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Animal Law - When Dogs Bite: A Fair, Effective, and Comprehensive Solution to the Contemporary Problem of Dog Attacks

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ANIMAL LAW—WHEN DOGS BITE: A FAIR, EFFECTIVE, AND COMPREHENSIVE SOLUTION TO THE CONTEMPORARY PROBLEM OF DOG ATTACKS

I. INTRODUCTION

Suppose two families—the Smiths and the Joneses—relocate to the city of Maumelle, Arkansas.[1] Also suppose that each family brings along its beloved dog: Sparky Smith, a Labrador Retriever, and Johnny Jones, an American Bulldog.[2] For the sake of illustration, assume the following set of facts about these two dogs: Sparky, an unaltered male, is an "outside dog" and is wary of strangers (especially children) who approach his territory. In the past, Sparky has growled at and nipped young children who reached through a chain link fence that surrounds the Smiths' back yard, attacked several postal employees, and harassed and intimidated utility workers. Sparky is also an escape artist and regularly manages to jump over or dig under the fences that surround his yard. Previously, Sparky bit and severely injured a small boy's hand. The Smiths paid for the boy's medical care, and his parents agreed not to pursue the matter further.

Johnny, on the other hand, is a "gentle giant" who spends most of his time asleep on the family couch. Johnny has never displayed any aggression and is particularly calm around small children. He was neutered while a puppy and is never allowed to roam at large; Mr. or Mrs. Jones always supervises Johnny when he is unleashed outside in his yard.

Which dog would you suppose the city of Maumelle will legislate most harshly against? If you answered "Sparky," you are incorrect! Pursuant to section 10-134(f) of the Maumelle City Code, it will be illegal for the Joneses to even bring Johnny with them to Maumelle.[3] He will be banned

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1. The beautiful city of Maumelle is located in north-central Pulaski County, Arkansas, and has an estimated population of 15,867. United States Census Bureau, http://www.census.gov (follow "American FactFinder" hyperlink; then follow "Population Finder" hyperlink; then enter "Maumelle" and select "Arkansas" (last visited Oct. 12, 2009)). As of the 2000 Census, Maumelle had the highest median household income and the lowest portion of its population living below the poverty line among all cities in the state with a population above one hundred people. United States Census Bureau, http://factfinder.census.gov (follow "people" hyperlink, then follow "income" hyperlink, then enter "Maumelle" and select "Arkansas", then follow "Income and Poverty: for all city/town in state" hyperlink (last visited Oct. 12, 2009)). Maumelle is also the home of the author, his wife, and their three fabulous pugs.

2. These breeds were chosen to demonstrate the operation of a local ordinance. The author intends no comment on either breed's suitability as a pet or any offense toward their respective devotees.

3. MAUMELLE, ARK., CODE § 10-134(f) (2002). The ordinance provides the following: Banning of specific breeds. Banned breeds of dogs are banned entirely and may not be

from the city—not because of any particular threat he poses to the community—but because he is a member of a breed singled out as inherently dangerous. Sparky, conversely, will be allowed to come with his family, and unless he is found to be vicious or dangerous by the office of animal services,[4] will be free to roam the fences of his yard and prey upon anyone who dares to approach the Smiths' home.

This hypothetical demonstrates the problem with so-called breed-specific legislation and dangerous-dog laws.[5] Under the former, a dog is not judged on his behavior and disposition but rather upon his identity as a member of a particular breed that has been deemed—on the whole—to be unusually prone to violent attacks.[6] Under the latter, a dog is deemed dangerous or vicious vis-à-vis documented complaints in a particular jurisdiction.[7] Maumelle is just one of many cities throughout Arkansas and the country that has adopted such an approach to further the public policy of preventing vicious dog attacks.[8] As the hypothetical demonstrates, however, these laws do not address the root of the problem and have unfortunate, inefficient, and unintended consequences.

This note proposes a comprehensive solution to the problem of dog bites and maulings. It begins by exploring the various means adopted by state and local governments in recent years to reduce the number of vicious dog attacks, specifically focusing on breed-specific and dangerous-dog laws and

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owned or kept within the city. Banned breeds of dogs are any of the following:

(1) American Pit Bull Terrier.
(2) Staffordshire Bull Terrier.
(3) American Staffordshire Terrier.
(4) American Bulldog.
(5) Any dog whose sire or dam is a dog of a breed which is defined as a banned breed of dog under this section.
(6) Any dog whose owner registers, defines, admits or otherwise identifies the dog as being of a banned breed.
(7) Any dog conforming or substantially conforming to the breed of American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or American Bulldog as defined by the United Kennel Club or American Kennel Club.
(8) Any dog which is of the breed commonly referred to as "pit bull" and commonly recognizable and identifiable as such.
(9) Any vicious dog which is found at large in violation of section 10-90.

4. *See* MAUMELLE, ARK., CODE § 10-133(b) (2002).
5. *See* discussion *infra* Part II.A.
6. *See infra* Part II.A.2.
7. *See infra* Part II.A.1.
8. *See, e.g.*, LITTLE ROCK, ARK., CODE § 6-20 (1988); NORTH LITTLE ROCK, ARK., CODE § 10-46 (1996); PINE BLUFF, ARK., CODE § 5-27 (1990); CINCINNATI, OHIO, CODE § 701-6 (2003); DENVER, COLO., CODE § 8-55 (1982). These ordinances (and many others) may be accessed by visiting http://www.municode.com/Resources/OnlineLibrary.asp (last visited Oct. 12, 2009).

the legal effects of each approach.[9] Next, the note will survey the civil remedies a victim of a dog attack might have against the dog's owner and the efficacy of each.[10] The note will then explore the limited, though recently expanded, circumstances under which a dog owner can be held criminally liable for the actions of his dog.[11] With this frame of reference, the note will propose the following three-point plan to remedy the problem of vicious dog attacks: (1) the scope of criminal liability should continue to expand in the case of preventable and especially violent attacks; (2) a dog owner's civil liability should be based on a simple negligence standard under which neither the animal's breed nor its prior behavioral history are entirely dispositive, but rather factors to be considered in determining the scope of the owner's duty; and (3) state and local dog registration laws should be practical, easily enforceable, and aimed solely at promoting responsible dog ownership, whatever the breed.

II. BACKGROUND

In recent years, the dog-bite problem has become an epidemic.[12] Recent estimates show that four to five million Americans, or approximately two percent of the population, experience a dog attack each year.[13] Of this group, more than fifty percent are young children;[14] in fact, more than half of American children have been bitten at least once before the age of twelve.[15] Furthermore, the severity of dog attacks is increasing.[16] Each year, more than 350,000 emergency room visits involve a serious dog bite; this averages out to be about 960 dog attacks per day.[17]

Fortunately, however, even the most violent attacks do not usually result in the victim's death.[18] Nevertheless, the overall cost to society is stag-

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. *See* Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 FORDHAM L. REV. 2847, 2849 (2006).

13. *Id.* at 2849 (citing Kenneth Morgan Phillips, *Dog Bite Statistics*, http://www.dogbitelaw.com/PAGES/statistics.html (last visited Oct. 12, 2009)).

14. *Id.* (citing Phillips, *supra* note 13).

15. *Id.* (citing Phillips, *supra* note 13).

16. For example, "while the dog population increased only two percent between 1986 and 1996, the number of dog bites requiring medical attention rose thirty-seven percent." *Id.* (citing Matt Wapner & James F. Wilson, *Are Laws Prohibiting Ownership of Pit Bull-Type Dogs Legally Enforceable?*, J. AM. VETERINARY MED. ASS'N, May 15, 2000, at 1552).

17. *Id.* at 2850 (citing the ubiquity of dog bites as discussed in Wapner & Wilson, *supra* note 16, at 1552) ("dog bites now rank among the top causes of nonfatal injuries, and are responsible second only to baseball and softball injuries for emergency room visits.")).

18. Hussain, *supra* note 12, at 2850 (citing Phillips, *supra* note 13).

gering. Not only do the most severe nonfatal attacks require extensive medical care, but they also wreak havoc on the insurance industry.[19] In response, many insurers specifically exclude losses stemming from dog bites in their homeowners' policies while others refuse altogether to write policies for homeowners who keep particularly dangerous breeds in their homes.[20]

A. Municipal Regulation of Dog Ownership

Given the problem's local nature, it is not surprising that the principal laws governing the keeping of dogs as pets are state, local, and municipal ordinances.[21] Generally, these ordinances are aimed at regulating the ownership of potentially vicious dogs within a given jurisdiction.[22] There are essentially two types of these laws: dangerous-dog laws and breed-specific legislation.[23] Dangerous-dog laws impose ownership regulations on particularly vicious or dangerous dogs; the determination that a dog is vicious or dangerous is usually based on the dog's prior conduct.[24] Breed-specific legislation, on the other hand, "regulates or bans ownership of particular breeds based on a belief that the breed is inherently vicious or dangerous."[25]

1. *Dangerous-Dog Laws*

The goal of dangerous-dog laws is "to reduce the threat dangerous dogs pose to the public by requiring owners of dogs so labeled to abide by statutorily defined precautionary measures."[26] Generally, in order to be classified as dangerous or vicious, the dog must have threatened or injured a person who was lawfully on the owner's premises and who did not provoke the attack.[27] These laws impose regulations on owners based on an examina-

19. *Id.* (citing the effects of dog bites on the insurance industry as discussed in Phillips, *supra* note 13 and Charles Toutant, *Putting a Leash on Dog-Bite Claims: Carriers Seek to Limit Homeowner Coverage for Fierce Canine Breeds*, 173 N.J. L.J. 277, 277 (2003) (stating that dog bites "account for one-third of homeowner insurance claims nationally, and insurance companies pay out approximately $345 million of the more than $1 billion loss associated with dog bites annually")).

20. *Id.* (citing Toutant, *supra* note 19, at 277).

21. *See id.* at 2854. *See also* MARY RANDOLPH, EVERY DOG'S LEGAL GUIDE: A MUST-HAVE BOOK FOR YOUR OWNER 286 (6th ed. 2007).

22. Thirty-one states and the District of Columbia regulate the ownership of dangerous dogs on a statewide level. RANDOLPH, *supra* note 21, at 279.

23. *See* Hussain, *supra* note 12, at 2854.

24. *Id.* at 2854–55.

25. *Id.* at 2854.

26. *Id.* at 2855.

27. *See id. See also* RANDOLPH, *supra* note 21, at 280.

tion of the "behavioral history of a particular dog and owner" and not on the perceived dangerousness of its breed in general.[28]

One of the obvious challenges inherent to dangerous-dog laws is enforcement. Any investigation into a potentially dangerous dog must logically begin with a formal complaint from a member of the public, animal control officer, or bite victim.[29] In the next step of the process, the appropriate animal control agency notifies the owner that complaints have been filed against the dog or that the agency has found the dog to be vicious or dangerous by an independent investigation.[30] The agency then schedules a hearing in which the owner may "contest the determination before a judge or public health official."[31] If the owner is unsuccessful and the judge or official confirms the agency's determination, he must undertake "statutorily provided safety precautions or risk fines or forfeiture and possible destruction of the dog."[32] It is usually within the judge's discretion to "order immediate destruction of the dog or removal from city limits" if the attack was extremely vicious.[33]

2. *Breed-Specific Legislation*

Rather than determining whether a dog is dangerous based on prior conduct, breed-specific legislation targets all dogs of a certain breed "based solely on membership in that breed."[34] The enactment of these laws is often preceded by a particularly vicious and often fatal attack by a dog of a particularly dangerous breed.[35] The spectrum of breed-specific legislation is quite wide, with some jurisdictions imposing a total breed ban[36] and others only requiring additional licensing requirements.[37] Despite this variety, the procedural operation of most breed-specific ordinances is similar.[38] After receiving notice of an allegedly "illegal" dog, the appropriate agency will investigate to determine whether the dog is affected by the ordinance. If the

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28. *See* Hussain, *supra* note 12, at 2855.

29. *See id. See also* RANDOLPH, *supra* note 21, at 279.

30. Hussain, *supra* note 12, at 2855.

31. *Id.* at 2856.

32. *Id.*

33. *Id.*

34. *Id.* at 2859 ("Breed-specific legislation regulates or bans ownership of particular breeds, typically providing that ownership of a target breed is prima facie evidence of ownership of a vicious or dangerous dog.")

35. *Id.*

36. For example, the City of Maumelle, Arkansas, bans all pit bulls (specifically the American Pit Bull Terrier, Staffordshire Bull Terrier, and the American Staffordshire Terrier) as well as American Bulldogs. MAUMELLE, ARK., CODE § 10-134(f) (2002).

37. *See, e.g.*, PINE BLUFF, ARK., CODE § 5-43 (1990).

38. *See* Hussain, *supra* note 12, at 2861.

agency classifies the dog as a member of the prohibited breed, the burden shifts to the owner to present evidence that the dog is not a member of the target breed, thereby defeating the applicability of such an ordinance.[39] Ultimately, if the owner cannot overcome the presumption that the dog is a member of the prohibited breed, he "must abide by statutorily imposed safety precautions or risk fines or forfeiture and possible destruction of the dog."[40]

3. *Constitutionality of Dog Registration Laws*

Two United States Supreme Court rulings have established that "legislation regulating dogs is a valid exercise of the states' police power"[41] and "that such regulations do not amount to a violation of a dog owner's substantive due process."[42] Dangerous-dog laws also generally survive Equal Protection[43] challenges "[b]ecause they serve a legitimate governmental interest in protecting the public health and welfare."[44] Nevertheless, procedural due process issues often arise because particular owners might not have the opportunity to contest a determination that their dog is vicious or dangerous under the relevant law.[45] Generally, however, it is relatively easy for a municipality to draft and enforce a dangerous-dog law that does not offend the Constitution.

Because most breed-specific laws target only one or a few breeds, scholars have argued that such laws violate the owners' constitutional right to equal protection of the laws.[46] The Equal Protection Clause says that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[47] The United States Supreme Court has stated that this clause is "essentially a direction that all persons similarly situated should be treated alike."[48] Although countless laws operate by classifying people into

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39. *Id.*

40. *Id.*

41. *Id.* at 2858 (noting the ruling of *Sentell v. New Orleans & Carrollton Railroad Co.*, 166 U.S. 698 (1897)).

42. *Id.* (noting the ruling of *Nicchia v. New York*, 254 U.S. 228 (1920)).

43. *See infra* notes 46–57 and accompanying text.

44. *See* Hussain, *supra* note 12, at 2858.

45. *See, e.g.*, Phillips v. San Luis Obispo County Dep't of Animal Regulation, 228 Cal. Rptr. 101 (Cal. Ct. App. 1986).

46. *See* Hussain, *supra* note 12, at 2862 n. 127 (citing Colo. Dog Fanciers, Inc. v. City of Denver, 820 P.2d 644, 652 (Colo. 1991) (en banc); Vanater v. Vill. of S. Point, 717 F. Supp. 1236, 1245 (S.D. Ohio 1989); State v. Peters, 534 So. 2d 760, 763 (Fla. Dist. Ct. App. 1988)).

47. U.S. CONST. amend. XIV, § 1.

48. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

different groups,[49] only those that classify people into suspect categories (such as race, alienage, or national origin)[50] or implicate fundamental rights or interests (such as the freedom of association)[51] are subject to the highest level of judicial review: strict scrutiny.[52] A middle level of review, intermediate scrutiny, is used where a law discriminates on the basis of gender.[53] Breed-specific legislation—like all laws not subjected to strict or intermediate scrutiny[54]—faces the most deferential standard of judicial review, the so-called "rational basis" test.[55]

Most of the Equal Protection challenges against breed-specific ordinances have been brought by owners of pit bulls who assert that they are being singled out and not receiving the same treatment under the law as other dog owners.[56] Finding a rational relationship between concern for public health and welfare and the classification and regulation of particularly dangerous breeds, courts almost always hold that such ordinances are constitutional.[57]

Other pit bull owners have challenged the constitutionality of the bans on the bases of overbreadth,[58] under-inclusiveness,[59] and substantive due

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49. For example, most states restrict people younger than sixteen from obtaining a driver's license. *See, e.g.*, ARK. CODE ANN. § 27-16-604 (LEXIS Repl. 2008).

50. *See Cleburne*, 473 U.S. at 440.

51. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

52. Professor Chemerinsky has summarized strict scrutiny thusly: "the government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 671 (3d ed. 2006).

53. Reed v. Reed, 404 U.S. 71 (1971). Under this standard of review, the government's objective must be characterized as "important" (though not a "compelling" interest, as under strict scrutiny) and the law must bear a "substantial relationship" to that objective. CHEMERINSKY, *supra* note 52, at 671.

54. The relative mutability of a given characteristic seems to be the key factor in receiving heightened scrutiny in an Equal Protection challenge. Race, national origin, and gender are all immutable characteristics and receive heightened scrutiny. Professor Chemerinsky posits that "it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change." CHEMERINSKY, *supra* note 52, at 672.

55. Rational basis review is by far the most deferential standard of review under Equal Protection. First, unlike strict and intermediate scrutiny, the challenger bears the burden of proof. *Id.* Second, all that is required is a rational relationship between the classification and a legitimate (not even "important") governmental purpose. *Id.*

56. Because dog owners in general and pit bull owners specifically do not comprise a suspect class or implicate a fundamental right, courts have almost uniformly applied minimal scrutiny to breed-specific ordinances. *See* Hussain, *supra* note 12, at 2862 (citations omitted).

57. *See* Hussain, *supra* note 12, at 2862.

58. *See* Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah 1991).

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

process.[60] These challenges are almost always unsuccessful. Breed-specific ordinances, however, have been successfully challenged under the void-for-vagueness doctrine under procedural due process.[61]

Procedural due process generally requires that laws provide notice[62] and the opportunity to be heard.[63] Local ordinances must be sufficiently definite so that ordinary persons can understand what conduct is prohibited.[64] Furthermore, when a law does not provide adequate notice or is susceptible to arbitrary enforcement, it can constitute a violation of due process via the void-for-vagueness doctrine.[65] Owners of banned breeds have successfully argued that the ordinances, particularly with regard to the statutory definition of a pit bull, are unconstitutionally vague because there is no such breed as a "pit bull" and that "the statute[s] [fail] to adequately define the breeds included within the classification and thus subject to the regulation."[66] Although the void-for-vagueness doctrine has not significantly ameliorated pit bull bans, it has likely forced municipalities to sharpen the language of their ordinances to give fair warning to dog owners of exactly what breeds are banned.

B. Civil Suits for Harm Caused by Dog Bites

Tort law provides a system of redress for victims injured by dog bites.[67] The owner of the attacking dog may be held liable through the common law one-bite rule,[68] negligence,[69] or strict liability.[70] Although these

60. *See* Hearn v. City of Overland Park, 772 P.2d 758 (Kan. 1989).

61. *See* Am. Dog Owners Ass'n. v. City of Des Moines, 469 N.W.2d 416 (Iowa 1991); Am. Dog Owners Ass'n. v. City of Lynn, 533 N.E.2d 642 (Mass. 1989).

62. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

63. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

64. Reinert v. State, 348 Ark. 1, 4, 71 S.W.3d 52, 54 (2002).

65. *See* Township of Plymouth v. Hancock, 600 N.W.2d 380, 382 (Mich. Ct. App. 1999).

66. *See* Hussain, *supra* note 12, at 2866.

67. *See, e.g.*, Hamby v. Haskins, 275 Ark. 385, 630 S.W.2d 37 (1982); Strange v. Stovall, 261 Ark. 53, 546 S.W.2d 421 (1977); Finley v. Smith, 240 Ark. 323, 399 S.W.2d 271 (1966).

68. The rule is based on the notion that every dog should be allowed "one bite" before the owner has actual or constructive knowledge of its propensity for viciousness. *See, e.g.*, Cindy Andrist, *Is There (and Should There Be) Any "Bite" Left in Georgia's "First Bite" Rule?*, 34 GA. L. REV. 1343, 1344 (2000) (quoting Torrance v. Brennan, 432 S.E.2d 658, 660 (Ga. Ct. App. 1993)).

69. *See* Rebecca F. Wisch, Quick Overview of Dog Bite Laws, Animal Legal & Historical Center, 2004, http://www.animallaw.info/articles/qvusdogbite.htm (last visited Oct. 12, 2009).

70. Historically, there was a bright-line dichotomy between cases involving wild animals that have caused harm (where strict liability was imposed) and cases involving domestic animals (where negligence principles carried the day). *See* Hilary M. Schwartzberg, *Tort*

causes of action seem to provide several viable options to injured plaintiffs, the respective prima facie cases may be difficult to establish and several powerful defenses are available to defendants, such as provocation, contributory negligence, and victim's prior knowledge.

1. *Establishing a Prima Facie Case; Ownership and Scienter*

The first (though often overlooked) requirement in stating a cause of action will be establishing that the defendant was in fact the animal's owner or keeper.[71] For the purposes of dog-bite liability, the determination that a person was the owner or keeper will not turn on the amount of time the animal was in the person's custody; rather, the question is whether he attempted to control the animal during the period of custody.[72] The concept of undertaking control is generally dispositive of whether one will be found to be an owner or keeper of an animal. For example, courts have held that roommates,[73] family members,[74] employers,[75] and landlords[76] of a person who had been entrusted with the care of an animal *were not* owners and keepers for the purposes of liability despite their close association to the entrusted person and the animal.

Having established the identity of the legal owner or keeper, the plaintiff now must choose one of two theories of liability: common-law strict liability or negligence. The case of *Bradley v. Hendricks* clearly lays out the prima facie case for common law strict liability in Arkansas[77]:

> It is well settled in Arkansas that when a person is injured by a domestic animal legally permitted to run at large by its owner, in order for the injured person to recover damages from the owner without the necessity of

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Law in Action and Dog Bite Liability: How the American Legal System Blocks Plaintiffs From Compensation, 40 CONN. L. REV. 845, 857 (2008). Today, however, "thirty-two American states currently provide some form of strict liability rule for harm caused by pet dogs." *Id.*

71. *See, e.g.*, Bradley v. Hendricks, 251 Ark. 733, 734, 474 S.W.2d 677, 678 (1972) (referring to the animal's "owner" four times in laying out the prima facie case).

72. For example, in *Fontecchio v. Esposito*, the court determined that the dog-sitter defendant was the keeper of a dog for which she was caring while the owner of the dog was away. 108 A.D.2d 780 (N.Y. App. Div. 1985). Control over the dog was the determinative factor: the dog-sitter agreed to keep the dog on her premises and to feed, shelter, and generally care for the dog while the owner was on vacation. *Id.*

73. *See* Goodman v. Kahn, 356 S.E.2d 757 (Ga. Ct. App. 1987).

74. *See* Arslanoglou v. Defayette, 105 A.D.2d 973 (N.Y. App. Div. 1984).

75. *See* Hackett v. Dayton Hudson Corp., 382 S.E.2d 180 (Ga. Ct. App. 1989) (holding that defendant employer was not a keeper of an employee's dog even though it allowed employee to keep dog on its premises).

76. *See* Stokes v. Lyddy, 815 A.2d 263 (Conn. App. Ct. 2003); RESTATEMENT (SECOND) OF TORTS § 514 (1977).

77. 251 Ark. 733, 474 S.W.2d 677 (1972).

> proving the owner's negligence, it must be shown that the animal has vicious tendencies or dangerous propensities and that the owner knew, or should have known, of such tendencies or propensities.[78]

The scienter requirement—whether the owner knew of the animal's vicious tendencies or dangerous propensities—is generally a question of fact.[79] For example, in *Bradley*, the Arkansas Supreme Court held that affirmative testimony on the animal's temperament given by witnesses and the defendant's own testimony as to her knowledge of that temperament constituted substantial evidence and thus were properly submitted to the jury as the finder of fact.[80] In a subsequent case, *Hamby v. Haskins*, the Arkansas Supreme Court established that an owner may have constructive notice of an animal's viciousness if, through the exercise of reasonable diligence, he would have been aware of the animal's dangerous propensities.[81] The court found the fact that the dog's previous owner had kept it contained was sufficient to put the defendant on constructive notice.[82] *Hamby* is also an example of how a plaintiff can pursue a negligence theory in the alternative.[83]

2. *Overcoming Nonlegal Bars to Recovery*

The strong correlation between poverty and violent dog attacks cannot be overlooked in considering a hypothetical victim's decision to sue and her probability of recovering damages. The KC Dog Blog,[84] a website that calls itself the "Unofficial Watchdog on Animal Welfare Issues," recently posted an interesting analysis of dog-bite fatalities in 2008.[85] Its author undertook an informal survey of dog-bite fatalities occurring in 2008 as reported by various media sources and his findings are rather startling. Needless to say,

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78. *Id.* at 734, 474 S.W.2d at 678 (citing Finley v. Smith, 240 Ark. 323, 399 S.W.2d 271 (1966); McIntyre v. Prater, 189 Ark. 596, 74 S.W.2d 639 (1934); Field v. Viraldo, 141 Ark. 32, 216 S.W. 8 (1919); Holt v. Leslie, 116 Ark. 433, 173 S.W. 191 (1915)).

79. *Id.* at 734, 474 S.W.2d at 678.

80. *Id.* at 740, 474 S.W.2d at 681.

81. 275 Ark. 385, 388, 630 S.W.2d 37, 38–39 (1982).

82. *Id.* at 388, 630 S.W.2d at 38–39.

83. In order to establish a prima facie case in a common law negligence action, the plaintiff must prove that the defendant had a duty to protect persons in the plaintiff's position from foreseeable dangers posed by the animal, that the defendant breached this duty, and that the breach of duty was a proximate cause of the plaintiff's injury. *See* Allison E. Butler, Annotation, *Cause of Action Against Owner, Keeper or Harborer of Domestic Animal to Recover for Personal Injuries Caused by Animal*, 33 CAUSES OF ACTION 2D 293 (2008).

84. Brent Toellner, *KC Dog Blog*, http://btoellner.typepad.com/kcdogblog/ (last visited Oct. 12, 2009).

85. Brent Toellner, *KC Dog Blog, Dog Bite Fatalities*, http://btoellner.typepad.com/kcdogblog/2009/01/2008-dog-bite-fatalities.html (last visited Oct. 12, 2009).

the author disclaimed the unscientific nature of his study and acknowledged that the list is likely to be incomplete.[86] Nevertheless, the study found that almost every fatal attack on adults during 2008 happened in a low-income city or county.[87] The study defined low-income areas as any city or county with a poverty rate above the national level of twelve percent.[88] Possible explanations for this phenomenon include lower levels of education (which might lead to poor ownership and training practices), high-crime neighborhoods (which might incentivize ownership of aggressive breeds), and greater levels of household violence (which might increase the aggressiveness of dogs). Regardless of the cause, the realities of shallow-pocket defendants and their likely lack of substantial liability insurance might effectively prevent a victim from even pursuing redress in the courts.

3. *Affirmative Defenses*

Even when a plaintiff can establish a prima facie case under strict liability theories or negligence, it can be difficult to prevail. This is because the dog-owner has several potent affirmative defenses, most importantly the doctrines of provocation and comparative negligence.

a. Provocation

The concept of provocation is that although the dog-bite victim was indeed injured by the animal, he directly caused it to become aggressive, and therefore should not be allowed to hold its owner responsible because without his action the attack would not have occurred.[89] Under Arkansas law, the doctrine is recognized in Model Jury Instruction 1603:
" _____ contend(s) that _____ was guilty of fault which was a proximate cause of his/her own [injury][damages]. _____ [has][have] the burden of proving this contention."[90] Although no Arkansas case specifically discusses what constitutes provocation, other jurisdictions have held the following acts as provocation and denied liability: striking the dog,[91]

86. *Id.*

87. *Id.* Interestingly, attacks on young children did not seem to have as strong of a correlation. The author attributes this to the fact that those types of attacks necessarily involve negligence on the part of supervising adults and do not likely implicate society-wide trends or factors.

88. *Id.*

89. *See* Jay M. Zitter, Annotation, *Intentional Provocation, Contributory or Comparative Negligence, or Assumption of Risk as Defense to Action for Injury by Dog*, 11 A.L.R. 5th 127, 147 (1993) (stating that "it would not be just to make the owner pay where the bite was the fault of the victim.").

90. ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL AMI 1603 (2008).

91. *See, e.g.*, Paulsen v. Courtney, 277 N.W.2d 233 (Neb. 1979).

pulling or pushing the dog or its chain,[92] hugging the dog,[93] straddling or attempting to ride the dog,[94] carrying the dog,[95] stepping on or falling over the dog,[96] shouting or yelling at the dog,[97] playing with the dog,[98] feeding the dog,[99] approaching the dog/proximity,[100] putting body part through or over a fence,[101] and entering yard or porch area.[102] This list is not exhaustive[103] nor is it clear that these acts automatically trigger the provocation defense;[104] rather, it tends to show that a defendant generally has a broad initiative to establish the defense.

b. Comparative negligence

Unlike some jurisdictions that apply the harsh doctrine of contributory negligence,[105] Arkansas employs the more equitable doctrine of comparative negligence.[106]

Arkansas Model Jury Instruction 1604 sets forth the doctrine in dog-bite cases:

> If you should find that the occurrence was proximately caused by the conduct of _____ in keeping the animal and not by any fault on the part of _____, then _____ is entitled to recover the full amount of any damages he/she has sustained as a result of the occurrence.
>
> If you find that the occurrence was proximately caused both by _____'s conduct in keeping the animal and by fault on the part of _____, then you must determine their comparative fault.
>
> If the fault of _____ is of less degree than the fault of _____, then _____ is entitled to recover any damages which you may find he/she has sustained as a result of the occurrence after you

92. *See, e.g.*, Reed v. Bowen, 503 So. 2d 1265 (Fla. Dist. Ct. App. 1986).
93. *See, e.g.*, Nelson v. Hansen, 102 N.W.2d 251 (Wis. 1960).
94. *See, e.g.*, Staniszeski v. Walker, 550 So. 2d 19 (Fla. Dist. Ct. App. 1989).
95. *See, e.g.*, Pulley v. Malek, 495 N.E.2d 402 (Ohio 1986).
96. *See, e.g.*, Rutland v. Biel, 277 So. 2d 807 (Fla. Dist. Ct. App. 1973).
97. *See, e.g.*, Hayes v. McFarland, 535 So. 2d 568 (La. Ct. App. 1988).
98. *See, e.g.*, Grummel v. Decker, 292 N.W. 562 (Mich. 1940).
99. *See, e.g.*, Stehl v. Dose, 403 N.E.2d 1301 (Ill. App. Ct. 1980).
100. *See, e.g.*, Ambort v. Nowlin, 289 Ark. 124, 709 S.W.2d 407 (1986).
101. *See, e.g.*, Blair v. Jackson, 526 S.W.2d 120 (Tenn. Ct. App. 1973).
102. *See, e.g.*, Gomes v. Byrne, 333 P.2d 754 (Cal. 1959).
103. *See generally*, Zitter, *supra* note 89.
104. *Id.*
105. The doctrine of contributory negligence acts as a total bar to recovery where the plaintiff is shown to have some degree of fault in his injury. *See* Chausse v. Southland Corp., 400 So. 2d 1199, 1202 (La. Ct. App. 1981).
106. *See* ARK. CODE ANN. § 16-64-122 (LEXIS Repl. 2005).

> have reduced them in proportion to the degree of his/her own fault. On the other hand, if the fault of _____ is equal to or greater in degree than the fault of _____, then _____ is not entitled to recover any damages.[107]

The case of *Ambort v. Nowlin* illustrates this doctrine in action.[108] In *Ambort*, the plaintiff was a traveling salesman who approached the front porch of the defendant (who turned out to be a mentally disabled woman with little ability to communicate).[109] One of the defendant's dogs jumped up and bit off a portion of the plaintiff's nose.[110] The trial judge submitted the case to the jury based on the theory of comparative negligence rather than strict liability, and the jury returned a verdict in the plaintiff's favor for approximately $5000 despite his claim of over $7000 in medical bills and $3000 in lost wages.[111] The appellate court held that this was proper, finding "[t]here was a fact question of whether [the plaintiff] was trespassing or a licensee since he was on private property and had not been expressly invited there."[112] Thus, the court upheld the reduced verdict.

C. Criminal Liability for Harm Caused by Dog Bites

There are two principal theories of punishment in the criminal law: utilitarianism and retributivism.[113] Under a utilitarian theory, punishment is only justifiable if it will reduce crime.[114] Proportionality between the punishment and the crime is critical to utilitarians because, to them, punishment is not desirable in itself; rather, it is viewed as a means to prevent crime and thereby improve society.[115] Furthermore, utilitarians consider whether the goal is general deterrence, when the punishment is imposed "in

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107. ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL AMI 1604 (2008).

108. 289 Ark. 124, 709 S.W.2d 407 (1986).

109. *Id.* at 125, 709 S.W.2d at 408.

110. *Id.* at 125, 709 S.W.2d at 408.

111. *Id.* at 125–26, 709 S.W.2d at 408.

112. *Id.* at 126, 709 S.W.2d at 408 (alteration in original). This fact is important because AMI 1602 (the strict liability instruction) provides a note that a court should not use this instruction "when the plaintiff is a trespasser as a matter of law." ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL AMI 1602 (2008). Also, the note states that the instruction should be appropriately modified "if there is an issue of fact as to whether the plaintiff is a trespasser, licensee, or invitee . . . ." *Id.*

113. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03[A] (3d ed. 2001).

114. *Id.* § 2.03[B][1].

115. *Id.* Utilitarians generally speak in terms of cost–benefit economic analysis. Professor Dressler explains that, to a classical utilitarian, "the imposition of five units of pain (however the "units" are measured) on [a defendant] is justifiable if it will prevent more than five units of pain (in the form of crime) that would have occurred but for [the defendant's] punishment." *Id.*

order to convince the *general* community to forego criminal conduct in the future,"[116] or specific deterrence, when the punishment "is meant to deter future misconduct" by a particular defendant by "prevent[ing] him from committing crimes in the outside society during the period of his segregation" and "reminding him that if he returns to a life of crime, he will experience more pain."[117]

On the other hand, retributivism punishes the wrongdoer simply because he deserves it, rather than as a means of protecting society.[118] The central idea behind retribution is that the defendant should suffer as a way of paying for his crime.[119] The concept of proportionality is also central to retributive theory: "a person [is deemed] more deserving of punishment if he intentionally, rather than . . . negligently, causes the particular harm."[120]

The imposition of criminal liability upon owners of vicious dogs that have severely injured or killed an innocent party is a relatively recent phenomenon.[121] Generally, there are two circumstances under which an owner may face criminal charges related to the violent actions of his dog: when the owner directly incites his dog to attack the victim ("sic 'em" cases),[122] or when the owner uses a vicious dog during the commission of a separate crime ("aggravating circumstances" cases).[123] Under either scenario, the dog is treated as a deadly weapon or dangerous instrumentality of its owner.[124] It

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116. *Id.* § 2.03[B][2].

117. *Id.*

118. *Id.* § 2.03[C][1].

119. DRESSLER, *supra* note 113, at § 2.03[C][2]. Some retributivists also believe that punishment is a "defeat of the wrongdoer," whose unlawful actions manifest a belief "that his (the criminal's) rights and desires are more valuable than those of the victim." *Id.* (citing Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992)). This form of retributive theory has been called "victim vindication." *Id.*

120. *Id.* § 6.03[B][1]. This is essentially an inquiry into a defendant's "moral blameworthiness." *Id.*

121. *See* Mary Stanfield Bubbett, *In the Doghouse or in the Jailhouse?: The Possibility of Criminal Prosecution of the Owners of Vicious Dogs in Louisiana*, 49 LOY. L. REV. 953, 960 (2003).

122. *See, e.g.*, State v. Cook, 594 S.E.2d 819 (N.C. Ct. App. 2004); State v. Bodoh, 582 N.W.2d 440 (Wis. Ct. App. 1998); Morris v. State, 722 So. 2d 849 (Fla. Dist. Ct. App. 1998)). The phrase, "sic 'em," is slang for "attack that." Urban Dictionary, *sic 'em*, http://www.urbandictionary.com (search "sic 'em") (last visited Oct. 12, 2009).

123. *See, e.g.*, State v. Michels, 726 So. 2d 449 (La. Ct. App. 1999); State v. Sinks, 483 N.W.2d 286 (Wis. Ct. App. 1992).

124. In the criminal law, the classification of things—other than firearms—as deadly weapons is usually a functional process. For example, in *State v. Cook*, the North Carolina Court of Appeals applied the following three-factor test: "'the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use.'" 594 S.E.2d 819, 821–22 (quoting State v. Peacock, 330 S.E.2d 190, 196 (N.C. 1985)).

is manifest that a vicious dog qualifies as a weapon,[125] and increasingly courts are holding that a dog can satisfy the requirements of a deadly weapon.[126]

1. *"Sic 'em" Cases*

When the owner incites his dog to attack, the proper analysis is akin to that of a criminal assault.[127] The Florida case of *Morris v. State* is illustrative.[128] The defendant, Erika Morris, owned a large mixed-breed dog that resembled a Rottweiler.[129] When a law enforcement officer approached Morris about another matter, Morris gave the dog a "sic" command and it bit the officer on the right calf and thigh.[130] Emphasizing that "'whether or not a particular dog is a deadly weapon or instrument will depend on the circumstances of each case,'"[131] the court held that there was sufficient evidence from which a jury could find that Morris's dog was a deadly weapon.[132]

One court has held that even nonowners can be held criminally liable for the actions of a dog if they incite an attack on a third party. That case, *State v. Cook*, also concerned an attack on a law enforcement officer.[133] At trial, the State adduced the following facts. Two police officers pulled over the defendant for minor traffic offenses.[134] Shortly thereafter, a scuffle en-

125. *See* Smith v. Nussman, 156 So. 2d 680, 682 (Fla. Dist. Ct. App. 1963) (defining a weapon as "anything used or designed to be used in destroying, defeating, or injuring an enemy—an instrument of offensive or defensive combat.") (citation omitted)).

126. *See* State v. Bodoh, 582 N.W.2d 440, 442 (Wis. Ct. App. 1998) (reiterating that "'[i]t is common knowledge that dogs can inflict severe injury and can . . . attack.'") (quoting *Sinks*, 483 N.W.2d at 290) (alterations in original)).

127. Under the Model Penal Code, a defendant is guilty of simple assault if he
(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
(b) negligently causes bodily injury to another with a deadly weapon; or
(c) attempts by physical menace to put another in fear of imminent serious bodily injury. MODEL PENAL CODE § 211.1 (2001).

128. 722 So. 2d 849 (Fla. Dist. Ct. App. 1998).

129. *Id.* at 850–51.

130. *Id.* at 851.

131. *Id.* at 850. (quoting People v. Nealis, 283 Cal. Rptr. 376, 379 (Cal. App. Dep't Super. Ct. 2001)). The court broadly applied Florida's "deadly weapon" definition: "[A]ny instrument which, when it is used in the ordinary manner contemplated by its design and construction, will or is likely to cause great bodily harm, or any instrument likely to cause great bodily harm because of the way it is used during a crime." *Id.* (quoting Taylor v. State, 672 So. 2d 580, 582 (Fla. Dist. Ct. App. 1996) (alterations in original)).

132. *Id.*

133. 594 S.E.2d 819 (N.C. Ct. App. 2004).

134. *Id.* at 820.

sued and Cook escaped the officers' restraints.[135] He subsequently fled on foot to the back yard of his sister's home where there was a medium-sized dog on a chain.[136] Cook placed himself between the dog and the police officers.[137] When the first officer reached the back yard, Cook pushed the dog toward him and said, "bite him."[138] In the midst of a commotion during which Cook was eventually subdued and handcuffed, the dog bit both officers on the lower leg.[139] Citing *Morris v. State*,[140] the court upheld Cook's conviction on two counts of assault with a deadly weapon on a government official.[141]

2. *Dog as Aggravating Circumstance During the Commission of a Crime*

A second line of cases establishes criminal liability where the owner uses his dog during the commission of an independent felony, such as arson, burglary, kidnapping, larceny, rape, robbery, or sodomy.[142] In these circumstances the defendant's use of the dog, so long as it is found to be a dangerous or deadly weapon or instrumentality, can be held to be an aggravating circumstance to the primary bad act.[143]

a. When owner affirmatively uses dog as a dangerous weapon

The concept of aggravation is an American statutory invention with little basis in the common law.[144] A crime may be aggravated if it is "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime."[145] In these cases, the State must first prove the underlying crime and then demonstrate the aggravating circumstance.[146] In cases where the dog owner is charged with a

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 820–21.

139. *See Cook*, 594 S.E.2d at 821.

140. 722 So. 2d 849 (Fla. Dist. Ct. App. (1998). *See supra* notes 128–32 and accompanying text.

141. *Cook*, 594 S.E.2d at 822. In so holding, the court scrutinized both Cook's *use* of the dog and the officers' *perception* of its violent potential, in addition to the dog's vicious nature. *Id.*

142. *See* Bubbett, *supra* note 121, at 960.

143. *See, e.g.*, State v. Michels, 726 So. 2d 449 (La. Ct. App. 1999); State v. Sinks, 483 N.W.2d 286 (Wis. Ct. App. 1992).

144. *See* State v. Sorenson, 359 P.2d 289, 291 (Haw. 1961).

145. BLACK'S LAW DICTIONARY 75 (9th ed. 2009).

146. "Aggravating circumstance" is defined as a "fact or situation that increases the degree of liability or culpability for a criminal act." BLACK'S LAW DICTIONARY 277 (9th ed.

crime of a higher degree, the aggravating circumstance is usually the owner's use of an instrumentality or weapon classified as dangerous or deadly. For example, in *State v. Sinks*, the defendant was tried and convicted on one count of kidnapping and three counts of first-degree sexual assault.[147] In Wisconsin, a person is guilty of first-degree sexual assault if he, "[h]as sexual contact or sexual intercourse with another person without consent of that person *by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.*"[148] The facts of *Sinks* are as follows. Defendant Sinks came upon the victim while she was stranded on the roadside after her car ran out of fuel and offered to take her to his home to use his telephone and borrow a gas can.[149] During the drive to Sinks's home, he remarked to his victim that "he had a doberman pinscher and that the dog once prevented a burglar from getting away after breaking into his home."[150] Once inside his home, "Sinks held a knife to her throat and instructed his doberman to 'guard.'"[151] The victim testified that "she believed the dog would kill her if she tried to leave and that she was afraid of it."[152] Sinks proceeded to brutally rape his victim while his doberman "stood guard."[153]

Sinks appealed his first-degree sexual assault conviction arguing that "a dog cannot be an instrumentality because instrumentality refers only to an inanimate object."[154] The appellate court rejected this argument based on rules of statutory construction[155] and precedent from other jurisdictions.[156]

2009). For example, under the Model Penal Code (MPC), a person is guilty of aggravated assault if he: "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or . . . attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." MODEL PENAL CODE § 211.1(2) (2001). Unlike simple assault, which is either a misdemeanor or petty misdemeanor under the MPC, *id.* § 211.1(1), aggravated assault is a felony of either the second or third degree. *Id.* Observe the statute's heightened scienter requirement ("purposely, knowingly or recklessly"), its focus on the character of the action ("extreme indifference to the value of human life"), and, most importantly, its "deadly weapon" requirement. *Id.*

147. 483 N.W.2d 286, 287–88 (Wis. Ct. App. 1992).

148. *Id.* at 288 (citing WIS. STAT. § 940.225(1)) (emphasis added).

149. *Id.* at 287.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Sinks*, 483 N.W.2d at 287.

154. *Id.* at 289.

155. *Id.* The court held that the "common and ordinary definition" of instrumentality is not so limited to inanimate objects, but is rather "something by which an end is achieved." *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1172 (Unabr. 1976)). It also noted that the definition of "dangerous weapon" in a companion statute was not "limit[ed] or confine[d] . . . to only inanimate objects." *Id.*

156. *Id.* at 289–90 (citing People v. Kay, 328 N.W.2d 424, 425–26 (Mich. Ct. App. 1982)

Having concluded that a dog can be a dangerous weapon, the appellate court addressed the question of whether the trial court properly concluded that Sinks "used or intended to use [his] particular dog in a manner likely to produce death or great bodily harm."[157] The court answered in the affirmative citing the victim's testimony regarding Sinks's dog restraining a would-be burglar, Sinks's "guard" instruction to the dog, and the dog's presence during the assault.[158] Moreover, the court noted that Sinks was aware of the dog's vicious propensities as demonstrated by his construction of a dog pen following complaints about the animal.[159]

b. When vicious dog is merely present during commission of a crime

A somewhat similar case, *State v. Michels*, went a step further than *Sinks* and held that the *mere presence of a vicious dog during the commission of a crime*—even when the defendant does not directly command the dog to become aggressive or persuade his victim to believe in its dangerous potential—is enough to convict the defendant of using an aggravating enhancement.[160] In *Michels*, the victim was visiting the defendant inside of his trailer and both were enjoying an alcoholic beverage.[161] While the victim and Michels were sitting on his couch, Michels removed his pants and those of his victim, forced his victim to perform oral sex on him, and then raped her.[162] The victim testified that during the assault, Michels's pit bull was near them and bared its teeth and growled while she struggled with Michels.[163] She further testified that if she continued to struggle with Michels, the dog would attack her.[164]

The trial court convicted Michels under Louisiana's aggravated oral sexual battery statute,[165] which the appellate court quoted, in pertinent part:

> Aggravated oral sexual battery is an oral sexual battery committed when the intentional touching . . . is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

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and Commonwealth v. Tarrant, 314 N.E.2d 448, 450–51 (Mass. Ct. App. 1974)).

157. *Id.* at 290.

158. *Id.*

159. *Sinks*, 483 N.W.2d at 290.

160. 726 So. 2d 449 (La. Ct. App. 1999).

161. *Id.* at 450.

162. *Id.*

163. *Id.* at 452–53.

164. *Id.* at 453.

165. *Id.* at 451.

. . .

(3) When the victim is prevented from the resisting the act because the offender is armed with a dangerous weapon. [166]

On appeal, Michels argued that the mere presence of his dog during the encounter did not satisfy the third subsection's requirement of being "armed with a dangerous weapon," and therefore, the State did not carry its burden of proving that the victim did not lawfully consent.[167] Citing the Louisiana rule that "the dangerousness of the instrumentality . . . is a factual question for the jury,"[168] the court held that there was sufficient evidence to support the jury's finding that Michels's dog was a dangerous weapon within the purview of the aggravated oral battery statute and affirmed the conviction.[169]

III. PROPOSAL

This note establishes that the dog-bite problem is usually approached from three distinct legal angles.[170] First, cities and municipal governments establish regulations on the ownership of dogs generally through licensing or permit mechanisms and specifically on the ownership of purportedly vicious dogs through dangerous-dog or breed-specific ordinances.[171] Second, the law of tort provides dog-bite victims with causes of action against the owner for civil damages related to the attack.[172] Third, the criminal law provides certain penalties in only the most egregious cases.[173] The order in which I have presented these methods of dealing with the problem is in inverse proportion to their comparative efficacy.

For example, most of the breed-bans set forth in municipal codes represent a knee-jerk approach meant to ensure the safety of vulnerable citizens following a well-publicized and especially vicious attack.[174] Yet such an approach only improves the safety of a community if there are a number of otherwise model, law-abiding citizens who happen to be harboring vi-

166. *Michels*, 726 So. 2d at 451 (quoting LA. REV. STAT. ANN. § 14:43.4(A) (1999)).

167. *Id.* at 452.

168. *Id.* at 453 (citing State v. Munoz, 575 So. 2d 848, 850 (La. Ct. App. 1991), *writ denied*, 577 So. 2d 1009 (La. 1991)).

169. *Id.*

170. *See supra* Part II.

171. *See supra* Part II.A.

172. *See supra* Part II.B.

173. *See supra* Part II.C.

174. For example, following a horrific attack on a three-year-old boy in which four pit bulls ripped off one of the boy's arms, a state legislator proposed a statewide ban on the ownership of the breed. *See* Mick Hinton, *Pit Bull Ban Proposed: Lawmaker's Idea Draws Quick Opposition*, TULSA WORLD, July 17, 2005, at A13.

cious dogs—of the named breed(s)—in an irresponsible manner that permits grossly violent incidents to occur. In effect, the registration approach merely infringes upon the civil liberties of a substantial number of dog owners who have nurtured docile and loving pets that pose no threat to the community, while incentivizing rogue ownership and poor breeding practices of the most potentially dangerous breeds by non-law-abiding citizens.

The proper legislative response to an especially vicious attack is an examination of the relevant criminal statutes to make sure that there is a proportionate punishment available to the owners of dogs that severely maim or kill a person.[175] For this reason, the following proposal focuses primarily on expanding criminal liability while suggesting modest but meaningful reforms in civil remedies and registration laws.

A. Criminal Law—the "Big Stick"

Under either utilitarian or retributive theory, Arkansas's current criminal dog-bite legislation fails miserably. The statute, entitled Unlawful Dog Attack,[176] was enacted in Arkansas in 2007 and provides:

> (a) A person commits the offense of unlawful dog attack if:
>
> (1) The person owns a dog that the person knows or has reason to know has a propensity to attack, cause injury, or endanger the safety of other persons without provocation;
>
> (2) The person negligently allows the dog to attack another person; and
>
> (3) The attack causes the death of or serious physical injury to the person attacked.
>
> (b) The offense of unlawful dog attack is a Class A misdemeanor.
>
> (c) In addition to any penalty imposed under this section, the court or jury may require the defendant to pay restitution under section 5-4-205 for any medical bills of the person attacked for injuries caused by the attack.[177]

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175. Devin Burstein succinctly expressed this sentiment in his introductory note to the following cited comment: "To prevent the tragedies that can occur when a dog attacks a human, legislation must take aim at the heart of the problem, the human owners that allow, through negligence or intentional mistreatment and training, these attacks to occur." Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 ANIMAL L. 313, 313 (2004).

176. ARK. CODE ANN. § 5-62-125 (LEXIS Supp. 2009).

177. *Id.*

First, the statute imposes a scienter requirement that, although merely meant to establish the requisite mens rea, will operate in practice as a difficult hurdle for prosecutors to overcome. Second, the statute does not provide proportional punishment. Observe that the statute is not triggered unless the attack "causes the death of or serious physical injury to the person attacked."[178] Such an attack would likely be of a gruesome and torturous nature. Yet the animal's owner faces a relatively light penalty because the offense is only a Class A misdemeanor.[179] Under Arkansas law, a Class A misdemeanor carries a maximum prison sentence of one year.[180]

Under a retributive analysis—assuming arguendo a guilty verdict and a one-year prison sentence—the owner of the dog is forced to pay too small a price for his crime, particularly when the victim is killed or permanently disabled. Such an owner simply will not suffer enough. Similarly, the utilitarian view is unsatisfied. From a general deterrence perspective, the fear of spending one year in jail is not likely to incentivize a dog owner to take the kind of precautionary steps that eliminate substantial risks of harm. From a specific deterrence perspective, the penalty is even more unsatisfactory. Although one year in prison would most certainly be unpleasant, it is short enough that upon the owner's release he will find a status quo within which he can easily obtain another vicious animal and resume his previous lifestyle.

Either theory of punishment seems to demand a consequence more in line with manslaughter, aggravated assault, or aggravated battery. The Arkansas manslaughter statute is set forth in Arkansas Code section 5-10-104. Subsection (a)(3) is on point: "A person commits manslaughter if: . . . [t]he person recklessly causes the death of another person."[181] Manslaughter is a Class C felony,[182] and it carries a minimum three-year and maximum ten-year prison sentence.[183] An important affirmative defense in the manslaughter statute is the defendant's non-use of a deadly weapon.[184] A recent case, *Duke v. State*, however, held that dogs can be "used in such a manner as to constitute deadly weapons."[185] Thus, it seems that a manslaughter conviction is possible under Arkansas law. Such a substantial jail sentence and the stigma that accompanies the conviction would be a strong deterrent to society at large and anyone convicted under the statute. Furthermore, an individ-

178. *Id.*
179. *Id.*
180. ARK. CODE ANN. § 5-4-401(b)(1) (LEXIS Repl. 2007).
181. *Id.* § 5-10-104(a)(3) (LEXIS Supp. 2009).
182. *Id.* § 5-10-104 (c).
183. *Id.* § 5-4-401(a)(4) (LEXIS Repl. 2006).
184. *Id.* § 5-10-104(b)(2) (LEXIS Supp. 2009).
185. 77 Ark. App. 263, 272, 72 S.W.3d 907, 913 (2002).

ual convicted under this statute would more realistically "pay his debt to society."[186]

In cases where the victim survives an extremely vicious attack, an aggravated assault charge is appropriate. Arkansas's aggravated assault law is set forth in Arkansas Code section 5-13-204. Under the statute, "a person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely . . . [e]ngages in conduct that creates a substantial danger of death or serious physical injury to another person."[187] The key here is that the owner need not have intended to assault the victim, but rather must have "engage[d] in conduct that create[d] a substantial danger" to another.[188] The statute is a Class D felony;[189] therefore, a dog owner convicted under it would face a maximum sentence of six years in prison.[190]

In summation, the criminal law of Arkansas must address the disparity in crimes and sentencing between generally violent offenses and crimes involving a dog attack. The latter crimes are just as deleterious to society, the victims are just as debased, and the owners of these dogs are just as morally culpable. One possible solution to this problem would be the enactment of a reckless endangerment statute.

Arkansas is one of several states without a reckless endangerment statute.[191] One state that has such a provision is Maryland.[192] The Maryland law provides, in pertinent part, "[a] person may not recklessly . . . engage in conduct that creates a substantial risk of death or serious physical injury to another."[193] Although the statute only provides a misdemeanor offense, it does allow for a prison sentence of up to five years.[194] The statute does not apply to conduct involving the "manufacture, production, or sale of a product or commodity."[195] If Arkansas were to adopt a similar law, prosecutors would be able to confront situations when the owner allows—though does not at all encourage—his dog to cause grievous bodily harm to an innocent person. At present, Arkansas can only prosecute owners in "sic 'em" scenarios or when the dog is used as a dangerous instrumentality during the

186. This assumes a lack of intent or purpose to kill the victim. If the defendant acted with the requisite mens rea for murder, then that statute, rather than ARK. CODE ANN. § 5-10-104, should be applied.

187. ARK. CODE ANN. § 5-13-204(a)(1) (LEXIS Supp. 2009).

188. *Id.*

189. *Id.* § 5-13-204(b).

190. *Id.* § 5-4-401(a)(5) (LEXIS Repl. 2007).

191. *See* Earl v. State, No. CA CR 90-103, 1991 WL 36295, at *2 (Ark. App. Mar. 13, 1991) (noting that there is "no such offense in our criminal code.").

192. *See* MD. CODE ANN., CRIM. LAW § 3-204 (West 2008).

193. *Id.* § 3-204(a)(1).

194. *Id.* § 3-204(b).

195. *Id.* § 3-204(c)(1)(ii).

commission of a felony. The reckless endangerment option for prosecutors would likely act as a significant deterrent to owners who impose nonreciprocal risks on society through their reckless handling and training practices.

B. Making Tort Law Work for Dog-Bite Victims and Owners

Historically a dog owner's liability was in keeping the animal "after gaining knowledge of its propensity for abnormally vicious behavior."[196] This principle evolved in a logical manner. Then, as now, dogs were "man's best friend" and were considered cherished companions. Thus, the default state of dogs—as a matter of law—was *not vicious*.[197] When, however, an animal was in fact dangerous or vicious (an exception to the aforementioned presumption), an abnormality arose.[198] A dog owner could only be liable after he was put on notice of his dog's "abnormality," which essentially meant that the dog got "one free bite."[199] This law was friendly to dog owners and quite unfriendly to victims because proving the owner's knowledge of his dog's abnormality, the so-called scienter requirement, was extremely difficult.

More modernly, however, some states have removed the scienter requirement and created de facto strict liability for owners of biting dogs. These "dog-bite statutes" exist in about half of the states.[200] In Illinois, for example, the dog-bite statute provides, pertinent part:

> If a dog or other animal, without provocation, attacks . . . or injures any person who is peaceably conducting himself . . . in any place where he . . . may lawfully be, the owner of such dog or other animal is liable in . . . damages to such person for the full amount of the injury proximately caused thereby.[201]

Cases under statutes like this one typically turn on whether the victim provoked the attack.[202] Because reading the mind of an animal is nearly impossible, such statutes are usually very friendly to the victim.

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196. *See* Lynn A. Epstein, *There are no Bad Dogs, Only Bad Owners: Replacing Strict Liability with a Negligence Standard in Dog Bite Cases*, 13 ANIMAL L. 129, 132 (2006) (citing Andrews v. Smith, 188 A. 146, 148 (Pa. 1936)).

197. *Id.*

198. *Id.*

199. *Id.* at 134. The expression "*one* free bite" is somewhat misleading. As a practical matter, the requirement of proving the dog's prior bites was very difficult, and therefore, dogs at common law might have had *many* free bites. *Id.*

200. *Id.* (citing RESTATEMENT (THIRD) OF TORTS).

201. 510 ILL. COMP. STAT. ANN. 5/16 (West 2006).

202. Epstein, *supra* note 196, at 135 (citing Nelson v. Lewis, 344 N.E.2d 268, 270 (Ill. App. Ct. 1976) (stating that the issue at trial was whether the plaintiff's intentional act consti-

One scholar, Professor Lynn Epstein,[203] has proposed a middle ground between the common law and strict liability models: plain negligence. Professor Epstein's concept is founded upon an analogy to children. She points out that, under the Restatement of Torts, "parents may become liable for their own inaction in failing to prevent their children from harming others."[204] The notion is that "parents have a duty to exercise reasonable care to control their minor children in order to prevent them from causing harm to others, if the parent knows he has the ability to control his child and knows of the necessity and opportunity for exercising such control."[205] Professor Epstein's proposal is as follows:

A person who harbors or possesses a domestic animal, such as a dog, has a duty to prevent an unreasonable risk of harm to others. Preventing a risk of harm includes controlling and supervising the dog in order to make conditions safe for those with whom the dog comes into contact.[206]

These principles in combination with the law of simple negligence should form the basis of a single jury instruction for all civil dog-bite cases.[207] Such an instruction might read as follows:

> A person who harbors or possesses a domestic animal has a duty to prevent an unreasonable risk of harm to others. This includes controlling and supervising the animal so that conditions are safe for those with whom the animal comes into contact. A person's failure to meet this standard of reasonable care is negligence. If you find that this negligence caused, in a natural and continuous sequence, harm to the plaintiff and without which the harm would not have occurred, your verdict should be against the defendant.

Observe that this instruction is modeled after basic hornbook law of negligence: duty, breach, causation, and harm. It is intended to effect two critical reforms upon current Arkansas law: (1) the abrogation of the common-law scienter requirement and (2) the adoption of a more expansive view of the proper scope of a dog owner's duty to innocent persons. Such an instruction would permit a deserving plaintiff to recover damages while insulating prudent and responsible dog owners against frivolous actions.

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tuted "provocation")).

203. Professor of Law, Shepard Broad Law Center at Nova Southeastern University.

204. Epstein, *supra* note 196, at 141 (citing RESTATEMENT (SECOND) OF TORTS § 316 cmt. a (1977)).

205. *Id.* at 141–42.

206. *Id.* at 144.

207. Currently, the Arkansas Model Jury Instructions contain four separate instructions to be used in civil suits arising out of a dog bite, 1601 through 1604. ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL AMI 1601–04 (2008).

C. Local Ordinances That Are Practical and Fair

Breed-specific legislation will not solve the dog-bite problem. Rather, it is likely to make things worse. When a ban is instituted, a black market is created. Breeding practices become even more suspect, dogs' healthcare needs become more neglected, and law-abiding owners of these breeds have to move or give up their beloved pets. What local governments should do to maintain safety and order is strictly enforce all basic "dog laws" such as mandatory licensing, rabies vaccination, leash laws, nuisance laws, and absolutely prohibit any sort of illegal tie-ups or other aberrant containment techniques. Requiring proof of spay or neuter would be an extremely positive step as well; not only do spayed or neutered dogs act more peaceably,[208] but the stray population would naturally decrease as well. Obviously, some sort of breeding permit would be required to exempt those animals kept by legitimate dog breeders from the spay or neuter requirement.

Stricter licensing laws would have an enormously positive effect. If a city had an accurate accounting of all pets in its jurisdiction, imagine how much more effectively an injured victim could seek redress. Furthermore, those who refused to properly license their dogs—likely the same people who neglect their animals and encourage their antisocial and violent behavior—would forfeit their current and any future ownership rights.

IV. CONCLUSION

The current method of dealing with the dog-bite problem in Arkansas (and throughout the country) is irrational and counterproductive. What is most important is the deterrence of irresponsible ownership, and for that, the criminal law is the most effective vehicle. In addition to imposing aggravated criminal liability on a dog owner who incites his dog to attack an innocent party or uses his dog as a dangerous instrumentality during the commission of a felony, states should vigorously prosecute any owner whose dog severely wounds or kills an innocent party under a reckless endangerment-type statute. Second, civil dog-bite actions should be vastly simplified to a common-sense negligence standard. This change could be most effectively implemented by an amendment to the Arkansas Model Jury Instructions. Finally, breed-specific legislation should be repealed and local

208. *See, e.g.*, Cynthia A. McNeely & Sarah A. Lindquist, *Dangerous Dog Laws: Failing to Give Man's Best Friend a Fair Shake at Justice*, 3 J. ANIMAL L. 99 n.112 (citing statistical data on the comparative aggressiveness of unneutered male dogs in KAREN DELISE, FATAL DOG ATTACKS: THE STORIES BEHIND THE STATISTICS (2002) ("[U]nneutered males are 2.6 times more likely to bite than neutered males, and male dogs are 6.2 times more likely to bite than females.")).

municipalities should focus on enforcing basic dog control laws such as vaccination, spay–neuter, and leash laws.

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