It had] just a zero balance [in describing the issue] . . . I’ve got a lot of emails about that

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Karin Brulliard, Fur and Fury at 40,000 Feet as More People Bring Animals on Planes, WASH. POST (Jan. 22, 2018, 10:00 AM), <https://www.washingtonpost.com/news/animalia/wp/2018/01/22/fur-and-fury-at-40000-feet-as-more-people-bring-animals-on-planes/> [<https://perma.cc/XQ7L-GLYR>].

article . . . [from people] who found it extremely offensive, particularly because I have a lot of clients who are not capable of defending themselves and who are ashamed by this.

In addition, stories about competing interests of people with allergies (a protected type of disability under the ADA<sup>142</sup>) versus people who use assistance animals have been on the rise as well. One example told the story of a seven-year-old boy and his family who were forced to disembark a plane because he had had an allergic reaction to an

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<sup>142</sup>. For example, in 2012, a settlement was reached in a case in which Lesley University in Cambridge, MA, was sued \$50,000 for not providing an adequate number of food selections in the university dining hall to students with food allergies. In the press release issued by the DOJ on the settlement, it was acknowledged that failing to make necessary reasonable modifications in policies, practices, and procedures to permit students with celiac disease and/or food allergies violates Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181–89. See Press Release, Dep’t of Just., Justice Department and Lesley University Sign Agreement to Ensure Meal Plan Is Inclusive of Students with Celiac Disease and Food Allergies (Dec. 20, 2012), <https://www.justice.gov/opa/pr/justice-department-and-lesley-university-sign-agreement-ensure-meal-plan-inclusive-students> [<https://perma.cc/FY22-PGGH>]; see also D’Andra Millsap Shu, Food Allergy Bullying as Disability Harassment: Holding Schools Accountable, 92 U. COLO. L. REV. 1, 40–45 (2021) (discussing other cases interpreting food allergy as disability under the ADA).

assistance dog that was aboard the aircraft.<sup>143</sup> This tension between the competing rights of people with different disabilities arose with Anna (twenty-three), a student with learning disabilities:

I went to the hospital two weeks ago [when] a lady came in with her service dog. And a lot of people were like, “Why is her dog there? I’m sick right now.” The doctor had to confront [one of the women who complained] and say, “You know what? That’s actually a service dog, and they need to be with her.” They’re like, “I’m really sick right now, and I have allergies . . .” and the doctor was [saying], “Well all I can do is maybe move the lady to another seat, but as of now that’s a service dog and you need to understand.” . . . I thought to myself, wow that’s – I don’t know. I mean if she’s allergic to dogs [she has a valid point], but at the same time, this is a [disabled] person who needs to come to the doctor’s, and she needs her service dog.

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<sup>143</sup>. Fredrick Kunkle, Horrible People Applaud as 7-Year-Old Is Removed from Plane Because of Allergic Reaction to Pets, WASH. POST (Feb. 25, 2016, 12:36 PM), <https://www.washingtonpost.com/news/tripping/wp/2016/02/25/horrible-people-applaud-as-7-year-old-is-removed-from-plane-because-of-allergic-reaction-to-pets/> [<https://perma.cc/AM6X-ATK3>]; see also Eldridge, supra note 38; Letters to the Editor, Sharing the Plane Cabin with Animals, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/11/opinion/airlines-pets.html> [<https://perma.cc/VY93-6HN3>].

The doctor was right.<sup>144</sup> The ADA regulations specifically note that allergies and fear of dogs do not constitute valid defenses for preventing access to people accompanied by a service dog, and thus the person with allergies or phobia needs to excuse themselves.<sup>145</sup>

Similar to what happened vis-à-vis other types of disability cons, public suspicion has influenced existing disability legislation and policy. Disabled people are now forced to navigate new defensive rules that seek to address widely held perceptions of fraud and abuse.<sup>146</sup> These defensive policies limit the scope of accommodations and are forcing individuals to cut through further red tape to exercise their lawful rights.<sup>147</sup>

As will be shown later, since 2016, forty-two states have introduced bills or finalized the enactment of legislation to combat misrepresentation of a pet or emotional support animal as a service animal.<sup>148</sup> In 2018, following the numerous media articles about “the surge of animals” on airplanes, Delta and United Airlines both made adjustments to their

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<sup>144.</sup> See C.L. v. Del Amo Hospital, Inc., No. 19–56074, 2021 U.S. App. LEXIS 9235, at \*32–33 (9th Cir. Mar. 30, 2021) (holding that a hospital is a place of public accommodation and ruling that a person with mental disabilities who has psychiatric service dog, whom she self-trained, should be allowed to bring it with her when hospitalized).

<sup>145.</sup> Title III and Title II regulations, 28 C.F.R. § 36.302(c); 28 C.F.R. § 35.136(b)-(d).

<sup>146.</sup> Dorfman, [Un]Usual Suspects, supra note 5, at 564.

<sup>147.</sup> Id.

<sup>148.</sup> See infra Section III.C.3.

policies regarding flying with assistance animals.<sup>149</sup> United and Delta began to require additional documentation for customers traveling with an emotional support animal or a psychiatric service animal to be submitted at least forty-eight hours before the flight.<sup>150</sup> These policies by the airlines demanded, “[i]n addition to a letter from a licensed medical/mental

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<sup>149</sup>. Rebecca J. Huss, Pups, Paperwork and Process: Confusion and Conflict Regarding Service and Assistance Animals Under Federal Law, 20 NEV. L.J. 785, 808, 808 n.124 (2020).

<sup>150</sup>. Service Animals, UNITED AIRLINES, [https://www.united.com/web/en-US/content/travel/specialneeds/disabilities/assistance\\_animals.aspx](https://www.united.com/web/en-US/content/travel/specialneeds/disabilities/assistance_animals.aspx) [<https://perma.cc/manage/create/?folder=41475>]; Trained Service and Emotional Support Animals, DELTA AIRLINES, [https://www.delta.com/content/www/en\\_US/traveling-with-us/special-travel-needs/service-animals.html](https://www.delta.com/content/www/en_US/traveling-with-us/special-travel-needs/service-animals.html) [<https://perma.cc/72NA-CWPQ>]. Delta has also prohibited emotional support animals from boarding flights that are longer than eight hours. See Krystal Hu, Delta Bans Emotional Support Animals on Long Flights, YAHOO! FIN. (Dec. 11, 2018), <https://finance.yahoo.com/news/delta-bans-service-animals-long-flights-152112513.html> [<https://perma.cc/G2TP-QJL7>]. Lawsuits brought on account of attacks of dogs presented as emotional support animals in airports would likely increase this type of regulations. See Meagan Flynn, An ‘Emotional Support’ Pit Bull Mauled a 5-Year-Old Girl in an Airport Terminal, Lawsuit Says, WASH. POST (Feb. 28, 2019, 4:44 AM), <https://www.washingtonpost.com/nation/2019/02/28/an-emotional-support-pit-bull-mauled-year-old-girl-an-airport-terminal-lawsuit-says/> [<https://perma.cc/HJH6-U9RQ>].

health professional, customers will need to provide a veterinary health form documenting the health and vaccination records for the animal and confirm that the animal has been trained to behave properly in a public setting.”<sup>151</sup> Interestingly, both airlines required those extra verifications not only for emotional support animals but also for trained psychiatric service dogs, perpetuating the myth about the illegitimacy of the latter.<sup>152</sup>

In December 2020, after intensive lobbying by airlines, the Department of Transportation (DOT) approved an amendment to the ACAA regulations so that only service dogs would be allowed on planes.<sup>153</sup> Although safety concerns were raised,<sup>154</sup> it seems like the moral panic along with the potential financial loss of fees imposed for flying pets were the main rationales behind this new amendment.<sup>155</sup>

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<sup>151</sup>. UNITED AIRLINES, supra note 150; DELTA AIRLINES, supra note 150. The ACAA regulations give airlines the authority to require this early registration, stating that airlines “may require a passenger with a disability seeking to travel with a service animal in the cabin of the aircraft to provide up to 48 hours’ advance notice.” 14 C.F.R. § 382.27(b)(3).

<sup>152</sup>. For the stigma about small service dogs, see infra Section III.C.1.

<sup>153</sup>. Traveling by Air with Service Animals, 85 Fed. Reg. 6448, 6452 (proposed Feb. 5, 2020) (to be codified at 14 C.F.R. § 382.3); see also Neil Vigdor, U.S. to Limit Service Animals on Planes to Dogs Only, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/12/02/us/service-animals-flights.html> [<https://perma.cc/Y3NK-867H>].

<sup>154</sup>. Traveling by Air with Service Animals, 85 Fed. Reg. 6449–50.

<sup>155</sup>. Alison Sider, U.S Moves to Let Airlines Ban Emotional-Support

Disability rights advocates have argued that these restrictions affect people with disabilities' access to the freedom to "get up and go" with the same level of flexibility as nondisabled individuals possess.<sup>156</sup> Thus these new restrictions stand in contrast to the principle of equality of opportunity that served as the basis for enacting the ACAA in the first place.<sup>157</sup>

The ADA regulations do protect the privacy of people who use service animals by preventing such people from being questioned about their disabilities.<sup>158</sup> The regulations specifically note that personnel in a place of public accommodation should not ask about the nature of a person's disability or ask for documentation proving the nature of the service animal.<sup>159</sup> In cases in which the disability and the services performed are not clear,<sup>160</sup> the only two inquiries that are allowed are these: "if the

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Animals, WALL ST. J. (Jan. 22, 2020, 2:22 PM), <https://www.wsj.com/articles/u-s-proposes-tighter-rules-for-emotional-support-animals-on-flights-11579720969> [<https://perma.cc/EE2T-M4ME>].

<sup>156.</sup> Rebecca Cokley, The Rights of Disabled Americans Are Under Attack, CNN (May 25, 2018, 2:03 PM), <https://www.cnn.com/2018/02/14/opinions/disability-access-under-attack-trump-hr-620-cokley-opinion/index.html> [<https://perma.cc/SU3M-G9D4>].

<sup>157.</sup> See supra notes 120–23 and accompanying text.

<sup>158.</sup> 28 C.F.R. § 36.302(c)(6).

<sup>159.</sup> Id.

<sup>160.</sup> Situations in which the services a dog performs, according to the regulations, are "e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing

animal is required because of a disability and what work or task the animal has been trained to perform.”<sup>161</sup>

Those rules, however, only apply to staff at governmental or private places; they do not apply to laypeople, who often engage in such questioning when they see someone else using an assistance animal in a public place.<sup>162</sup> Online videos showcasing people (some are people with disabilities themselves) confronting others about their alleged service dogs they bring to public spaces have been surfacing.<sup>163</sup> Erica told me the following story about such type of surveillance:

One of the first weeks that I had my service dog, I was taking him to the grocery store with me, and he was doing everything he was supposed to do, which was great. And I had a man come up to me . . . in the middle of Kroger and the dairy section;

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assistance with stability or balance to an individual with an observable mobility disability.” Id.

<sup>161.</sup> Id.

<sup>162.</sup> See id. (“A public accommodation shall not ask . . .”) (emphasis added); Dorfman, [Un]Usual Suspects, supra note 5, at 564.

<sup>163.</sup> See, e.g., @Teamflopppyears, Faking A Service Dog is Against the Law, TIKTOK (Apr. 7, 2017), <https://www.tiktok.com/@teamflopppyears/video/6812891734305967365> [<https://perma.cc/G5HH-AL8D>]; Justice True, Fake Service Dog!, YOUTUBE (Mar. 13, 2015), [https://www.youtube.com/watch?v=5jD8LzWO\\_sY](https://www.youtube.com/watch?v=5jD8LzWO_sY) [<https://perma.cc/L6XU-MYCC>]; Service Dog Rue, Fake Service Dog, YOUTUBE (Apr. 6, 2016) <https://www.youtube.com/watch?v=-mKqcdcjjUg> [<https://perma.cc/YT69-L53U>].

I remember it so vividly. He comes up to me, and he goes, “Why do you need a service dog?” like that sharp tone of voice, like very accusatory, like a “What’s wrong with you?” kind of thing. And I remember being so shocked that I just spilled my guts to him. Like, I froze, and then I just started babbling on and on about this condition that I have. And I remember later that day I thought to myself, “Why did I tell that man my whole life story?” like I should have told him off; I should have like educated him, which is what I do now. I have gotten a much thicker skin when dealing with the public.

Despite the concrete legal reactions by airlines and states, federal law does not have a mechanism of enforcement to distinguish between a “real” service dog and a pet or an emotional support animal (as there is no registration or identifying gear required, nor is there any specific kind of training requirement).<sup>164</sup> In addition, both laypeople and state authorities find the law ambiguous and difficult to follow.<sup>165</sup> These factors, along with the intense media coverage, play a significant role in perpetuating public mistrust of assistance animals encountered in everyday life.

### C. Bounded Ethicality and the Psychology of Committing Assistance-Animal Disability Con

There seems to be an important distinction between assistance-animal disability con and other abuses of disability rights. This distinction

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<sup>164.</sup> Yamamoto et al., supra note 3, at 3.

<sup>165.</sup> Id. at 13.

relates to the ways people justify the engagement in assistance-animal disability con. Some people who misrepresent their pets do not feel shame in doing so and might even brag about it. This is probably not the case with people who are abusing other disability rights, such as parking privileges, public benefits, learning accommodations, and so on.<sup>166</sup> Brenda (forty-two), who lives with myasthenia gravis (a chronic autoimmune neuromuscular disease) and learning disabilities, points out this:

So, my own brother, whom I'm furious at, he does have a back problem, but he specifically says that he gets a note from his doctor that his dog is a service animal so that he doesn't have to pay rent on that dog. I was out with him in Seattle, and he was going around . . . and sort of bragging that he has this service animal so he can take his dog anywhere. I was furious because it's so hard to have that taken seriously, and yet my own brother is abusing it. Does he need the dog for his back? So, some may argue that it is actually an accommodation, but when you're openly bragging that you have a service animal in order to get X [a benefit], that's when [it is wrong].

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<sup>166</sup>. For example, findings from a field experiment on illegal parking in disabled spaces show that people tend to park in the least conspicuous parking spaces, suggesting that they feel guilty about their actions. See Donna Fletcher, *A Guilt Gradient in the Illegal Use of Parking Spaces Reserved for People with Disabilities: Field Observations Over Five Years*, 93 PERCEPTUAL & MOTOR SKILLS 157, 161 (2001).

What might explain the difference in people's attitudes is the psychological barrier known as "bounded ethicality."<sup>167</sup> Bounded ethicality is a cognitive process that leads people to overestimate their own ability to remain impartial and to assess the nature and consequences of their actions.<sup>168</sup> This tendency limits people's recognition of conflicts of interest between their self-interest and others' welfare, which leads them to believe that they are acting more ethically than they really are.<sup>169</sup> The clouding of the ethicality leads to immoral behavior that is not driven by malice<sup>170</sup> and is routinely performed by "good people."<sup>171</sup> The psychological-cognitive mechanism of bounded ethicality can explain various social problems from sexual harassment,<sup>172</sup> to employment

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<sup>167.</sup> Dolly Chugh, Max H. Bazerman, & Mahzarin R. Banaji, Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 81 (Don A. Moore et al. eds., 2005); Anthony G. Greenwald & Mahzarin R. Banaji, Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes, 102 PSYCH. REV. 4, 10–11 (1995).

<sup>168.</sup> Chugh et al., supra note 167, at 81.

<sup>169.</sup> Id. at 83.

<sup>170.</sup> Francesca Gino, Understanding Ordinary Unethical Behavior: Why People Who Value Morality Act Immorally, 3 CURRENT OP. BEHAV. SCI. 107, 107 (2015).

<sup>171.</sup> YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 1 (2018).

<sup>172.</sup> Ann E. Tenbrunsel, McKenzie R. Rees & Kristina Diekmann, Sexual

theft,<sup>173</sup> to misconduct by financial advisers.<sup>174</sup> In all of those instances, people are aware of how an act might be wrong; they just often do not perceive their own act as constituting such a wrong.<sup>175</sup>

The vast willingness (or at the very least, indifference) to engage in assistance-animal disability con, especially compared with other types of disability cons, can be explained by bounded ethicality. People who misrepresent their dogs as service dogs or as emotional support animals seem not to see their acts as malicious or unethical—so much so, that as we saw in the interview quotation above, some even take pride in doing so.<sup>176</sup>

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Harassment in Academia: Ethical Climates and Bounded Ethicality, 70 ANN. REV. PSYCH. 245, 255–56 (2019).

<sup>173.</sup> Yuval Feldman & Yotam Kaplan, Big Data and Bounded Ethicality 29 CORNELL J.L. & PUB. POL'Y 39, 58–59 (2019).

<sup>174.</sup> Id. at 44–45. For review of misconduct by financial advisers who “are often perceived as dishonest and consistently rank among the least trustworthy professionals,” see Mark Egan, Gregor Matvos & Amit Seru, The Market for Financial Adviser Misconduct, 127 J. POL. ECON. 233, 234 (2019).

<sup>175.</sup> See FELDMAN, supra note 171, at 152; Tenbrunsel et al., supra note 172, at 255 (stating that “harassers who experience ethical fading may be blind to the ethical dimensions of their actions, leading to behavior that they consider benign but that is in fact sexual harassment”).

<sup>176.</sup> See supra note 17.

The underlying reason for the bounded ethicality of assistance-animal disability con seems to be that those engaging in the abuse are not directly taking a resource from disabled persons. The person committing the con is also not reminded of the “disability association” of the act.<sup>177</sup> In contrast, a person who uses other disability resources or rights usually gets reminded of such disability association. This happens when people see a white stylized image of a person in a wheelchair on a blue background as they approach reserved parking spots; when they consult the “disability office” at the college or the workplace to receive accommodations; or when they apply for Social Security Disability benefits, an act commonly known as “going on disability.”<sup>178</sup> When people present their pets as assistance animals, however, the disability context is lost.<sup>179</sup>

As social psychologists have shown, being able to identify a victim who would suffer the consequences of people’s acts triggers an emotional response that will affect decision-making and behavior in a

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<sup>177.</sup> See, e.g., trainingfaith, TUMBLR (Oct. 4, 2015), <https://trainingfaith.tumblr.com/post/130515155695/fake-service-dogs> [<https://perma.cc/8JAW-QFPQ>].

<sup>178.</sup> See Chana Joffe-Walt, [Unfit for Work: The Startling Rise of Disability in America](https://www.npr.org/unfit-for-work/), NPR, <https://www.npr.org/unfit-for-work/> (last visited May 21, 2021) [<https://perma.cc/K4KW-E9KT>].

<sup>179.</sup> See trainingfaith, [supra](#) note 177.

variety of contexts.<sup>180</sup> The “identified victim effect” increases empathy and the adoption of the victim’s perspective.<sup>181</sup> The more concrete and vivid the description of the victim, the more likely a person will be willing to contribute and help the victim.<sup>182</sup> As the people who commit assistance-animal disability con do not see a person with disabilities suffer the consequences of these acts, in other words, are not reminded of a “concrete victim,” it is easier for them to act unethically (and illegally) toward such a disabled person. Nevertheless, there is an indirect harm to people with disabilities from assistance-animal disability con, which is the erosion of public trust in the practice of using such animals.

In addition, when committing assistance-animal disability con, people see themselves as successfully manipulating a deep-pocketed entity such as airlines, housing management companies, or business owners.<sup>183</sup> They actually feel a sense of pride for “sticking it to the man”

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<sup>180</sup>. Deborah A. Small & George Loewenstein, Helping a Victim or Helping the Victim: Altruism and Identifiability, 26 J. RISK & UNCERTAINTY 5, 5–6, 13–14 (2003); Deborah A. Small & George Loewenstein, The Devil You Know: The Effects of Identifiability on Punishment, 18 J. BEHAV. DECISION MAKING 311, 316–17 (2005).

<sup>181</sup>. Tehila Kogut & Ilana Ritov, The “Identified Victim” Effect: An Identified Group, or Just a Single Individual?, 18 J. BEHAV. DECISION MAKING 157, 158–59 (2005).

<sup>182</sup>. See id. at 164–65.

<sup>183</sup>. See, e.g., Stockman, supra note 38.

and scoring a victory for the little guy.<sup>184</sup> Further empirical research on this point is needed, but it seems that because the damage to the disability community as a consequence of assistance-animal disability con is much less visible compared with other disability cons, it can easily be ignored by abusers who might, in fact, take pride in their acts.<sup>185</sup>

Bounded ethicality in this context operates alongside perverse financial incentives that encourage misrepresentation of pets as assistance animals. Commercial entities charge high fees for accommodating pets (taking them onboard planes, into hotels, etc.).<sup>186</sup> Prior to the 2020 ACAA amendment, people knew they could avoid paying the steep prices by committing an act they do not seem to perceive as harmful and unethical, so there is no wonder many chose to engage in assistance-animal disability con.<sup>187</sup>

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<sup>184.</sup> See id.

<sup>185.</sup> See id.

<sup>186.</sup> Christopher Elliott, Pets on Planes: More Owners Smuggling Them Aboard, SEATTLE TIMES: TRAVEL (Apr. 12, 2010, 3:44 PM), <https://www.seattletimes.com/life/travel/pets-on-planes-more-owners-smuggling-them-aboard/> [<https://perma.cc/V86W-8WGM>]; Stacey Leasca, Here's How Much It Really Costs to Travel with Your Dog, TRAVEL & LEISURE (July 7, 2017), <https://www.travelandleisure.com/trip-ideas/pet-friendly-travel/how-much-it-costs-to-travel-with-your-dog> [<https://perma.cc/MNZ7-SGZJ>].

<sup>187.</sup> See David Schaper, No More Emotional Support Peacocks as Feds Crack Down on Service Animals on Planes, NPR: NAT'L (Dec. 8, 2020, 11:44 AM), <https://www.npr.org/2020/12/08/944128033/>

Some recent media stories pointed out the ethical ramifications and the effect this disability con has on people with disabilities who actually need an assistance animal. Recently, there has been a rise in public accounts encouraging calling out friends who are committing a “service dog scam”<sup>188</sup> and urging people not to “scam the service dog system just because you love being with your pet.”<sup>189</sup> So far it seems that those efforts have been sporadic and did not have a real effect on those engaging in assistance-animal disability con.<sup>190</sup>

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no-more-emotional-support-peacocks-as-feds-crack-down-on-service-animals-on-plan [<https://perma.cc/2ZYG-HN56>].

<sup>188.</sup> See, e.g., Kwame Anthony Appiah, [Should I Call My Friend Out for Her ‘Service Dog’ Scam?](http://www.nytimes.com/2016/11/30/magazine/should-i-call-my-friend-out-for-her-service-dog-scam.html) N.Y. TIMES (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/magazine/should-i-call-my-friend-out-for-her-service-dog-scam.html> [<https://perma.cc/PUQ2-WPN9>]; Eldridge, supra note 38.

<sup>189.</sup> Michele C. Hollow, [Don’t Scam the Service Dog System Just Because You Love Being with Your Pet](https://web.archive.org/web/20161001052523/http://fusion.net/story/352592/dont-get-a-fake-service-dog/), FUSION (Sept. 29, 2016), <https://web.archive.org/web/20161001052523/http://fusion.net/story/352592/dont-get-a-fake-service-dog/> [<https://perma.cc/J3YL-MWAZ?type=image>]; Jason Haag, [Phony Service Dogs Hurt Veterans](https://www.wsj.com/articles/phony-service-dogs-hurt-veterans-11580071621), WALL ST. J. (Jan. 27, 2020 3:47 PM), <https://www.wsj.com/articles/phony-service-dogs-hurt-veterans-11580071621> [<https://perma.cc/DX9Q-N9NA>].

<sup>190.</sup> See Reid Knight & Emily Ladau, [I’m Tired of Being Accused of “Faking” My Need for a Service Animal](https://rootedinrights.org/invisible-disabilities-and-service-animals/), ROOTED IN RIGHTS (May 15, 2018), <https://rootedinrights.org/invisible-disabilities-and-service-animals/> [<https://perma.cc/D6NH-B8F7>] (discussing fatigue that proliferates from the

### III. INFORMAL SIGNS OF COMPLIANCE: BREEDS AND VESTS

In this Part, I explain the ways in which extra-legal norms, such as the breed of the dog and use of vests, play a crucial role in the way assistance-animal disability con manifests itself. I then describe the experimental study I conducted on the role of those extra-legal norms. The results indicate that whether a dog is wearing a vest or not has a larger effect on the level of suspicion of assistance-animal disability con than the breed of the dog (whether it is a breed traditionally associated with service or a smaller breed). I then discuss the findings and their implications for the way in which state laws fight assistance-animal disability con. An increasing number of states have adopted statutes that prohibit the use of vests or other gear to misrepresent dogs as assistance animals.<sup>191</sup> Lastly, I situate this phenomenon within a larger strand of law and society literature concerning adoption of informal visible signs of compliance into law.

#### A. Establishing Trust through Signs of Compliance

Trust, as a characteristic of social relations as opposed to a personal-psychological trait,<sup>192</sup> has become a hot topic in the social sciences

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stigma against people with disabilities and their service animals).

<sup>191</sup>. NAT'L CONF. STATE LEGISLATURES, Service Animal Misrepresentation (Aug. 15, 2019), <https://www.ncsl.org/research/labor-and-employment/service-animal-misrepresentation.aspx> [<https://perma.cc/4LEJ-6A8Q>].

<sup>192</sup>. Karen S. Cook & Alexandra Gerbasi, Trust, in THE OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY 331, 334 (Peter Hedström & Peter Bearman, eds., 2011).

over the past two decades.<sup>193</sup> This is due to the realization that a closer analysis of “microfoundations of social life,” which are composed of everyday interactions, lead to the understanding of macro-societal systems such as law and public policy.<sup>194</sup> Trust in others, specifically strangers, is based on signals communicated between and among individuals.<sup>195</sup> “Signaling theory,” which examines the interaction between the “signaler” and the “receiver,” was first developed by biologists<sup>196</sup> and

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<sup>193.</sup> Piotr Sztompka, New Perspectives on Trust, 112 AM. J. SOCIO. 905, 905 (2006).

<sup>194.</sup> Id.; see also ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS 4 (1988).

<sup>195.</sup> See Bacharach & Gambetta, supra note 14, at 150, 155.

<sup>196.</sup> Renowned evolutionary biologist Amotz Zahavi discussed the ability of animals to detect quality in the potential mates according to characters and signals the male gives to potential females. An interesting use of words by Zahavi in the context of this research is that of the term “handicap” to mean a situation where a fit animal, like a peacock, would display this trait while investing considerable amount of effort in an extravagant trait (such as a long colorful tail). It is this effort that signals to the female that the male is so strong and could squander a resource to impress her, albeit creating a handicap, i.e., difficulty, for itself. See Amotz Zahavi, Mate Selection—A Selection for a Handicap, 53 J. THEORETICAL BIOLOGY 205, 207–08 (1975); Amotz Zahavi & Avishag Zahavi, THE HANDICAP PRINCIPLE: A MISSING PIECE OF DARWIN’S PUZZLE 32–33 (1997).

economists,<sup>197</sup> later to be picked up by game theorists who examine “trust games.”<sup>198</sup> When evaluating another signaler’s trustworthiness, the receiver is using information they gained through experience and knowledge.<sup>199</sup>

The need for individuals with disabilities to signal their identity as assistance animal handlers is not new. In his 1946 memoir My Eyes Have a Cold Nose, screenwriter Hector Chevigny writes about his experiences with his guide dog, Wizard, in New York City, a part of the country where laws allowing the entrance of service animals to public spaces were in place years before they appeared federally.<sup>200</sup> The following words were written more than seventy-five years ago, yet continue to resonate today:

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<sup>197.</sup> Michael Spence discussed how the hiring process in the labor market is done under much uncertainty and thus requires applicants to signal desirable traits to their potential employers. See Michael Spence, Job Market Signaling, 87 Q.J. ECON. 355, 356–58 (1973).

<sup>198.</sup> See Charles L. Glaser, Realists as Optimists: Cooperation as Self-Help, 19 INT’L SEC. 50, 67–69 (1994); Andrew Kydd, Trust, Reassurance, and Cooperation, 54 INT’L ORG. 325, 330–33 (2000); Bacharach & Gambetta, supra note 14, at 149.

<sup>199.</sup> Roderick M. Kramer, Collective Paranoia: Distrust Between Social Groups, in DISTRUST 136, 146 (Russell Hardin, ed., 2009); see Bacharach & Gambetta, supra note 14, at 161.

<sup>200.</sup> KUUSISTO, supra note 75, at 201–02.

During the [first world] war, when the manpower shortage was acute and the New York systems employed many bus and trolley drivers who either were ignorant of the niceties of the law or didn't care to learn them, I had serious trouble on several occasions, but the fault wasn't the companies'. In these cases, it was to an extent mine too; Wizard, not being a German Shepherd [but a Boxer], is not usually recognized immediately as a standard Seeing Eye dog, and because I refuse to wear such customary identification of the blind as dark glasses and canes, I sometimes have trouble explaining my status. At such times I know that courtesy is the only answer and I am never without my identification card.<sup>201</sup>

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<sup>201</sup>. Chevigny is referring to identification cards given by The Seeing Eye School for guide dogs. HECTOR CHEVIGNY, *MY EYES HAVE A COLD NOSE* 265 (1946). Some blind writers who have guide dogs have referred to incidents where they were thought by other to be fakers. Susan Krieger writes about many incidents in which strangers were asking her, "Are you training that dog," as she maneuvered the world so eloquently. She writes: "[W]hen people ask me, 'Are you training that dog?' I feel attacked, pried into, challenged, as if I am being told, 'You're not blind, so what are you doing with that dog?'" SUSAN KRIEGER, *TRAVELING BLIND: ADVENTURES IN VISION WITH A GUIDE DOG BY MY SIDE* 111 (2010). Stephen Kuusisto writes: "A woman who lived on the grounds of the MacDowell Colony [an artists' colony in Peterborough, New Hampshire] . . . told employees I was faking my blindness because she saw me walking with Corky on a leash in the

Chevigny points out the need of individuals with disabilities (signalers) to use signs to gesture to the rest of the public (receivers) their identity as service dogs' handlers. He points to the two main problems in regard to the difficulty of differentiating between an "authentic-legal" service dog and a "disability con." Two informal signs of compliance, ones that do not appear in federal legislation, are considered: the breed of the dog and some type of an identification mechanism (ID or vest).

The first is the breed of the dog. In fourteenth- and fifteenth-century Europe, beggars, itinerant bards, and vagrant storytellers were known for carrying around small dogs for service as well as for protection and companionship.<sup>202</sup> The idea of using a small dog for guidance or service, however, did not catch on in the public's mind.<sup>203</sup> It is thus no wonder that

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woods. That a guide dog sometimes gets 'leash time' hadn't occurred to her. In her view I was cheating the system, bringing a pet into her domain." KUUSISTO, supra note 75, at 176–77.

<sup>202.</sup> Fishman, supra note 75, at 453. The term "fiddler's bitch" refers to the vagrants' dogs in England. See CHEVIGNY, supra note 201, at 211; see also Krista A. Murchison, Guide Dogs in Medieval Art and Writing, DR. KRISTA A. MURCHISON, [https://kristamurchison.com/medieval-guide-dogs/?fbclid=IwAR0zjnkpQSSc73BTKwxYzOypjiQtP7cxhxsm\\_yn5jupONplTfeJSLi1cvWQ](https://kristamurchison.com/medieval-guide-dogs/?fbclid=IwAR0zjnkpQSSc73BTKwxYzOypjiQtP7cxhxsm_yn5jupONplTfeJSLi1cvWQ) (last visited May 21, 2021) [<https://perma.cc/UH8K-HKKL>].

<sup>203.</sup> Cf. Access Press Staff, History Note: The History of Service Dogs and the Protections They Have (Jan. 9, 2019), <https://mn.gov/mnddc/past/>

upon his return to the United States in 1928, Morris Frank, the first blind American to use a guide dog, which he had obtained in Switzerland,<sup>204</sup> was warned that he would need to prove two things to the American public to legitimize the use of service dogs. First, that he could actually navigate urban spaces safely with a guide dog whereas:

[T]he second job you have to do may be more difficult. The American public's concept of dogs and blind people together is that of a little animal leading a beggar on a string. The combination inevitably means a tin cup [for collecting alms]. You and Buddy [the dog] must show America by your action that your relationship is dignified. You must prove that it merits confidence and respect.<sup>205</sup>

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[access\\_press/Access\\_Press\\_01–19.pdf](https://perma.cc/KU5Z-69GA) [https://perma.cc/KU5Z-69GA] (“In the United States, service dogs weren’t legally recognized until . . . 1990 . . . Before that, the only service dogs with specific legal protections were seeing eye dogs or dog guides for people with visual disabilities. These dogs first appeared in the United States in the 1920s.”).

<sup>204</sup>. See KUUSISTO, supra note 75, at 87–89.

<sup>205</sup>. HARTWELL, supra note 75, at 91; Nair, supra note 55 (articulating how during 1930–1940 “[a]s the guide dog movement spread across the world, there were inevitable problems when they first ventured into public spaces,” including mistrust from the public). The idea about service dogs’ handlers need to serve as “ambassadors” and be on their best behavior to establish public trust in the institution of service dogs exists to this day. See KUUSISTO, supra note 75, at 95. For medieval depictions of guide dogs

The stigma about small service dogs continues to this day, as Erica explains:

There is a lot of stigma around small service dogs, but small service dogs can be a good thing for a lot of people . . . I have a friend who has diabetes who has a small service dog, and the dog just needs to be close enough to her to be able to smell her breath, to smell her body chemicals changing. Small dogs take a lot less care, they're less expensive, they don't need as much space, so they can be a really good thing for a lot of people . . . I'm kind of glad that I got a large service dog at this point because I do get less suspicion . . . if I had to do it again, I think I would still get a large service dog despite the accommodations I have to make because he's a large dog. I think I would still get a large dog because there's less stigma.

According to the ADA regulations, a service dog can be of any breed.<sup>206</sup> Nevertheless, the public seems to be more trusting of larger dogs, specifically the breeds that traditionally serve as guide dogs (such as German Shepherds, Labradors, or Golden Retrievers).<sup>207</sup> Small dogs usually serve people with chronic illnesses or mental disabilities.<sup>208</sup> This

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carrying bowls in their mouths to collect alms, see Murchison, supra note 202.

<sup>206</sup>. Frequently Asked Questions, supra note 51, at 5.

<sup>207</sup>. Fishman, supra note 75, at 455; HARTWELL, supra note 75, at 121–23.

<sup>208</sup>. Cf. Amber King, 5 Jobs for Small Dogs, I HEART DOGS, <https://iheartdogs.com/5-big-jobs-for-small-service-dogs/> (last visited May 21,

is the case for Norah (fifty-five), a retired teacher who lives with chronic pain and severe sleep apnea. When we met, she presented her small dog and told me about her experiences:

Because of all my different conditions, I cannot use my CPAP machine . . . . It's for breathing at night when you sleep—you know, when you stop breathing and the machine helps you with that. I wasn't able to tolerate that . . . and my daughter suggested that [I get a service dog instead] . . . . I looked online, and I looked at the disability act [the ADA]. So when I got her [the dog], she was twelve weeks old, and she was very smart . . . [b]ut I had people come up and tell me: "Oh, you're so lucky; you get to bring your dog." I say, "it's a package deal; you've got to take what it comes with. It's not just you take your dog everywhere." I've had people kick me out of hotels and conventions. I've had people kind of question me at restaurants and grocery stores . . . . You know, I was really upset when they kicked me out of a convention. Good thing it was at the end of the day. I was with my coworkers, and I had to be separated from them, and I was very upset, and I wanted to write to the hotel, but I just don't have the energy to do it.

Aimee also has a small psychiatric service dog due to PTSD.

She recalls:

Basically, since 2007, I was walking around like a zombie for two years with constant flashbacks. I couldn't sleep, and [I was]

suicidal . . . . I just wasn't getting better, and I was flooded with constant flashbacks of the events that occurred, but then I had physical symptomatology with it, not just PTSD because it was a battery, too. And so my dog saved my life basically . . . . I slowly started doing things just to integrate myself back into the world, and that included going to restaurants and all that stuff and hang[ing] out with friends . . . which was a normal part of my life when I was in business or dating, and so I bring him [her dog]. And man, it was just constant. It was like sometimes it wasn't worth having him because of the harassment from restaurant owners and from random people that just come up to you and talk to you about it.

Oh, one time I was in the Ferry Building [in San Francisco] where dogs weren't allowed. I just needed a reprieve from whatever I was doing . . . and I'm sitting there and have him [the dog] in my bag [in which] I would carry him around. So I'm sitting there at Peet's Coffee at a little counter, and this woman literally comes up to me and she says, "Get out of here." And I said, "You know what? This is a service dog." "He is not, and you have no right to be here. And you're abusing the law, and you need to get out of here right away or I'm going to call security." And I said, "Listen, lady." I said, "You need to just walk away right now." I said, "Just leave. I am sitting here quietly. I'm not bothering you." And she just kept on me and on me and on me. And I said, "You just go ahead. You call [security]," and I started getting combative with

her, which was rare. Usually, I let it be, or I leave because it's not worth the hassle.

I just want to fit in. I just want to live my life . . . . So people that don't have these issues, they have no clue. They have no clue of the service, the purpose that he serves or anything. They see him as a cute fluffy dog, and they assume maybe because of the way I look and the way I dress that I'm just lying.<sup>209</sup>

Eva, who also uses a small service dog trained to alert and respond to her seizures and PTSD symptoms and to help her with symptoms of fibromyalgia, said:

People hate us; they hate people who use service dogs. Like, if you go someplace, they're so annoyed that they have to deal with it . . . . As soon as they see somebody with a service dog coming in, they kind of like lift their nose, and they're like, "Oh my God, there's trouble again." And that's just because people find disabled people, in my world from what I'm experiencing, really annoying because we have all these extra needs that they [business owners] find annoying. But for us, it's completely normal, you know.

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<sup>209</sup>. For a blog post depicting similar experiences about public suspicion with regard to an emotional support dog, see Erin Jackson, Encounters with the Disability Police: My Illness, Emotional Support Animal, and "Be Nice" Mandate, INSPIRE SANTÉ (Jan. 1, 2017), <http://www.inspiresante.com/sante-blog/disabilitypolice> [<https://perma.cc/T8LR-5WKW>].

A second informal sign of compliance is an accessory to signal that the dog “is working” and performing a service for the individual. It is widely known that the harness held by the blind person when traveling with a guide dog “carries with it the reputation of guide dog and the characteristics that guide dogs are reputed to possess, namely intelligence and a high level of training.”<sup>210</sup> The ADA regulations do not require service dogs (of any kind) to wear special gear such as a vest, tag, harness, or ID.<sup>211</sup> Nevertheless, a “cottage industry” offering such accessories for purchase online is flourishing.<sup>212</sup> As Adele (fifty-five) who has a hearing impairment and uses a hearing dog commented:

I have great offense for people who do false vest and false identity. And people contact me and say, “Oh, I can just buy it on the internet.” That is so wrong. I get more people [who] come up and say, “I can tell that your dog is a real service dog.”

Norah also pointed to this situation, saying:

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<sup>210</sup>. MICHALKO, supra note 75, at 128.

<sup>211</sup>. Frequently Asked Questions, supra note 51, at 2.

<sup>212</sup>. As a Colorado disability legal services director mentioned: “You can say ‘how can I get a service animal vest,’ punch in a few things, and lo and behold, a service vest is delivered to your door. Those are the people we need to be focusing on [in the bill].” Kelly Weill, Finally, Colorado Is Cracking Down on Service Dog Fraud, DAILY BEAST (Apr. 13, 2017 4:05 PM), <http://www.thedailybeast.com/articles/2016/04/02/finally-colorado-is-cracking-down-on-service-dog-fraud.html> [<https://perma.cc/U22M-ZTUY>].

And what really gets me upset is when people go, “Oh, we can just go online and apply for an ID or whatever in order to get your service dog to go with you.” Sometimes I don’t say anything, and sometimes I tell them: “You know, it’s against the law, and there are \$1,500 fines,” I tell that to my friends sometimes when they say, “Oh, I’ll just go ahead and apply.”

Ashley (thirty-two), who has cerebral palsy, feels that buying a vest online to misrepresent a pet as a service animal degrades her:

You know what? I feel that when people are out and about and their dog . . . has a vest on and it acts a certain way and eats from their table, then I go away, ‘cause it makes me sad. ‘Cause here I had to do all this work to get a service dog whereas they might buy something online . . . that makes me feel like, “OK, my value as a person with a disability with a service dog is completely out the window.”

Erica points to the dangers of attacks on “real” service dogs by “fake” ones who are wearing vests:

The vests that you can buy online, the certificate you can buy online, those are excuses for people who want to take their pets, usually not very well-trained pets, everywhere they go, and not only is that bad for the reputation of people with legitimate service animals, it is also dangerous because those pets have a tendency to be aggressive, and there has been known to be attacks where untrained pets will attack a trained service animal and that service animal has to then . . . it depends on the animal,

but has to be retrained certain ways; sometimes they start showing fear, and so they cannot cope with it. It's a trauma.

Although federal regulations do not require any form of identification or registration, two states, Connecticut<sup>213</sup> and Virginia,<sup>214</sup> require service dogs to wear some form of identification such as a harness, backpack, vest, or an orange-colored leash and collar.<sup>215</sup>

## B. Empirically Testing the Role of Informal Signs of Compliance: A Survey Experiment

### 1. The Experimental Design and Hypotheses

To further investigate the public suspicion of service dogs and to determine the role extra-legal norms have in triggering suspicion, I created a 2×2 survey experiment involving the two informal visible signs of compliance: the breed of dog and the existence of a vest. I designed the experiment based on a Yelp customer review of a seafood restaurant in San Diego,<sup>216</sup> which featured a photo, likely taken with a cell phone

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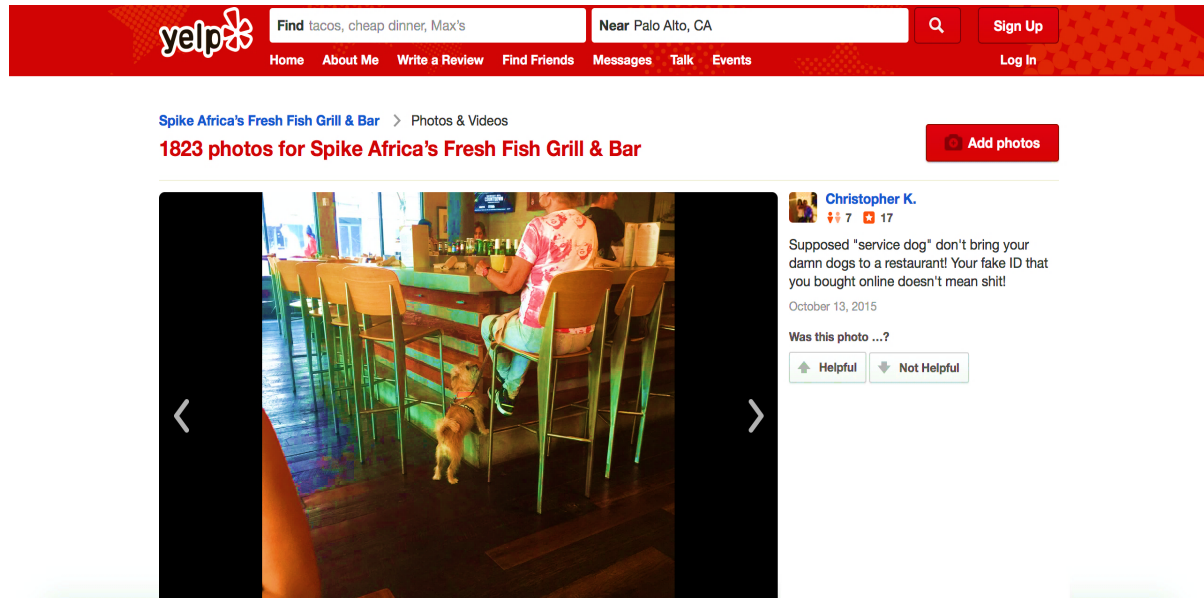
<sup>213</sup>. CONN. GEN. STAT. § 46a-64 (2017).

<sup>214</sup>. VA. CODE ANN. § 51.5–44 (2020).

<sup>215</sup>. Mississippi, Oklahoma, and Rhode Island require only guide dogs or hearing dogs (and not other service dogs) to wear some kind of a colored harness or vest. See Buhai, supra note 94, at 786–87.

<sup>216</sup>. Yelp is a popular website and app wherein consumers can share experiences about product quality in different businesses, including restaurants. Fast Facts, YELP (Dec. 31, 2020), <https://www.yelp-press.com/company/fast-facts/default.aspx> [<https://perma.cc/SF2F-BURH>].

camera, of a small dog sitting next to a person at the counter. The review read as follows: “Supposed ‘service dog’ don’t bring your damn dog to a restaurant! Your fake ID that you bought online doesn’t mean shit!”<sup>217</sup>



I recreated the photo in the original Yelp review four times. My photos all depicted a young white male wearing neutral clothing sitting at a restaurant counter with a dog. Although I chose to keep the handler’s identity constant throughout the experiment, I am aware that gender and racial stereotypes about dog owners might have played some role in the perceived authenticity of the man presented.<sup>218</sup>

One independent variable I used was the dog’s breed. I used a Labrador, which is a breed usually thought of as a “legitimate” service

<sup>217</sup>. Christopher K., Comment to Spike Africa’s Fresh Fish Grill & Bar, YELP (Oct. 13, 2015), [https://www.yelp.com/biz\\_photos/spike-africas-fresh-fish-grill-and-bar-san-diego-4?select=RV8INmrvUxS7I-CptYW68g](https://www.yelp.com/biz_photos/spike-africas-fresh-fish-grill-and-bar-san-diego-4?select=RV8INmrvUxS7I-CptYW68g) [<https://perma.cc/B9GQ-Y952>].

<sup>218</sup>. For further discussion of these stereotypes, see infra Section III.C.1.

dog, and a Shih Tzu, which is a small dog that does not fit the public expectation of what a service dog should be. My first hypothesis is thus that participants would be more suspicious of the Shih Tzu and less suspicious of the Labrador. Both dogs were photographed from the back to eliminate bias that might occur by looking at the dogs' faces.

The other independent variable I used was whether the dog was wearing a vest. My second hypothesis was that a dog wearing a vest would be considered less suspicious. The dependent variable was the level of suspicion about the authenticity of the person in the photo being a disabled service dog handler.

The experiment was included in omnibus surveys comprising questions on various topics investigated by Stanford University researchers from various departments<sup>219</sup> and thus allowed for some flexibility in the ordering of the questions.

Participants were randomly assigned to one of four treatments depicted in a photo:

- Big Dog (Labrador) + Vest;
- Big Dog (Labrador) + No Vest;
- Small Dog (Shih Tzu) + Vest;
- Small Dog (Shih Tzu) + No Vest;

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<sup>219</sup>. Only one more question in the omnibus survey concerned disability and abuse of parking privileges. The findings from the other experiment were reported in Dorfman, [Un]Usual Suspects, supra note 5, at 577–79.

The vignette presented to all the participants read as follows:

FIGURE 1

Some US laws ban pets from public spaces, except for situations where they are considered to be service animals accompanying people with disabilities. You just sat down at a restaurant, which you know is an area where the law bans pets (that are not service animals) from public spaces, when you notice this scenario:

How likely is it, in your opinion, that the man in the photo requires a service animal?

- Extremely likely
- Very likely
- Moderately likely
- Slightly likely
- Not at all likely

After the vignette was displayed, participants were randomly assigned to one of the photos:

FIGURE 2: PHOTOS RANDOMLY ASSIGNED TO PARTICIPANTS



## 2. The Research Population

After pre-testing the survey experiment on Amazon's Mechanical Turk, an online convenience sample, I ran the experiment on a representative sample of the US population, which was distributed by

YouGov in January 2017.<sup>220</sup> The YouGov nationally representative sample included 1,000 respondents, 447 men and 553 women, between the ages of eighteen and ninety-two. There were 239 people who self-identified as people with disabilities and 761 people who identified as nondisabled. This percentage (almost 24% of the survey sample identify as people with disabilities) closely corresponds with data collected by the federal government showing that nearly 25% of the US population lives with some kind of disability.<sup>221</sup>

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<sup>220</sup>. YouGov interviewed 1,078 participants who were then matched down to a sample of 1,000 to produce the final dataset. The participants were matched to a sampling frame on gender, age, race, education, party identification, ideology, and political interest. The frame was constructed by stratified sampling from the full 2010 American Community Survey (ACS) sample with selection within strata by weighted sampling with replacements (using the person weights on the public use file).

<sup>221</sup>. Catherine A. Okoro, NaTasha D. Hollis, Alissa C. Cyrus & Shannon Griffin-Blake, Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016, 67 *MORBIDITY & MORTALITY WKLY. REP.* 882, 882 (2018), <https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6732a3-H.pdf> [<https://perma.cc/RD6F-L5N2>].

TABLE 1: RESEARCH POPULATION

	<b>Mean / %</b>
<b>Disabled</b>	24%
<b>Nondisabled</b>	
With Cordial/Familial Relationship with a Disabled Individual	27%
<b>Female</b>	55%
<b>Age</b>	49
<b>Party ID</b>	
Democrat	38%
Republican	28%
Independent	27%
Other/Not Sure	7%
<b>Political Ideology<sup>◇</sup></b>	3.42

Note: N = 1,000; <sup>◇</sup> Political Ideology measured on a scale of 1–5 (Liberal to Conservative).

### 3. Findings

The results of the experiment fit the hypotheses and demonstrate an additive effect of both independent variables on the level of suspicion (the dependent variable). Respondents were statistically significant ( $P < 0.001$ ), almost 35 percentage points less suspicious of a Labrador than of a Shih Tzu.<sup>222</sup> Respondents were statistically significant ( $P < 0.001$ ), 60 percentage points less suspicious of a dog (of any breed)

<sup>222</sup>. See infra Table 2.

who was wearing a vest.<sup>223</sup> A two-factor analysis of variance (ANOVA) confirmed these findings. The effects of the breed of the dog were statistically significant ( $F(1, 999) = 20.46, p < 0.001$ ), as was the effect for having the dog wear a vest ( $F(1, 999) = 61.72, P < 0.001$ ). The effect size of the dog's breed within the variance is  $d = 0.267$ ,<sup>224</sup> which according to Cohen's  $d$  conventions is a small effect whereas the effect size of the vest condition within the variance is  $d = 0.486$ ,<sup>225</sup> which is a medium-size effect.<sup>226</sup> The interaction effect of the dog's breed and the vest condition was not statistically significant;<sup>227</sup> in other words, no multiplicative effect of the independent variables was found. The results indicate that the vest condition (whether a dog is wearing a vest or not) has a much larger effect on the level of suspicion of assistance-animal disability con.

In addition, disabled respondents were statistically significantly ( $P < 0.01$ ) less suspicious than were nondisabled respondents with no relationship with a disabled person.<sup>228</sup> Consistent with previous research

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<sup>223.</sup> See infra Table 2.

<sup>224.</sup> See infra Table 2.

<sup>225.</sup> See infra Table 2.

<sup>226.</sup> According to the Cohen's convention,  $d = 0.2$  be considered a "small" effect size, 0.5 represents a "medium" effect size and 0.8 a "large" effect size. See JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 473–481 (2d ed., 1988).

<sup>227.</sup> See infra Table 2.

<sup>228.</sup> See infra Table 2.

conducted on the public suspicion of the disability con,<sup>229</sup> women were found to be statistically significantly ( $P < 0.001$ ) less suspicious than men were.<sup>230</sup> I found a statistically significant ( $P < 0.05$ ) positive relationship between suspicion and age.<sup>231</sup> As age increases, people become more suspicious, although the effect size is rather small (0.005). Political ideology (being conservative or liberal on a five-point Likert scale) had a small statistically significant effect on the level of suspicion.<sup>232</sup> Being conservative increased the level of suspicion by nearly 8 percentage points.<sup>233</sup> Party identification—identifying as Democrat, Republican, or independent—however, did not have a statistically significant effect on the level of suspicion.<sup>234</sup> Therefore, the effect of political worldview on the level of suspicion is suggestive at best. Having some college education and race and/or ethnicity were not found to have a statistically significant effect on the level of suspicion.<sup>235</sup>

Being nondisabled and having a disabled friend or relative was not found to have a statistically significant effect on the level of suspicion.<sup>236</sup> This is despite findings from a recent study that found that “[survey]

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<sup>229.</sup> See Dorfman, *Fear of the Disability Con*, supra note 5, at 1075–76; Dorfman, *[Un]Usual Suspects*, supra note 5, at 598.

<sup>230.</sup> See infra Table 2.

<sup>231.</sup> See infra Table 2.

<sup>232.</sup> See infra Table 2.

<sup>233.</sup> See infra Table 2.

<sup>234.</sup> See infra Table 2.

<sup>235.</sup> See infra Table 2.

<sup>236.</sup> See infra Table 2.

participants with friends/family who owned either an emotional support or a service dog felt that there was a higher proportion of fraudulent use of both types of assistance dogs.”<sup>237</sup> Findings from previous research on suspicion of disability con more broadly also found people with a friendly or familial relationship with a disabled person to be more suspicious of others.<sup>238</sup> One possible reason for the contradiction between the studies could be the common notion in social science that more abstract questions about a phenomenon receive different answers than do questions asked in context.<sup>239</sup> This phenomenon has been widely known in political science research as “Fenno’s paradox.”<sup>240</sup> Public opinion surveys demonstrate the phenomenon that individual members of Congress have relatively high approval ratings whereas simultaneously Congress as a whole has an extremely low approval rating.<sup>241</sup> Similarly, although the majority of public school parents said that they would

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<sup>237</sup>. Schoenfeld-Tacher et al., supra note 45, at 15.

<sup>238</sup>. Dorfman, Fear of the Disability Con, supra note 5, at 1072.

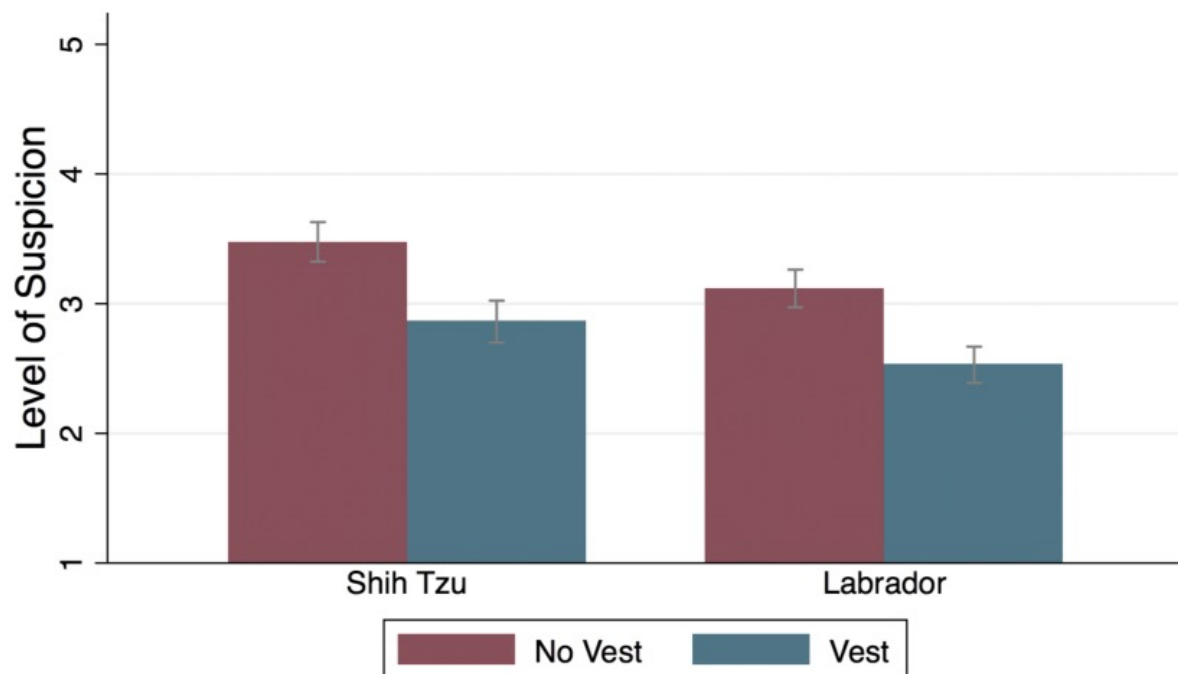
<sup>239</sup>. See id. at 1070.

<sup>240</sup>. RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 164–68 (1978).

<sup>241</sup>. Laurel Harbridge & Neil Malhotra, Electoral Incentives and Partisan Conflict in Congress: Evidence from Survey Experiments, 55 AM. J. POL. SCI. 494, 507 (2011); see also Elizabeth Mendes, Americans Down on Congress, OK With Own Representative, GALLUP (May 9, 2013), <http://news.gallup.com/poll/162362/americans-down-congress-own-representative.aspx> [<https://perma.cc/34YH-976L>].

give their child's school a grade of "A" or "B," just 17% of these same participants would give "public schools nationally" the same high score.<sup>242</sup> Thus, when asked general questions about the scope of assistance-animal disability con in the two studies, participants with a relationship to disability answered differently from how they did in this study, which presented concrete cases of encountering a dog at a restaurant.

FIGURE 3: LEVEL OF SUSPICION SERVICE DOGS BY BREED AND PRESENCE OF VEST



Note: N=1,000

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<sup>242.</sup> See Catherine Rampell, Actually, Public Education Is Getting Better, Not Worse, WASH. POST (Sept. 18, 2014), [https://www.washingtonpost.com/opinions/catherine-rampell-actually-public-education-is-getting-better-not-worse/2014/09/18/7c23b020-3f6a-11e4-9587-5dafd96295f0\\_story.html](https://www.washingtonpost.com/opinions/catherine-rampell-actually-public-education-is-getting-better-not-worse/2014/09/18/7c23b020-3f6a-11e4-9587-5dafd96295f0_story.html) [<https://perma.cc/QUX9-L22N>].

TABLE 2: OLS REGRESSION OF LEVEL OF SUSPICION IN THE ASSISTANCE ANIMALS EXPERIMENT

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Dog Breed (Having a Labrador)	-0.346*** (0.0765)	-0.353*** (0.0763)	-0.363*** (0.0762)	-0.361*** (0.0758)	-0.359*** (0.0758)	-0.369*** (0.0756)
Having a Vest	-0.601*** (0.0764)	-0.615*** (0.0768)	-0.607*** (0.0766)	-0.605*** (0.0762)	-0.604*** (0.0762)	-0.604*** (0.0761)
No Relationship w/ Disability (ref.)	--	--	--	--	--	--
Having a Friendly or Familial Relationship w. Disabled Individual	--	-0.112 (0.0917)	-0.107 (0.0911)	-0.109 (0.0909)	-0.109 (0.0910)	-0.095 (0.0907)
Having a Disability	--	-0.237* (0.0954)	-0.243* (0.0948)	-0.268** (0.0952)	-0.273** (0.0959)	-0.254** (0.0957)
Female	--	--	-0.281*** (0.0763)	-0.270*** (0.0763)	-0.269*** (0.0764)	-0.263*** (0.0761)
Age	--	--	--	0.005* (0.00226)	0.005* (0.00226)	0.005* (0.00226)
Having Some College Educ.	--	--	--	--	-0.039 (0.0787)	-0.001 (0.0796)
Political Ideology (Liberal to Conservative)	--	--	--	--	--	0.078** (0.027)
Political Identification Democrat (ref.)	--	--	--	--	--	--
Republican	--	--	--	--	--	0.145 (0.0947)
Independent	--	--	--	--	--	0.107 (0.0959)
Constant	3,469***	3,567***	3,723***	3,472***	3,499***	3,211***
R-square	0.0749	0.0808	0.0932	0.0979	0.0981	0.1053
Adjusted R-square	0.0731	0.0771	0.0886	0.924	0.0917	0.0980
Sample Size (N)	1,000	1,000	1,000	1,000	1,000	1,000

Notes: Other control variables that were not found significant are race and family income; level of suspicion measured on a scale of 1–5.

\*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$  (two-tailed test)

### C. Discussion

Both visible signs of compliance that were tested in the survey experiment, the breed of the dog and whether it was wearing a vest, are examples of extra-legal informal norms. ADA regulations do not limit service dogs to a specific breed, nor do they require the dog to wear any kind of gear while out in public. Nevertheless, both of these extra-legal norms play a role in the public reaction to the use of animals as accommodations.

#### 1. Small Dogs, Less Apparent Disabilities, and the Disability Hierarchy

Concerning the dog breed, laypeople tend to trust that larger breeds, traditionally trained as guide dogs, tend to be “real” service animals.<sup>243</sup> People who use smaller breeds are seen as less trustworthy of using a service dog.<sup>244</sup> Popular perceptions regarding owners of smaller dogs as opposed to larger breeds seem to be at play here as well.<sup>245</sup> Those perceptions relate to gender and racial stereotypes.<sup>246</sup> As a recent study has shown, smaller breeds (like Maltese or Dachshunds) were much

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<sup>243.</sup> See infra Figure 3; Frequently Asked Questions, supra note 51.

<sup>244.</sup> See supra Section III.A; supra Figure 3.

<sup>245.</sup> Michael Ramirez, ‘My Dog’s Just Like Me’: Dog Ownership as a Gender Display, 29 *SYMBOLIC INTERACTION* 373, 382 (2006); 5 Stereotypes About Small Dogs, Animal Planet, <http://www.animalplanet.com/pets/5-small-dogs-are-aloof/> (last visited May 21, 2021) [<https://perma.cc/FX93-R9Q2>].

<sup>246.</sup> Ann Linder, The Black Man’s Dog: The Social Context of Breed Specific Legislation, 25 *ANIMAL L.* 51, 52, 60–64 (2018).

more likely to be attributed to a female owner whereas larger breeds (like German Shepherds, Pitbulls, or Golden Retrievers) were more likely attributed to males.<sup>247</sup> The study also found that dogs considered to be dangerous like Pitbulls, and to a lesser extent German Shepherds,<sup>248</sup> were more attributed to black owners (specifically young black males).<sup>249</sup> Other studies have also shown that masculine and feminine traits were associated with smaller and larger breeds of dogs.<sup>250</sup>

The choice of having a young white male be depicted in the experiment was driven by the desire to draw attention to the dog and to keep the identity of the owner as neutral as possible. It is possible that having a male owner with a Shih Tzu (a smaller, more “feminine” dog) contributed to the higher suspicion level. Further research that uses both male and female models as well as people of color would help further explore this point and help identify the intersectional angles of disability, gender, and race.

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<sup>247.</sup> Id. at 61.

<sup>248.</sup> Id. at 62.

<sup>249.</sup> Id. at 60, 62.

<sup>250.</sup> See, e.g., Annamari Vänskä, ‘Cause I Wuv You!’ Pet Dog Fashion and Emotional Consumption, *EPHEMERA: THEORY & POL. ORG.* 75, 81 (2016) (describing how since the 1950s fashion images started depicting small lap dogs such as pugs, poodles, and Pekinese, which represented the idea of feminine sensuousness); Ramirez, supra note 245, at 382 (discussing how male small dog owners overcompensate for the dog’s size by emphasizing the dog’s “masculine personality”).

Nevertheless, this study contributes to the literature, as it is the first to look at how disability stereotypes play out with regard to the use of animals. More specifically, and as I will immediately explain, the finding shows how a hierarchy within the disability community, one which has been discussed by disability scholars,<sup>251</sup> is replicated in the current regulation of assistance animals.

As discussed previously, stigma against smaller service dogs, which are often used to help with symptoms of chronic illnesses and mental disabilities, can be traced back hundreds of years.<sup>252</sup> This stigma has been translated and reinforced by policies like those of United and Delta Airlines that group emotional support animals and psychiatric service dogs in the same category.<sup>253</sup> This is despite the fact that small breed psychiatric service animals are trained to perform specific tests and are legally allowed in public spaces and in airplane cabins even after the 2020 ACAA amendment.<sup>254</sup> These dogs play a significant role in the lives of people living with mental disabilities, as Tom explained:

Because I do have a service animal . . . I know what it is like to not want to get out of bed and to sit in bed and hold my dog and stay under the covers. I have a lifelong experience dealing with depression and understanding it, [but] not everyone understands [it] . . . . I have also represented people who have much more

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<sup>251.</sup> See discussion supra Section III.A.

<sup>252.</sup> See discussion supra Section III.A.

<sup>253.</sup> See Huss, supra note 149 and accompanying text.

<sup>254.</sup> See Yamamoto et al., supra note 3.

severe disabilities than me that have service animals. I have a videotape of one of my clients in deposition, really breaking down and crying as she was explaining how she gets treated by people for having a service dog – a small little dog.

Disability studies scholars have pointed to the marginalization of people with mental disabilities and chronic illnesses, usually considered less visible, within the disability community and academic discourse that typically focuses on people with physical or sensory disabilities.<sup>255</sup> Similarly, the law itself seems to reproduce a disability hierarchy that disadvantages people with mental disabilities. In tort law, for example, courts have historically been unwilling to depart from the reasonable person standard when dealing with a tortfeasor with a mental disability.<sup>256</sup>

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<sup>255</sup>. Kirstin Marie Bone, Trapped Behind the Glass: Crip Theory and Disability Identity, 32 *DISABILITY & SOC'Y* 1297, 1302, 1306 (2017); BENJAMIN FRASER, *COGNITIVE DISABILITY AESTHETICS: VISUAL CULTURE, DISABILITY REPRESENTATIONS, AND THE (IN)VISIBILITY OF COGNITIVE DIFFERENCE* 29 (2015); MARGARET PRICE, *MAD AT SCHOOL: RHETORICS OF MENTAL DISABILITY AND ACADEMIC LIFE* 27 (2011); Nev Jones & Robyn Lewis Brown, The Absence of Psychiatric C/S/X Perspectives in Academic Discourse: Consequences and Implications, 33 *DISABILITY STUDS. Q.* 1, 2 (2013); Susan Wendell, Unhealthy Disabled: Treating Chronic Illnesses as Disabilities, 16 *HYPATIA* 17, 17–19 (2001).

<sup>256</sup>. “Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.”

This is while the standard of care for a physically disabled person is generally that of a reasonable person “under like disability.”<sup>257</sup> The rationales for applying a subjective standard to people with physical disabilities and an objective standard for people with mental disabilities have been stated to be the greater public familiarity and acceptance of the latter, stigmas about the threat imposed by people with mental disabilities, and the ease with which physical disabilities may be proven as compared with mental ones.<sup>258</sup>

The suspicion of small service dogs used by people with mental disabilities is yet another overlooked manifestation of the disability hierarchy between visible and less apparent disabilities. This hierarchy, which is entrenched in law and society alike, disadvantages people with less apparent disabilities and makes it much harder for them to exercise their given rights,<sup>259</sup> such as the ability to use a service dog.

## 2. Vests as Visible Signs of Compliance

As legal scholar Lauren Edelman famously argued, ambiguous and complex laws with relatively weak enforcement mechanisms puts into

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Restatement (Second) of Torts § 283B (AM. L. INST. 1965).

<sup>257.</sup> Id. § 283C.

<sup>258.</sup> James W. Ellis, Tort Responsibility of Mentally Disabled Persons, 4 A.B.A. RSCH. J. 1079, 1098–1102 (1981); Stephanie I. Splane, Tort Liability of the Mentally Ill in Negligence Actions, 93 YALE L.J. 153, 160 (1983).

<sup>259.</sup> Dorfman, [Un]Usual Suspects, supra note 5, at 568, 597, 599–603; Jasmine E. Harris, The Aesthetics of Disability, 119 COLUM. L. REV. 895, 931–37 (2019).

motion a process of constructing signs of compliance and legitimacy that do not appear in formal law.<sup>260</sup> She demonstrated her claim using the example of the organizational response to equal employment opportunity and affirmative action mandates set by Title VII of the Civil Rights Act of 1964.<sup>261</sup> Organizations institutionalized affirmative action offices, organized workshops, and set out internal policies – all requirements that do not exist in black letter law – to shape legal and societal views of what constitutes compliance or good faith efforts to comply.<sup>262</sup>

As shown, the legislation around assistance animals is complex, as it introduces various categories and applies differently relative to environments and contexts.<sup>263</sup> The enforcement mechanism is currently weak, as federal regulations do not have sanctions in place for those who abuse the law.<sup>264</sup> Recently, state laws were enacted to address this issue, but it will take some time before the effect of these laws on

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<sup>260.</sup> Edelman, supra note 10, at 1542–43; Edelman et al., supra note 10, at 76.

<sup>261.</sup> Edelman et al., supra note 10, at 76.

<sup>262.</sup> Edelman, supra note 10, at 1546; see also Jeb Barnes & Thomas F. Burke, Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access, L. & SOC'Y REV. 167, 174 (2012) (summarizing the literature on the responses by organizations to vague laws and regulations).

<sup>263.</sup> See discussion supra Part II.

<sup>264.</sup> See discussion supra Section II.B.

compliance can be assessed.<sup>265</sup> In the meantime, societal norms along with the fear of the disability con promulgated by the media have set the tone on the de facto regulation of assistance animals. I argue that these phenomena have created a legal environment in which there is an expectation of showcasing some signs of the dog's legitimacy and the authenticity of the handler's disability via the use of vests. This legal environment established norms that stem from the law but that do not necessarily appear in it literally. Edelman wrote about the "legal environment theory" with regard to organizations, but her theory can be applied to individual service dog handlers:

When a new law provides the public with new expectations or new bases for criticizing organizations, or when the law enjoys considerable societal support conditions, apparent noncompliance is likely to engender loss of public approval. Thus, independently of formal legal sanctions, a new law can exert strong pressures on organizations to adopt structures or practices that demonstrate attention to normative expectations.<sup>266</sup>

Owners of "real" assistance dogs are therefore also compelled to prove the authenticity of their accommodation and to signal compliance with the legal standards, and, as such, a process of "de facto construction

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<sup>265</sup>. See infra Part III.

<sup>266</sup>. Lauren B. Edelman, Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace, 95 AM. J. SOCIO. 1401, 1406 (1990).

of compliance” is created.<sup>267</sup> As a matter of fact, all the interviewees who use a service dog whom I met with all had vests on their dogs despite that they all knew it was not a legal requirement, and some even complained about the cottage industry that markets IDs and vests.<sup>268</sup> Disability studies scholar Margaret Price, who has a psychiatric service dog, admitted that she carries around a letter signed by her psychiatrist to negotiate with business owners and other gatekeepers despite that she is well aware she is not required to do so.<sup>269</sup> Lindsey speaks directly to the issue of trustworthiness that is a result of the vest and harness her service dog wears, which she says is “professional looking”:

- Q. Do you have situations when people question whether he is a service dog or not?
- A. Sometimes, but we don’t [encounter that often] . . . just because he’s a bigger dog and a lot of times he’s wearing a harness, and I also just try to make sure his gear is like very professional looking. We don’t usually have too much of an issue with people asking whether he’s a service dog, and he’s just kind of got the “serious work face.”
- Q. And you know the vest is not a legal requirement . . .

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<sup>267</sup>. Edelman, supra note 10, at 1568.

<sup>268</sup>. See supra notes 16–17 (discussing anonymous interviews conducted by the author).

<sup>269</sup>. Margaret Price, What Is a Service Animal? A Careful Rethinking, 13 *REV. DISABILITY STUD.* 1, 4 (2017).

- A. Yes, exactly. And I will never say to somebody that you don't have the right to put whatever you want on your vest, but you just have to know that if you do a vest with tons of other patches or that's like rainbow [colored], or whatever, you're going to get more attention, and you need to be ready for that.
- Q. What about the people who don't put any vest on their service dogs?
- A. Ummm, they don't have to. That's their choice, but again I don't want to hear them complaining that they're getting more questions like "Is that a service dog?" or people assuming that's a pet. Like if your dog has nothing marking it, then you just have to be ready for more of that stuff to happen. And I mean I appreciate that that's not written into the law [meaning that there is no requirement to wear a vest] 'cause there are certain "surprise situations" where I've worked him as we say "naked" [with no vest], but I don't really like it. It's just my anxiety, which is not what should be happening when I'm out with him.
- Q. And the anxiety is because you are afraid that other people might suspect he's not a service dog?
- A. Right. Exactly. I just don't like conflict . . . .

### 3. When Informal Becomes Formal

The final part of Edelman's account of informal visible signs of compliance indicates how those informal signs are being reinforced by the legal institution itself that adopts them as part of the law.<sup>270</sup> She shows how courts treated the institutionalization of affirmative action practices as evidence of compliance in good faith with the law despite that these practices were never in the law in the first place.<sup>271</sup> In other words, informal signs are adopted by legal institutions and become part of the law when a legal authority approves them (the courts in the case of antidiscrimination mandates and affirmative action practices). Legislatures also engage in a similar process of adopting informal norms regarding the vests and other gear, signaling the authenticity of a service dog.

In 2016, state laws that aimed to fight misrepresentation of pets or emotional support animals as service animals began to surface.<sup>272</sup> To determine whether and how the informal signs of compliance in the form of gear (such as a vest, tag, harness, etc.) are adopted into formal law, I conducted a content analysis of bills and statutes across the country.

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<sup>270.</sup> Edelman, supra note 10, at 1546–47.

<sup>271.</sup> Id.

<sup>272.</sup> See infra Table 3; Tiffany Lee, Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?, 23 ANIMAL L. 325, 337 (2017); see also Emily R. Zier, Which One to Follow? Service Animal Policy in the United States, 13 DISABILITY & HEALTH J. 100907, 100911 (2020).

As of February 2020, forty-two states have either a statute in place or a bill waiting for final approval that specifically forbids misrepresentation of pets as service animals, primarily by criminalizing such an act as a misdemeanor or as a civil matter.<sup>273</sup> Thirty-one states have a statute in place,<sup>274</sup> and eleven are considering a bill on the issue.<sup>275</sup> Out of these forty-two states, fifteen have enacted a specific prohibition about the use of vests, collars, tags, or harnesses on dogs that are not service dogs.<sup>276</sup> For example, New Hampshire's legislation reads "[i]t is unlawful for any person to fit an animal with a collar, leash, vest, sign, or harness of the type which represents that the animal is a service animal . . . if in

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<sup>273.</sup> New Jersey and Maine treat misrepresentation as a civil matter, whereas other states treat it as a petty offence or a misdemeanor. See Lee, supra note 272, at 337. Michigan has even regulated the possibility of reporting of misrepresentation to the Michigan Department of Civil Rights, a department of the Michigan state government, via its existing hotline. H.B. 4521, 98th Leg., Reg. Sess. (Mich. 2015).

<sup>274.</sup> These findings correspond with another study that was published in 2020. See Zier, supra note 272 at 100913.

<sup>275.</sup> See generally infra Table 3.

<sup>276.</sup> See also Huss, supra note 149, 833–34 (“It was not uncommon for state statutes to focus on the outward appearance of the purported service animal. Language in these statutes focus on the use of a harness, collar, or vest commonly used to designate that a dog is acting as a service animal.”).

fact said animal is not a service animal.”<sup>277</sup> The remaining twenty-seven states adopted a general prohibition about misrepresentation, similar to Florida’s statute, which provides: “A person who knowingly and willfully misrepresents herself or himself, through conduct or verbal or written notice, as using a service animal and being qualified to use a service animal or as a trainer of a service animal commits a misdemeanor of the second degree.”<sup>278</sup>

The conclusion is that formal law has adopted, to some effect, what used to be informal visible signs. Contrary to Edelman’s original theory, however, in the assistance-animal context, the adoption was of signs of noncompliance and of not acting in good faith, alerting others to the potential misleading use of those signs.<sup>279</sup>

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<sup>277</sup>. N.H. REV. STAT. ANN. § 167-D:8 I–II. (2021).

<sup>278</sup>. FLA. STAT. § 413.08(9) (West 2019).

<sup>279</sup>. Marx, supra note 35.

TABLE 3. STATE LEGISLATION PROHIBITING THE MISREPRESENTATION OF SERVICE DOGS (AS OF FEBRUARY 2020)

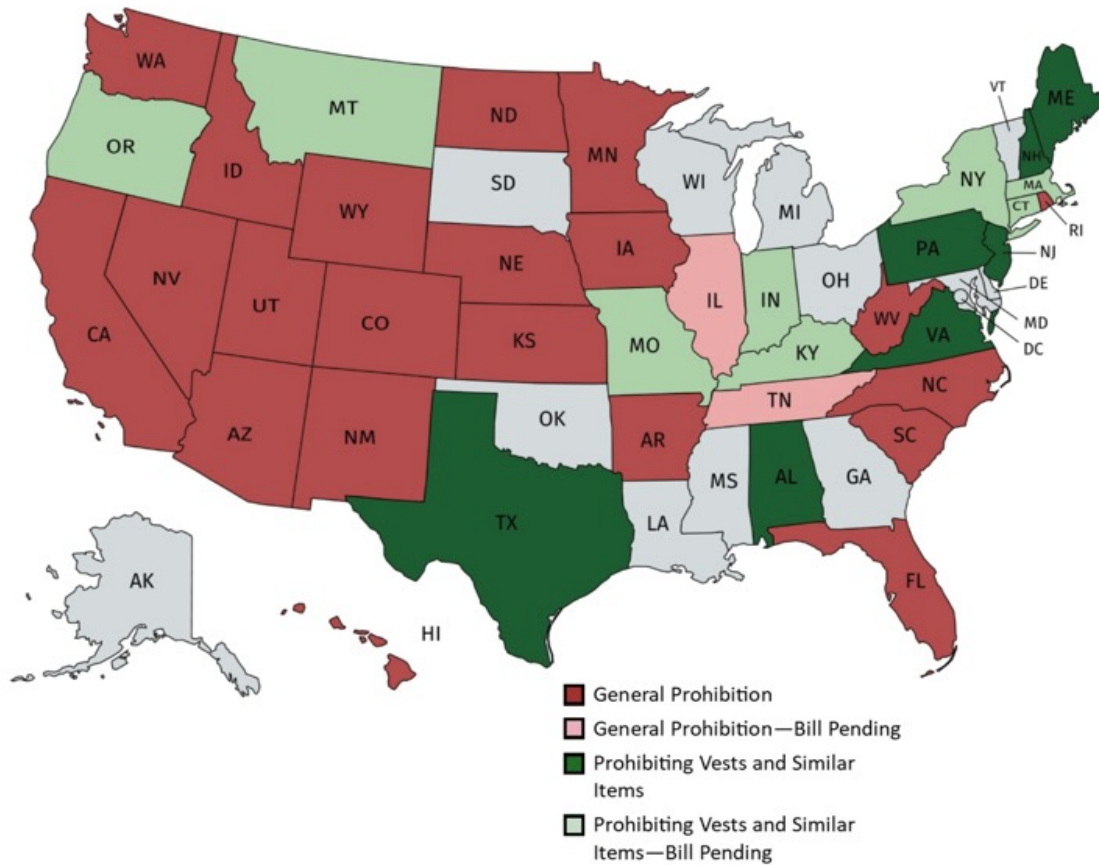
<b>State legislation adopting vests as visible signs of noncompliance</b>	<b>States with a general prohibition of misrepresentation</b>
Alabama °	Arizona
Connecticut ◇	Arkansas
Indiana ◇	California
Kentucky ◇	Colorado
Maine	Florida
Massachusetts ◇	Hawaii
Missouri ◇	Idaho
Montana ◇	Illinois ◇
New Hampshire	Iowa
New Jersey	Kansas
New York ◇	Michigan
Oregon ◇	Minnesota
Pennsylvania ◇ °	Missouri
Texas	Montana
Virginia	Nebraska
	Nevada
	New Mexico
	New York
	North Carolina
	North Dakota
	Rhode Island
	South Carolina
	Tennessee ◇
	Utah
	Washington
	West Virginia
	Wyoming

◇ Proposed legislation

° Regulates misrepresentation of pets in the housing context only

\* States that do not have any legislation prohibiting misrepresentation: Alaska, Delaware, District of Columbia, Georgia, Louisiana, Maryland, Mississippi, Ohio, Oklahoma, South Dakota, Vermont, Wisconsin

FIGURE 4: VISUAL REPRESENTATION OF STATE LEGISLATION PROHIBITING THE MISREPRESENTATION OF SERVICE DOGS (AS OF FEBRUARY 2020)



#### IV. PRACTICAL AND THEORETICAL IMPLICATIONS: THE FUTURE OF REGULATING ASSISTANCE ANIMALS

A strong sense of confusion and mistrust exists regarding the use of assistance animals, which generates a backlash against people with disabilities.<sup>280</sup> Black letter law currently has a limited role in establishing the perceived legitimacy of using an assistance animal. In this final Part, I offer novel ways to address the two main problems of regulating assistance animals raised by this Article: the issue of bounded ethicality

<sup>280</sup>. See supra Part II.

of people who commit assistance-animal disability con and the issue of restoring public trust in the practice and the system of employing assistance animals.

First, I offer ethical nudges as a tool to resolve the bounded ethicality issue that allows people to commit assistance-animal disability con without perceiving their act to be illegal and immoral. Second, I suggest the creation of an authorized, centralized permit system for assistance dogs that would distribute official identifying accessories, to serve as visible signs of compliance and restore public trust. For the registry permit system to work, action must be taken to prevent (or penalize) private vendors from selling accessories and identification for assistance animals. This third solution calls for stricter public enforcement, specifically by business owners and staff who serve as gatekeepers in places of public accommodation. The tension between public and private enforcement is the driving force of the legislative debate underlying the issue of assistance animals today.

#### A. Ethical Nudges—Combating Bounded Ethicality

In recent decades, psychologists and behavioral scholars have disputed the idea that fear of sanctions prevents people from disobeying the law, thus challenging the power of deterrence to curb illegal acts.<sup>281</sup> Those scholars rely on empirical studies to suggest that the severity of

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<sup>281</sup> Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169, 208 (1968); Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioral Science Investigation, 24 OXFORD J. LEGAL STUD. 173, 175–78 (2004).

punishment has only a small effect on deterrence.<sup>282</sup> The first explanation for these findings is that people might not even be aware of the written law and its sanctions.<sup>283</sup> This is specifically true regarding the regulation of assistance animals, for which state regulation is new and federal regulation is confusing and complex.<sup>284</sup> A second explanation for the lack of success of deterrence to prevent wrongdoing is bounded ethicality: those who often fail to recognize the unethical nature of their actions have little reason to consider the possibility they will be sanctioned for their behavior.<sup>285</sup>

Because people are unable to candidly and objectively assess the morality and legality of their acts, as research on bounded ethicality has shown, it is one of the main goals of legal policy to push those prone to commit wrongdoing to consider the repercussions.<sup>286</sup> The regulatory solution to dealing with the bounded ethicality behind assistance-animal disability should aim to encourage deliberation and ethical engagement rather than support the calculated pursuit of self-interest.

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<sup>282</sup>. ANDREW VON HIRSCH, ANTHONY E. BOTTOMS, ELIZABETH BURNEY & PER-OLOF H. WIKSTRÖM, *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* 63 (1999); Daniel S. Nagin & Greg Pogarsky, Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence, 39 *CRIMINOLOGY* 865, 890–91 (2001).

<sup>283</sup>. Robinson & Darley, supra note 281, at 176.

<sup>284</sup>. See, e.g., Frequently Asked Questions, supra note 51.

<sup>285</sup>. Feldman & Kaplan, supra note 173, at 62.

<sup>286</sup>. FELDMAN, supra note 171, at 88–104.

This could be accomplished through regulatory interventions known as “ethical nudges.”<sup>287</sup>

Nudges are legal-regulatory tools introduced by Richard Thaler and Cass Sunstein.<sup>288</sup> Those tools are designed to alter choice and behaviors, without limiting freedom, using a “nudge approach.”<sup>289</sup> Although “traditional nudges” are designed to improve people’s ability to make informed and rational choices that will maximize their own well-being,<sup>290</sup> ethical nudges aim to encourage more ethical conduct and to maximize others’ well-being by reducing harm caused to them.<sup>291</sup>

Ethical nudges are designed to raise awareness, promote ethical reflections, and ultimately alter behavior; and they can take on multiple forms. Examples include reading an honor code prior to the opportunity to commit a dishonest act,<sup>292</sup> or recalling past behavior that stands in

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<sup>287.</sup> Feldman & Kaplan, supra note 172, at 65–67; FELDMAN, supra note 171, at 101.

<sup>288.</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 24 (2008).

<sup>289.</sup> Id. at 8.

<sup>290.</sup> Id. at 5 (stating the nudges should aim at making “the choosers better off, as judged by themselves.”).

<sup>291.</sup> FELDMAN, supra note 171, at 198–99; Feldman & Kaplan, supra note 173, at 67.

<sup>292.</sup> Lisa L. Shu, Francesca Gino & Max H. Bazerman, Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting, 37 PERS. & SOC. PSYCH. BULL. 330, 344 (2011).

contrast to desired behavior.<sup>293</sup> For ethical nudges to be effective, they need to occur in real time, in other words, when the potential wrongdoer is at a “crucial juncture” of possibly committing an unethical/illegal act.<sup>294</sup> These interventions need to target disrupting the potential wrongdoers and not be something seen as routine.<sup>295</sup> Such disruption would foster an ethical, reflective deliberation.<sup>296</sup> Ethical nudges work best when they remind the potential wrongdoers of the victim of the unethical act and of the consequences of their acts via the use of messaging or symbols.<sup>297</sup>

As previously discussed, in the context of assistance-animal disability con, the victim is often unrecognized by those committing the con.<sup>298</sup> This is unlike other types of potential disability cons in which the wrongdoer is reminded of the disabled person whose resources are being taken away (think of the international symbol of access in scarce disabled parking spots).<sup>299</sup> To nudge someone who potentially is about to misrepresent a pet, we need to remind this person that assistance animals are used

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<sup>293</sup>. Karoline Gamma, Robert Mai & Moritz Loock, The Double-Edged Sword of Ethical Nudges: Does Inducing Hypocrisy Help or Hinder the Adoption of Pro-Environmental Behaviors?, 2020 J. BUS. ETHICS 351, 359–60 (2020).

<sup>294</sup>. Feldman & Kaplan, supra note 173, at 69.

<sup>295</sup>. Id. at 71.

<sup>296</sup>. Id.

<sup>297</sup>. Id.

<sup>298</sup>. See supra notes 201–05 and accompanying text.

<sup>299</sup>. See discussion supra Section II.C.

to treat disabilities, and these individuals are the ones being hurt by the abuse of the rules. Such messages can also include ones about the harassment people with disabilities experience as a consequence of the public's eroded legitimacy in the use of assistance animals, such as the examples shared in this article.<sup>300</sup> A declaration of the rules,<sup>301</sup> regarding an authentic doctor's note for emotional support animals or the training requirement of a service dogs, could also be way of nudging people to reconsider engaging in disability con.

An ethical nudge in these circumstances could be presenting a short text or a visual in a pop-up window when a person is purchasing online flight tickets and about to mark the box stating they will be accompanied by a service animal. Such a nudge reminding people of the rules could be done by hosts at restaurants before seating guests accompanied by dogs or by workers at the ticket counters in museums or movie theaters. Those signals could also be printed on menus placed outside of restaurants for those waiting to be seated or on the display boards at movie cinemas or theaters. These are just a few examples, adaptable to the specific circumstances of the public space in question.

As long as the message about the victims of assistance-animal disability con is being communicated in a clear manner, and at a time at which the person is still pondering whether to carry through with the

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<sup>300</sup>. See discussion supra Section III.A.

<sup>301</sup>. Feldman & Kaplan, supra note 173, at 72; FELDMAN, supra note 171, at 199–200.

disability con, ethical nudges could be an effective way to reduce the rate of misrepresentations.

In addition to ethical nudges, regulation of the fees charged by commercial entities for accommodating pets should be considered. Regulating and lowering the fees would help fight the current perverse financial incentive that exist to misrepresent a pet as a service animal in order to avoid paying steep fees related, for example, to flying a pet or having it in a hotel.<sup>302</sup>

## B. Centralized Permit System for Assistance Animals

Federal law does not require registration of service or emotional support animals.<sup>303</sup> Nevertheless, states such as Michigan,<sup>304</sup> North Carolina,<sup>305</sup> and California<sup>306</sup> provide a method for service animal handlers to voluntarily apply for state-issued identification. Other countries such as Japan require the registration of service dogs.<sup>307</sup>

Having a unified system that identifies “real” service dogs fits with the findings from the survey experiment presented in Section III.B that shows the public seeks a formal sign recognizing a service dog. Such a permit system, one that would also provide official and exclusive accessories for identification, could be a solution for restoring public trust in the usage

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<sup>302</sup>. Stockman, supra note 38.

<sup>303</sup>. See supra Section II.A.

<sup>304</sup>. MICH. COMP. LAWS ANN. § 37.303 (West 2020).

<sup>305</sup>. N.C. GEN. STAT. § 168–4.2 (2020).

<sup>306</sup>. CAL. FOOD & AGRIC. § 30850–54 (West 2020).

<sup>307</sup>. Yamamoto et al., supra note 3, at 17.

and legal treatment of assistance animals. Such a system could operate on the state level and provide permits respected in other states, similar to the way the vehicle registration systems work.<sup>308</sup> It could be done by the state itself or be relegated to an NGO or another state agency. Access to the actual system would be exclusive to law enforcement personnel. The signaling of the legal use of service dogs would be clearly indicated to the public via the usage of official and exclusive gear, such as vests, that could only be obtained through official channels, and not legally distributed in other ways. Nevertheless, such a solution is far from simple.<sup>309</sup>

The idea of requiring people with disabilities to register and carry around special identification is a contentious one.<sup>310</sup> The first concern is about the invasion of privacy and the potential for harassment or violence that might occur from signaling a disability.<sup>311</sup> As an interviewee from

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<sup>308.</sup> Registration for Non-Residents, AAA Digest of Motor Laws, <https://drivinglaws.aaa.com/tag/registration-for-non-residents/> [<https://perma.cc/T4JQ-NCNH>].

<sup>309.</sup> For example, James A. Kutsch, Jr., the President and CEO of The Seeing Eye, the first school for the training of guide dogs in the US, has written about some concerns regarding such a system. See James A. Kutsch, Jr., A Seeing Eye Perspective, SEEING EYE, [https://www.seeingeye.org/blog/a\\_seeing\\_eye\\_perspective.html](https://www.seeingeye.org/blog/a_seeing_eye_perspective.html) (last visited May 30, 2021) [<https://perma.cc/J7WF-FSXL>]; see also KUUSISTO, supra note 75, at 204.

<sup>310.</sup> See, e.g., Kutsch, supra note 309.

<sup>311.</sup> Jasmine E. Harris, Processing Disability, 64 AM. U. L. REV. 457, 529

previous research conducted on fear of the disability con said: “I don’t get a disabled parking permit. I have actually been harassed when trying to [use it] . . . I didn’t feel safe having a simple tag up.”<sup>312</sup> Nonetheless, the disabled parking permits or IDs that give disabled individuals discount rates on public transportation are widely used around the country and the world.<sup>313</sup> One might also argue that having a dog in public already signals a disability.<sup>314</sup> In addition, the vast majority of service dogs’ handlers already voluntarily use a vest or some kind of another identifier revealing that they are disabled.<sup>315</sup>

In terms of potential invasion of privacy regarding the database itself, the system would need to adhere to the standards put forth in the Health Insurance Portability and Accountability Act (“HIPAA”) regulations

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(2015).

<sup>312</sup>. Dorfman, Fear of the Disability Con, *supra* note 5, at 1081.

<sup>313</sup>. See Reciprocal Recognition of Parking Badges, INT’L TRANSP. F., <https://www.itf-oecd.org/reciprocal-recognition-parking-badges> (last visited May 30, 2021) [<https://perma.cc/NJK2-6AE2>].

<sup>314</sup>. See Kuusisto, *supra* note 75, at 117. As Kuusisto’s mother, who always instructed him to hide and overcome his blindness, reacted to his announcement that he is to get a guide dog: “I wish you weren’t doing this. Now everyone will know you can’t see.” *Id.*

<sup>315</sup>. See Frequently Asked Questions, *supra* note 51, at 2; Jen Karetnick, Service Dogs 101—Everything You Need to Know, AM. KENNEL CLUB (Sept. 24, 2019), <https://www.akc.org/expert-advice/training/service-dog-training-101/> [<https://perma.cc/XQU8-LLH7>].

that aim to protect individuals' health information.<sup>316</sup> Those include, for example, identifying the information only to "covered entities,"<sup>317</sup> "limiting the protected health information to a minimum necessary,"<sup>318</sup> and de-identifying the information.<sup>319</sup>

The second concern regards placing a financial burden on people with disabilities by requiring some kind of specific training to be eligible for the official permit (an issue that, as mentioned, is not currently regulated)<sup>320</sup> or obtaining the formal accessory to put on the dog. As

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<sup>316</sup>. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936.

<sup>317</sup>. 45 C.F.R. § 164.502(a)(1) (2020).

<sup>318</sup>. Id. § 164.502(b).

<sup>319</sup>. Id. § 164.502(d).

<sup>320</sup>. See supra Section II.A.1.

disability status is directly connected to poverty<sup>321</sup> and unemployment,<sup>322</sup> this is a major concern when discussing disability policy and should be a guiding principle when creating regulations and laws that pertain to this community. The Ninth Circuit recognized the financial burden of training

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<sup>321</sup>. Lewis Kraus, E. Lauer, R. Coleman & A. Houtenville, 2017 Disability Statistics Annual Report, UNIV. N.H. 23–26 (Jan. 2018), [https://disabilitycompendium.org/sites/default/files/user-uploads/2017\\_AnnualReport\\_2017\\_FINAL.pdf](https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf) [<https://perma.cc/85V3-P3R3>]; ROBERT HOLZMANN, LYNNE SHERBURNE-BENZ & EMIL TESLIUC, SOCIAL RISK MANAGEMENT: THE WORLD BANK’S APPROACH TO SOCIAL PROTECTION IN A GLOBALIZING WORLD 14 (2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.179.625&rep=rep1&type=pdf> [<https://perma.cc/ZD9P-T8QZ>]. In 2017, the median earnings of US civilians with disabilities ages 16 and over was \$22,047, about two-thirds of the median earnings of people without disabilities (\$32,479). See Kraus et. al, supra, at 9. For more about the connection between disability and poverty, see, for example, Jacobus tenBroek & Floyd W. Matson, The Disabled and the Law of Welfare, 54 CALIF. L. REV. 809 (1966); Armantine M. Smith, Persons with Disabilities as a Social and Economic Underclass, 12 KAN. J.L. & PUB. POL’Y 13, 21–23 (2002).

<sup>322</sup>. Press Release, Bureau of Lab. Stat., Persons with a Disability: Labor Force Characteristics—2019 (Feb. 26, 2020) <https://www.bls.gov/news.release/pdf/disabl.pdf> [<https://perma.cc/PMC8-BGW3>] (“Across all age groups, the employment-population ratios were much lower for persons with a disability than for those with no disability.”).

requirements in C.L. v. Del Amo Hospital, overturning the district court's decision requiring formal training for psychiatric service animals.<sup>323</sup> The plaintiff in the case was living on Supplemental Security Income (SSI) and therefore could only afford to self-train her dog.<sup>324</sup> The court opined that requiring a certificate for official training "would hinder the goals of the ADA . . . [and] would have negative consequences for persons with psychiatric disabilities who rely on service animals."<sup>325</sup>

The financial burden might be relatively simple to resolve. If the major training organizations were to transfer their own records about the dogs they have trained to the newly created system, most handlers would not need to reregister their dogs. They will only need to approve the transmission of information about their dogs from the training organization to the new federal permit system, without paying for a new permit. Under the proposed permit plan, people who self-train their dogs or use a smaller facility would still need to register them and would need to pay for such a service. Cost containment of such registration fees (which do not amount to paying large sums for official training like in the C.L. case) and allowing subsidies should ensure that such a step would not be onerous or cost prohibitive.

Such a permit system, however, could potentially not only create a financial burden but also an emotional one, as it reinforces the

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<sup>323</sup>. C.L. v. Del Amo Hosp., Inc., No. 19–56074, 2021 U.S. App. LEXIS 9235, at \*32–33 (9th Cir. Mar. 30, 2021).

<sup>324</sup>. Id. at \*6–7.

<sup>325</sup>. Id. at \*28.

medicalization of everyday lives of people with disabilities.<sup>326</sup> Such rules underpin the requirement that individuals prove their disabilities by constantly presenting documents that show exactly how they fit into fixed categories.<sup>327</sup> Such a process, which contrasts with the contemporary view of disability as a fluid process born from an interaction between pathology and the environment,<sup>328</sup> is referred to by disability studies scholar Ellen Samuels as Biocertification: “Biocertification materializes

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<sup>326.</sup> See Kutsch, supra note 309.

<sup>327.</sup> See Irving Kenneth Zola, Medicine as an Institution of Social Control, 20 SOCIO. REV. 487, 487 (1972); Fiona Kumari Campbell, Legislating Disability: Negative Ontologies and the Government of Legal Identities, in FOUCAULT AND THE GOVERNMENT OF DISABILITY 108, 113, 118 (Shelley Tremain ed., 2005).

<sup>328.</sup> See Sharon N. Barnartt, Disability as a Fluid State: Introduction, in DISABILITY AS A FLUID STATE 1, 2 (Sharon Barnartt ed., 2010); Irving K. Zola, Disability Statistics, What We Count and What It Tells Us: A Personal and Political Analysis, 4 J. DISABILITY POL'Y STUD. 9, 18 (1993); Saad Z. Nagi, Disability Concepts Revisited: Implications for Prevention, in DISABILITY IN AMERICA: TOWARD A NATIONAL AGENDA FOR PREVENTION 309, 326 (Andrew M. Pope & Alvin R. Tarlov eds., 1991). A similar definition was adopted by the World Health Organization. World Health Org. [WHO], Towards a Common Language for Functioning, Disability and Health, INT'L CLASSIFICATION OF FUNCTIONING, DISABILITY, HEALTH (ICF) 1, 9 (2002), <http://www.who.int/classifications/icf/training/icfbeginnersguide.pdf> [<https://perma.cc/94Z8-CG4G>].

the modern belief that only science can reliably determine the truths of identity and generally claims to offer a simple, verifiable, and concrete solution to questions of identity. Yet in practice biocertification tends to produce not straightforward answers but documentary sprawl, increased uncertainty, and bureaucratic stagnation.”<sup>329</sup> The fear of the disability con and the need to distinguish between “real” disabled individuals and the fakers are what feed the desire for biocertification processes.<sup>330</sup> When policies of this nature are not in place, such in the case of assistance animals, fear of the disability con becomes even greater.<sup>331</sup> The public suspicion is thus both the rationale behind administering biocertification policies and is also viewed as the unwanted consequence of not imposing them.

In regard to the emotional burden due to the need to reintroduce and prove an individual’s disabilities to strangers, the rules regarding the permit system need to be constructed in a way that does not create “hyper-enforcement” of the dogs’ authenticity by gatekeepers or laypeople. The regulations concerning private enforcement of the rules should remain as they are vis-à-vis HUD and ADA regulations. This

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<sup>329</sup>. ELLEN SAMUELS, FANTASIES OF IDENTIFICATION: DISABILITY, GENDER, RACE 122 (2014).

<sup>330</sup>. Campbell, supra note 327, at 128 n.17.

<sup>331</sup>. See Adrienne Matei, The Number of Fake Emotional Support Dogs is Exploding—Why? GUARDIAN (Aug. 13, 2019, 1:00 PM), <https://www.theguardian.com/lifeandstyle/2019/aug/12/fake-emotional-support-animals-service-dogs> [<https://perma.cc/62TW-AKSL>].

means that a housing provider or a public accommodation gatekeeper can only ask for documentation (as in the HUD regulations)<sup>332</sup> or ask specific questions (as in the ADA regulations)<sup>333</sup> if the disability is not readily apparent and it is unclear what service a dog provides.

A final possible concern relates to libertarian ideology about the need for restricted government intervention in issues of public policy that restrict zones of personal choice.<sup>334</sup> Such concerns might stand in the way of creating a federal permit system.<sup>335</sup> Yet it seems that after the significant public outcry about potential abuse of rules regarding assistance animals, garnering support for spending tax money on creating such a permit system might actually not be terribly difficult. This assumption is also supported by previous findings on the factors contributing to the public fear of the disability con, which demonstrated that a person's deservingness is what drives suspicion and that scarcity of resources does not.<sup>336</sup> In other words, the public might be willing to

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<sup>332</sup>. U.S. DEP'T OF HOUS. & URB. DEV., supra note 112, at 3.

<sup>333</sup>. Frequently Asked Questions, supra note 51, at 2.

<sup>334</sup>. See RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 188 (1995).

<sup>335</sup>. See Peter L. Kahn, Politics of Unregulation: Public Choice and Limits on Government, 75 CORNELL L. REV. 280, 308 (1990).

<sup>336</sup>. See Karin Bruilliard, If Emotional Support Animals Are Banned from Planes, Some People Say They'll Stop Flying, WASH. POST (Jan. 31, 2020, 7:00 AM), <https://www.washingtonpost.com/science/2020/01/31/if-emotional-support-animals-are-banned-planes-some-people-say-theyll->

take on some of the costs of regulating the issue as long as it is clear that the system can distinguish between the deserving and undeserving.<sup>337</sup>

Although current legislation in most states forbids misrepresentation of a pet or an emotional support animal as a service dog,<sup>338</sup> no restrictions exist on selling informal visible signs of compliance such as vests, harnesses, or IDs. Regulation in the field should focus on the sources of such equipment that allows misrepresentation rather than on the end-consumers. After regulation of a permit system and the development of formal identification for service animals are implemented, such regulation would be essential (as only the state or the federal government would be in charge of distributing such equipment). Regardless, such regulation would seem to minimize the use of vests and other informal visible signs of compliance by handlers and “fakers” alike, putting far less pressure on the former to oblige with the current cultural climate of using such equipment.

Changes on the federal level may be slow and hard to implement, creating centralized permit systems and restricting the sale of gear online might better be done through a uniform law that would be adopted by all states. The Uniform Law Commission (“ULC”) promulgates uniform laws with the aim to promote uniformity of state law.<sup>339</sup> Therefore, a possible

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stop-flying/ [https://perma.cc/UP8D-HZ7L].

<sup>337</sup>. Dorfman, [Un]Usual Suspects, *supra* note 5, at 595–96.

<sup>338</sup>. See supra Table 3.

<sup>339</sup>. See Uniform Law Commission, Overview, UNIFORMSLAWS.ORG, <https://www.uniformlaws.org/>

strategy to promote these issues should be drawing the attention of ULC to assistance-animal disability con and its implications on the disability community. A different strategy could be the promotion of model acts. Those are similar to uniform laws but may be proposed by any individual or organization and not only by the ULC.<sup>340</sup> Model acts, however, are usually only used as a basis for designing state laws and are not adopted in their entirety like uniform laws, and thus while easier to enact they might be less effective.<sup>341</sup>

### C. Enforcement of the Rules by Gatekeepers of Public Accommodations

Disability laws have traditionally been left to private enforcement by lay members of society, especially in everyday situations where formal law enforcement is absent.<sup>342</sup> As legal scholar Sarah Marusek observes:

Constitutive legal theory reminds us that law is made by everyday actors interpreting what the law really means. In this way, the non-disabled members of society have as much to say, if not more, about how the ADA works for the simple reason that,

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aboutulc/overview (last visited May 21, 2021) [<https://perma.cc/49CP-WJCG>].

<sup>340.</sup> Deanna Barmakian, Uniform Laws and Model Acts, HARV. L. SCH. LIBR. <https://guides.library.harvard.edu/law/unifmodelacts> (last visited May 21, 2021) [<https://perma.cc/PNP3-TCPY>].

<sup>341.</sup> Id.

<sup>342.</sup> See Jackson, supra note 209.

in my view, the non-disabled are those who implement disability policy in everyday situations.<sup>343</sup>

In the case of having service dogs in public spaces, public accommodation gatekeepers (businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices)<sup>344</sup> are supposed to enforce the federal regulations. Many interviewees expressed frustration about the lack of enforcement by the businesses themselves. Eva said:

[Businesses] are lazy. They are supposed to ask when a dog enters the stores. Businesses are supposed to be trained in disability law. So what they have to do is when somebody with an animal enters the store, they have to physically move, to go there, and say, "Hello, is this a service animal you're using for a disability?" Many people would say "yes." But then they will have the second question to ask: "What task is your dog trained to perform?" and most people cannot answer that. They will say support or comfort or whatever, and as a business owner . . .

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<sup>343</sup>. SARAH MARUSEK, POLITICS OF PARKING: RIGHTS, IDENTITY, AND PROPERTY 139 (2012); see also SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 9 (2009).

<sup>344</sup>. U.S. Dep't of Just., Information and Technical Assistance on the Americans with Disabilities Act: Public Accommodations and Commercial Facilities, ADA.GOV, [https://www.ada.gov/ada\\_title\\_III.htm](https://www.ada.gov/ada_title_III.htm) (last visited May 21, 2021) [<https://perma.cc/ENW7-VQDC>].

you can tell them, “I’m sorry; I can’t let you in.” It doesn’t matter whether the person is disabled or not; if the dog is not trained, they have no access, no right, being in the store, and they can tell them to leave the dogs outside.

Lindsey agreed:

The problem is that businesses don’t know their own rights, and they don’t enforce their own rights. Like, they’re not asking people, “Is that a service dog?” and “What does he do?” And they’re not saying, “You know what, your dog just tried to bite a kid; we need you to leave.” They are just like “Oh, we can’t ask anything,” or “We can’t ask them to leave no matter what the dog, you know, pees on.” And it’s just like, people are going to keep gaming the system if you keep letting them, but if you crack down a little bit [it would help stop the abuse]. Even those kinds of people [who commit disability con] don’t really want conflict because I think they know that they’re in the wrong, but they’re just like “As long as nobody says anything to me, of course I can do this; there’s no problem.”

Efforts should go into ensuring that gatekeepers are well-educated about the legal requirements and their assigned role in enforcing disability law. Gatekeeper education should also emphasize notions about biases related to particular breeds of dogs (and emphasizing the use of small psychiatric service dogs). Airline carriers, as gatekeepers, have addressed this issue in an incorrect manner.<sup>345</sup> This education

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<sup>345</sup>. See discussion supra Section II.A.2.

should also alert business owners to their rights to exclude service dogs when they are not on a leash or harness, are out of control, are not housebroken,<sup>346</sup> or are presenting a direct threat to the health or safety of others.<sup>347</sup> A good example of gatekeeper education is illustrated by a restaurant in Michigan that first denied access to a service dog handler, later apologized, and then hosted a special seminar for its employees and other business owners on proper service animal regulation.<sup>348</sup> Those trainings should be carried out by service dogs' handlers themselves, as they have the expertise and firsthand knowledge about such situations from lived experience.<sup>349</sup> Thus involving people with disabilities in the training of gatekeepers would also adhere to the famous disability rights adage "nothing about us without us."<sup>350</sup> Educating the public about

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<sup>346.</sup> 28 C.F.R. § 36.302(c)(2) (2020).

<sup>347.</sup> Id. § 36.208.

<sup>348.</sup> Brianna Owczarzak & Craig McMorris, Restaurant Hosts Seminar on Service Animals After Turning Away Veteran, WNEM.COM (Apr. 25, 2018), <http://www.wnem.com/story/38042363/restaurant-hosts-seminar-on-service-animals-after-turning-away-veteran> [<https://perma.cc/FV2V-HHKV>].

<sup>349.</sup> Doron Dorfman & Mariela Yabo, The Professionalization of Urban Accessibility, 47 FORDHAM URB. L.J. 1213, 1231–35 (2020) (discussing the process of professionalization in disability policy and how disabled users positioned themselves as experts credentialed by their lived experiences).

<sup>350.</sup> JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US—DISABILITY OPPRESSION AND EMPOWERMENT 16–17 (1998).

the variety of service dogs and the value they present to people with disabilities could serve as a central means of fighting current public misconceptions about and harassment of service dog's handlers.

## V. CONCLUSION

The moral panic related to disability con has clearly manifested itself concerning the use of assistance animals. Common misconceptions, fueled by portrayal in the media, combined with ambiguous and complex rules lacking enforcement mechanisms have all led to stigmas regarding assistance dogs and their handlers. Disabled handlers bear the burden; those who forced to adopt culturally accepted norms of presenting their dogs as trustworthy while often being accused of fakery. As the empirical findings from this study demonstrate, the public is more suspicious of handlers who use smaller breeds of dogs and is on the lookout for visual signs of compliance in the form of vests. This Article highlights the voices of disabled handlers, stresses the need for comprehensive regulation of the use of assistance animals, and emphasizes psychological-behavioral interventions to stop abuses under current law. New proposed regulations could include creating a centralized permit system, ending the sale of accessories not required by federal law and creating public confusion, and educating business owners and the public. Such efforts would allow people with disabilities great access into civic life and would better ensure that the law's aspiration toward inclusion be fulfilled—not merely remain on the books.

