
POODLE PANDEMONIUM: EMOTIONAL SUPPORT ANIMALS AND
THE COVENANT OF QUIET ENJOYMENT

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In 2011, 2,400 service and emotional support animals (“ESAs”) were registered with the National Service Animal Registry. In the span of just eight years, that number increased over 8,000%, totaling almost 200,000 in 2019. While “service animals” are greatly regulated by the Americans with Disabilities Act (“ADA”), ESAs remain largely unregulated, and states have made it increasingly easy to obtain documentation for such ESAs, leading to a system rife with abuse. Through services which make vests, collars, tags, and identification cards to identify any animal as an ESA, and with online therapists writing letters for patients they have not evaluated, it is easy for owners to misrepresent pets as ESAs. Once an individual has documentation “proving” their animal is an ESA, a landlord must waive no-pet restrictions and pet fees, allowing tenants practically unfettered access to their pets.

As ESAs often live in pet-free housing, these animals may disturb other tenants, violating the covenant of quiet enjoyment, which guarantees a tenant’s right to peaceful possession of their living quarters. Because ESA owners have no legal right to take their ESA with them in public, these animals must often be left at home, which could lead to disruption to other tenants. Additionally, untrained animals may attack other individuals or service dogs, and may cause unsanitary conditions or allergies.

States should implement stricter regulations for the registration of ESAs; an ESA should only be prescribed by a licensed mental health physician who has treated the patient in person and knows of his or her condition. This physician should evaluate the interactions between the animal and its owner and consider the living circumstances of the animal. Implementing stricter regulations for the registration of ESAs would allow those with mental disorders to obtain them, curb abuse of the system, and allow tenants the right to quiet, safety, and health.

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I. INTRODUCTION

Imagine this: you finally get accepted into the law school of your dreams, spend months apartment hunting, and finally find the perfect one. You choose a color scheme, pick out furniture, and hang pictures on the wall. As you fall asleep, you are absolutely content. But that feeling is short-lived. You are awoken early the next morning by a dog barking incessantly. Trusting this is an idiosyncratic event, you attempt to continue about your day, but the barking is relentless, interfering with both your study and leisure time. After a week of six a.m. wakeups and disruptions to your study schedule, you finally decide to call the landlord, who tells you that nothing can be done because the dog is an “emotional support animal,” or “ESA.” Although the dog consistently urinates in the hallways, relentlessly barks, and cries, there is nothing you can do about it because the tenant next door has a letter guaranteeing him access to housing without pet fees, regardless of his animal’s training. With the growing trend of ESAs and the ease with which tenants can “register” them, an increasing number of tenants are dealing with this scenario every day.

In 2011, 2,400 service and emotional support animals were registered with the National Service Animal Registry.¹ In the span of just eight years, that number increased over 8,000%, totaling almost 200,000 in 2019.² Although the Americans with Disabilities Act (“ADA”) limits the species of protected “service animals” to a dog or miniature horse,³ there is no such requirement for ESAs.⁴ In fact, people have been allowed to keep a variety of ESAs in their homes, such as pigs,⁵ monkeys,⁶ peacocks, penguins, turkeys, lobsters, and ducks.⁷ While many ESAs do serve a legitimate purpose,⁸ the system is rife with abuse.⁹ Through services which make vests, collars, tags, and identification cards to identify the animal as an ESA,¹⁰ and with online therapists writing letters for patients they have not evaluated, it is easy for owners to misrepresent pets as

1. 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/P3E3-M5U7].

2. *Id.*

3. *Service Animals*, ADA NAT’L NETWORK, <https://adata.org/factsheet/service-animals> (last visited Jan. 23, 2021) [https://perma.cc/U56X-2MHH].

4. *See id.*

5. Stockman, *supra* note 1.

6. *See* Fernando Alfonso III, *Missouri Woman in Legal Battle to Keep Three Emotional Support Monkeys*, CNN (Sept. 16, 2019, 6:31 AM), <https://www.cnn.com/2019/09/15/us/emotional-support-monkeys-texanne-mcbride-teahan-trmd/index.html> [https://perma.cc/HE6U-U348].

7. *See* Rachel Gillett, *‘Emotional Support Animals’ are Turning Into a Crisis for Airlines—Here are the Most Bizarre Animals People have Brought on Planes*, BUS. INSIDER (Jan. 31, 2018, 6:27 PM), <https://www.businessinsider.com/support-animals-people-have-tried-to-bring-on-planes-2018-1> [https://perma.cc/9PNX-986F].

8. *See* Gigen Mammoser, *What Do Emotional Support Animals Do Exactly? for Those in Need, A Lot*, HEALTHLINE (Sept. 4, 2018), <https://www.healthline.com/health-news/what-do-emotional-support-animals-do-for-those-in-need#1> [https://perma.cc/6GRX-9X89].

9. *See* Stockman, *supra* note 1.

10. Virginia C. Thomas, *At Your Service! Assistance Animals and the Law in Michigan*, 97 MICH. BAR J. 48, 48 (2018).

ESAs.¹¹ Despite this, in the majority of states, the laws have not yet addressed the potential for abuse, instead allowing tenants practically unfettered access to their pets as long as they have a letter from a licensed therapist stating they have a disability.¹² As abuse of the system becomes rampant, the Fair Housing Act (“FHA”), ESA laws, and the covenant of quiet enjoyment begin to conflict, causing problems for tenants and landlords alike.

The FHA prohibits “discrimination by direct providers of housing . . . whose discriminatory practices make housing unavailable to persons because of: race or color[,] religion[,] sex[,] national origin[,] familial status, or disability.”¹³ Included in the FHA is a mandate that “[h]ousing providers cannot refuse to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford a person with a disability the equal opportunity to use and enjoy a dwelling.”¹⁴ These reasonable accommodations include assistance animals.¹⁵ An “assistance animal” is “an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or that provides emotional support that alleviates one or more identified effects of a person’s disability.”¹⁶ Thus, both service animals and ESAs are covered under the FHA.¹⁷

Although the use of an ESA directly conflicts with many leases,¹⁸ individuals who are able to furnish documentation of a mental disability, such as anxiety disorders, depression, and even attention deficit disorder,¹⁹ cannot be turned away from housing, even if that housing has a no-pet policy.²⁰ Landlords also may not charge fees to keep these animals, even if one is ordinarily required.²¹ The average pet deposit is between 40% and 85% of the monthly rent, which can be extremely costly in more expensive apartments.²² This often does not include the additional cleaning fee.²³ This gives those with disabilities, or even without disabilities, incentive to register their pets as ESAs. Meanwhile, others without

11. Kristen Fischer, *To Crack Down on Fake Emotional Support Animals, Experts Issue New Recommendations*, HEALTHLINE (Aug. 9, 2019), <https://www.healthline.com/health-news/heres-what-really-qualifies-as-an-emotional-support-animal> [https://perma.cc/Z9FC-DF2K].

12. See Mammoser, *supra* note 8.

13. *The Fair Housing Act*, U.S. DEP’T OF JUST. (Dec. 21, 2017), <https://www.justice.gov/crt/fair-housing-act-1> [https://perma.cc/P6Q9-W6NV].

14. *Assistance Animals*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals (last visited Jan. 23, 2021) [https://perma.cc/HSC5-FYTX].

15. *Id.*

16. *Id.*

17. See *id.*

18. See Mammoser, *supra* note 8.

19. *Mental Health Conditions in the Workplace and the ADA*, ADA NAT’L NETWORK, <https://adata.org/factsheet/health> (last visited Jan. 23, 2021) [https://perma.cc/7JWU-H6UR].

20. See Mammoser, *supra* note 8.

21. See *id.*; see also Shawn Chitnis, *Landlord to Pay \$1M In Emotional Support Animals Lawsuit*, CBS DENVER (June 5, 2019, 12:15 PM), <https://denver.cbslocal.com/2019/06/05/meeker-emotional-support-animals-lawsuit/> [https://perma.cc/X3VU-6SRC].

22. *Pet-Friendly Housing Study*, PETFINDER, <https://www.petfinder.com/dogs/living-with-your-dog/pet-friendly-housing-study/> (last visited Jan. 23, 2021) [https://perma.cc/KR5W-H7EF].

23. See Claire Tak, *Pet Fees: What to Expect in a Tenant Pet Agreement*, APARTMENTGUIDE (Sept. 6, 2019), <https://www.apartmentguide.com/blog/pet-fees-what-to-expect/> [https://perma.cc/J4R8-TP44].

disabilities and those who are not willing to pretend to have a disability often cannot have a pet in their apartment without paying, in some cases, exorbitant fees.²⁴

Aside from the aforementioned protections, the FHA is incredibly vague; it does not limit an ESA to a certain species or breed,²⁵ nor does it require that an ESA have any training.²⁶ Because of their lack of training, ESAs have been the subject of much criticism, stemming from fear of injury to others,²⁷ to concern for the welfare of these animals.²⁸ According to Molly Crossman, a Yale University researcher specializing in human and animal interactions, “[i]t’s important to continue to study emotional support animals . . . because while the pets seem harmless, there are risks. Besides allergy and cleanliness concerns when an animal is in a public place, it’s also unclear if animals used for therapeutic purposes aren’t ‘stressed out’ by their role”²⁹

Additionally, as ESAs often live in pet-free housing, these animals may disturb other tenants, violating the covenant of quiet enjoyment. The covenant of quiet enjoyment has two elements: (1) “the tenant shall have quiet and peaceful possession of the demised premises as against the lessor, any person claiming title through the lessor, or any person with a title superior to the lessor,”³⁰ and (2) the possession is adequate, meaning it is not unfit for occupancy.³¹

As a result of this potential conflict, it is necessary that states implement stricter regulations for the registration of ESAs. While ESAs are incredibly helpful to those who actually need them, “alleviat[ing] the symptoms of psychiatric disorders in some individuals and allow[ing] tenants the equal opportunity to use and enjoy their dwelling,”³² the system is too often abused³³ by pet owners “obtaining phony certifications or letters from online therapists to avoid paying fees

24. See *Pet-Friendly Housing Study*, *supra* note 22.

25. See Mammoser, *supra* note 8.

26. 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, 142 (2010) (citing *Auburn Woods I Homeowners Ass’n v. Fair Emp. & Hous. Comm’n*, 18 Cal. Rptr. 3d 669, 682 (Ct. App. 2004)).

27. See Minyvonne Burke, *Emotional Support Pit Bull Attacks 5-Year-Old at Portland Airport, Mother Claims in Suit*, NBC NEWS (Feb. 28, 2019, 12:07 PM), <https://www.nbcnews.com/news/us-news/emotional-support-pit-bull-attacks-5-year-old-portland-airport-n977681> [<https://perma.cc/Z82B-6J26>]; see also Minyvonne Burke, *Man Attacked by Emotional-Support Dog on Delta Flight Sues the Airline and Passenger*, NBC NEWS (May 30, 2019, 10:37 AM), <https://www.nbcnews.com/news/us-news/man-attacked-emotional-support-dog-delta-flight-sues-airline-passenger-n1011881> [<https://perma.cc/D68V-6536>].

28. Hal Herzog, *Do Emotional Support Animals Need Emotional Support?*, PSYCH. TODAY (Sept. 16, 2019), <https://www.psychologytoday.com/us/blog/animals-and-us/201909/do-emotional-support-animals-need-emotional-support> [<https://perma.cc/T4ZD-BNCD>].

29. See Kate Thayer, *Despite the Popularity of Emotional Support Animals, Experts Say There’s Little Evidence They Work*, CHI. TRIB. (May 30, 2018, 5:00 AM), <https://www.chicagotribune.com/lifestyles/ct-life-emotional-support-animals-evidence-20180521-story.html> [<https://perma.cc/FC8A-CSVK>].

30. *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 895 (Iowa 2011) (citing *Cohen v. Hayden*, 163 N.W.2d 238, 239 (Iowa 1917)).

31. *Erlach v. Sierra Asset Servicing*, 173 Cal. Rptr. 3d 159, 161 (Cal. Ct. App. 2014).

32. Ligatti, *supra* note 26, at 141–42.

33. See Stockman, *supra* note 1.

or to get permission to bring creatures where they wouldn't normally be allowed."³⁴

By implementing a stricter registration process, states will ensure that people who need ESAs are able to obtain them while also curbing abuse of the system by those without disabilities. An ESA should only be prescribed by a licensed mental health physician who has treated the patient in-person and knows of his or her condition. Additionally, when prescribing an ESA, the physician should evaluate the interactions between the animal and its owner, considering the living circumstances of the animal.

Part II of this Note presents the factual background of the FHA, the ADA, and the recognition of assistance animals under the FHA. Part II also presents the background of the covenant of quiet enjoyment. Part III of this Note presents an analysis of the direct conflict between ESAs and the covenant of quiet enjoyment attributable to ESAs' lack of training. Part IV of this Note presents a recommendation that states and leasing agencies implement stricter rules for ESAs.

II. BACKGROUND

While apartment living seems fairly simple, often commencing with the signing of a lease, there are certain protections in place for landlords and tenants alike, including both federal and state law and certain covenants implied in the lease. Below is an overview of the covenant of quiet enjoyment, the FHA, and the ADA. This Part also includes a brief summary of the types of assistance animals covered under federal laws, including statistics on ESA ownership and court cases which have addressed tenants' rights to keep an ESA in their home. Furthermore, this Part reviews current state laws covering ESAs and addresses those laws' strengths and weaknesses.

A. *The Covenant of Quiet Enjoyment*

Although, in the mid-2000s, nearly 70% of Americans owned homes, homeownership has decreased,³⁵ especially among millennials, for whom "homeownership has . . . fallen to a record low . . . [i]n response to rising housing costs, soaring student debt, stagnant incomes, urbanization, and lifestyle changes . . ."³⁶ This trend is likely to continue.³⁷ Rental demand is the highest in Dallas, Chicago, Houston, New York City, and Washington D.C.³⁸ In 2017,

34. *Id.*

35. Kate O'Reilly-Jones, *When Fido is Family: How Landlord-Imposed Pet Bans Restrict Access to Housing*, 52 COLUM. J.L. & SOC. PROBS. 427, 429–30 (2019).

36. *Id.*

37. See Diana Olick, *Millennials Cause Homeownership Rate to Drop to Lowest Level Since 1965*, CNBC (July 28, 2016, 11:17 PM), <https://www.cnbc.com/2016/07/28/millennials-cause-homeownership-rate-to-drop-to-lowest-level-since-1965.html> [<https://perma.cc/R7VC-LM7X>].

38. Diana Olick, *Apartment Rental Demand Soars as More Millennials Believe It's Cheaper Than Owning a Home*, CNBC (July 8, 2019, 11:44 AM), <https://www.cnbc.com/2019/07/08/rental-demand-soars-as-more-millennials-say-its-cheaper-than-owning-home.html> [<https://perma.cc/C6UT-9GM2>].

43.3% of households were renter-occupied in Chicago.³⁹ The demand for apartments continues to grow, with an increase of 11% in 2019.⁴⁰

With a strong rental market,⁴¹ it is important to understand the rights a tenant holds. In the absence of an agreement to the contrary, a tenant is guaranteed “the quiet enjoyment of the demised premises, uninterrupted by any act of the lessor, or of any person authorized by him. The interruption . . . need not necessarily be an interference with the title, but may extend to an interference with the enjoyment of the premises.”⁴² The purpose of the covenant is to “secure tenants against the acts or hindrances of landlords.”⁴³

In other words, “the tenant shall have the right of possession, occupancy, and beneficial use of every portion of the leased premises.”⁴⁴ Absent an agreement to the contrary, the covenant of quiet enjoyment in itself creates a duty on the landlord to provide a suitable premises.⁴⁵ The covenant takes effect once the tenant has paid rent and complied with all other conditions of the lease.⁴⁶

A landlord breaches the covenant if he interferes with the permissible use of the property, which includes depriving a tenant of his physical possession of the property or making the property unfit for occupancy.⁴⁷ Because the covenant is implied “in order to effectuate what it is supposed the parties to the lease intended, but omitted through inadvertence,” evidence that a covenant was not intended by the parties may be presented to refute the covenant.⁴⁸ It is important to note that a tenant cannot claim a violation of the covenant because of a “minor inconvenience [or] annoyance[]”⁴⁹ The covenant need not be breached by the landlord directly.⁵⁰

An eviction, whether constructive or actual, is not necessary to constitute a breach.⁵¹ A tenant may claim an actionable breach by the landlord, another tenant, or “by a third person under the landlord’s control,” such as a maintenance person who works for the landlord.⁵² Thus, a landlord can be held responsible for failing to control a tenant’s disruptive behavior,⁵³ “even where the building

39. 2019 *State of Rental Housing in Cook County*, INST. FOR HOUS. STUD. AT DEPAUL UNIV. (Apr. 23, 2019), <https://www.housingstudies.org/releases/state-rental-2019/> [<https://perma.cc/EK4G-Q448>].

40. Olick, *supra* note 38.

41. *See id.*

42. A.G.S., Annotation, *Breach of Covenant for Quiet Enjoyment in Lease*, 62 A.L.R. 1257 Art. 2 (1929).

43. 52A C.J.S. *Landlord & Tenant* § 768 (2020).

44. *Talbott v. English*, 59 N.E. 857, 859 (Ind. 1901).

45. *See, e.g., Reste Realty Corp. v. Cooper*, 251 A.2d 268, 272 (N.J. 1969).

46. *Landlord & Tenant*, *supra* note 43, § 768.

47. Kristen M. Ross, *Eviction, Discrimination, and Domestic Violence: Unfair Housing Practices Against Domestic Violence Survivors*, 18 HASTINGS WOMEN’S L.J. 249, 255–56 (2007).

48. C. S. Parnell, Annotation, *Breach of Covenant for Quiet Enjoyment in Lease*, 41 A.L.R. 2d 1414 Art. 2 (1955).

49. Ross, *supra* note 47, at 256.

50. *Id.* at 257.

51. *See Moe v. Sprankle*, 221 S.W.2d 712, 715 (Tenn. Ct. App. 1948).

52. Ross, *supra* note 47, at 256 (quoting Terry B. Friedman, David A. Garcia & Mark Hagarty, CAL. PRACTICE GUIDE: LANDLORD-TENANT, § 4:9 (2005)).

53. *Id.* at 257.

itself does not contravene any health, safety, housing or maintenance standards.”⁵⁴

To control his tenants’ behavior, a landlord may enact restrictions so long as the restriction is rationally related to protecting health and safety.⁵⁵ A restriction is rationally related to protecting health and safety when it does not burden those subjected to the rule in an incidental manner and the “goal is [not] so attenuated as to render the distinction arbitrary or irrational.”⁵⁶ These restrictions are “clothed with a very strong presumption of validity” and are considered invalid only when they are arbitrary, contrary to public policy, or unconstitutional.⁵⁷

In *Nahrstedt v. Lakeside Village Condominium Ass’n, Inc.*, the Supreme Court of California, *en banc*, upheld a condominium complex’s complete prohibition on animals, stating that it did not “violate fundamental public policy,” was not “wholly arbitrary,” and did not “impose a burden . . . that far outweigh[ed] any benefit.”⁵⁸ The *Nahrstedt* court also addressed the rational relation of the condominium’s pet restriction, stating that “the recorded pet restriction . . . is not arbitrary, but is rationally related to health, sanitation, and noise concerns legitimately held by residents”⁵⁹

Courts have found a breach of the covenant of quiet enjoyment when tenants were disturbed by secondhand smoke,⁶⁰ when tenants lost the ability to use common areas,⁶¹ when a sex offender moved into an adjacent apartment,⁶² when a tenant was disturbed by noises in the apartment above his,⁶³ and more. In *Gainsborough Street Realty Trust v. Haile*, the court held that drifting cigarette smoke from a bar below the tenants had breached the covenant of quiet enjoyment because it had made the apartment “unfit for smokers and nonsmokers alike.”⁶⁴ The court awarded damages for the plaintiffs in the amount of three months of rent.⁶⁵

54. JACOB J. SHELLEY, SMOKE-FREE HOUSING BC., ENVIRONMENTAL TOBACCO SMOKE AS A BREACH OF THE COVENANT FOR QUIET ENJOYMENT 16 (2007) (quoting *Satchithanathan v. Cacciola*, 2002 CarswellOnt 5023, ¶ 50 (O.R.H.T.)).

55. O’Reilly-Jones, *supra* note 35, at 443.

56. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

57. *See, e.g., Hidden Harbour Ests. v. Basso*, 393 So. 2d 637, 639–40 (Fla. Dist. Ct. App. 1981); *Noble v. Murphy*, 612 N.E.2d 266, 270 (Mass. App. Div. 1993).

58. *Nahrstedt v. Lakeside Village Condominium Assn.*, 878 P.2d 1275, 1292 (Cal. 1994).

59. *Id.* at 1290.

60. *See Dworkin v. Paley*, 638 N.E.2d 636, 639 (Ohio Ct. App. 1994).

61. *See Doe v. New Bedford Hous. Auth.*, 630 N.E.2d 248, 255 (Mass. 1994).

62. *See Knudsen v. Lax*, 17 Misc. 3d 350, 361–62 (N.Y. Sup. Ct. 2007).

63. *See Bernard v. 345 E. 73rd Owners Corp.*, 581 N.Y.S.2d 46, 46 (N.Y. App. Div. 1992).

64. 50–58 *Gainsborough St. Realty Trust v. Haile, et al.*, SMOKE LITIGATION.ORG, <http://smokelitigation.org/cases/50-58-gainsborough-st-realty-trust-v-haile-et-al/> (last visited Jan. 23, 2021) [<https://perma.cc/QMD6-3W79>] (discussing the facts of 50-58 *Gainsborough St. Realty Trust v. Haile*, No. 98-SP-02279 (Bos. Hous. Ct. 1998)).

65. *Id.*

In *Doe v. New Bedford Housing Authority*, plaintiff Jane Doe filed a suit against her landlord for a breach of the covenant of quiet enjoyment for his failure to evict tenants involved in drug activity.⁶⁶ According to the tenant, “the crowds of people engaged in drug dealing [were] so large that the streets and sidewalks of the development [were] unusable and . . . the crowds create[d] noise and disturbances and litter[ed] the premises with drug paraphernalia.”⁶⁷ The Supreme Judicial Court of Massachusetts, Bristol, held that because “the plaintiffs truly are unable [to] use the common areas of the development, including sidewalks, streets, parking lots, and recreation areas within, then the situation constitutes a serious interference with their quiet enjoyment and substantially impairs the character of the leased premises.”⁶⁸

In *Knudsen v. Lax*, the City Court of Watertown held that the landlord breached the covenant of quiet enjoyment after he refused to allow a tenant with three young daughters to terminate the lease when a level three sex offender moved in next-door.⁶⁹ According to the court, because “they could not remove this sex offender . . . so as to restore to the tenants quiet enjoyment of the leasehold, they should have allowed the tenants to vacate the apartment without further rent obligations so they could afford to move their family to safer surroundings.”⁷⁰

While a court has not yet held that a pet breaches the covenant of quiet enjoyment, if it can find a breach of the covenant for smoke, the loss of common areas, or because a sex offender is living next door, it can certainly find a breach for a loud, vicious, or unsanitary animal. If a breach is found, the tenant is able to stay in possession and sue for damages equal to the difference between the value of the property with and without the breach,⁷¹ to “compensate the aggrieved party for all the detriment caused by the breach or which in the ordinary course would be a likely result.”⁷² Thus, recovery might include lost profits and moving expenses.⁷³ Recovery does not include punitive damages, unless the tenant has a wrongful eviction claim.⁷⁴ But even if a breach is found, damages may still be difficult to calculate in certain situations.⁷⁵

66. *New Bedford Hous. Auth.*, 630 N.E.2d at 249–50.

67. *Id.* at 250.

68. *Id.* at 255.

69. *See Knudsen v. Lax*, 17 Misc. 3d 350, 351 (N.Y. Sup. Ct. 2007).

70. *Id.* at 362.

71. *See Stevan v. Brown*, 458 A.2d 466, 474 (Md. Ct. Spec. App. 1983) (quoting *Burt v. Seven Grand Corp.*, 163 N.E.2d 4, 6 (Mass. 1959); *Echo Consulting Servs., Inc. v. N. Conway Bank*, 669 A.2d 227, 232 (N.H. 1995).

72. *Ginsberg v. Gamson*, 141 Cal. Rptr. 3d 62, 81 (Cal. Ct. App. 2012).

73. *Id.*

74. *See id.* at 82.

75. *Quiet Enjoyment in Commercial Leases: What Is It? Where Is It Going?*, FINDLAW, <https://corporate.findlaw.com/business-operations/quiet-enjoyment-in-commercial-leases-what-is-it-where-is-it.html> (Mar. 26, 2008) [<https://perma.cc/26KC-MWZW>].

B. *The Fair Housing Act (FHA)*

In 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968, which was designed to prohibit “discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, sex, (and as amended) handicap and family status.”⁷⁶ Title VIII of the Act is known as the FHA.⁷⁷ The FHA was passed in response to a multitude of issues which affected the housing market, including the civil rights movement and assassination of Reverend Dr. Martin Luther King, Jr., and the “growing casualty list from Vietnam.”⁷⁸ While the death toll in the Vietnam War was highest amongst African American and Hispanic men, their families were unable to purchase or rent homes in certain areas because of their race.⁷⁹ The FHA was passed and signed into law “[w]ith the cities rioting after Dr. King’s assassination, and destruction mounting in every part of the United States”⁸⁰

With the passage of the FHA, Congress prohibited “discrimination by direct providers of housing . . . whose discriminatory practices make housing unavailable to persons because of: race or color[,] religion[,] sex[,] national origin[,] familial status, or disability.”⁸¹ Discrimination in housing includes the refusal to rent or sell a dwelling, the refusal to negotiate with another over housing, making housing unavailable, altering the terms or prices on a sale or rental, and more.⁸² The FHA includes both multifamily dwellings and, in many cases, single family homes.⁸³

To demonstrate a disability under the FHA, an individual must show “a physical or mental impairment that substantially limits one or more major life activities,” a record of the impairment, or that they are “regarded as having such an impairment.”⁸⁴ The FHA lists examples of mental and physical impairments, including blindness, hearing impairment, HIV, mental retardation, alcoholism, head injuries, and more.⁸⁵ If an individual has one or more of the listed impairments, and this impairment affects the individual’s “seeing, hearing, walking, breathing . . . learning, speaking, or working,” the individual has a covered disability under the FHA.⁸⁶

Despite the protections of the FHA, individuals with disabilities continue to encounter many obstacles when searching for housing.⁸⁷ In 2014, 51.84% of

76. *History of Fair Housing*, U.S. DEP’T OF HOUS. & URB. DEV. [hereinafter *Fair Housing*], https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Jan. 23, 2021) [<https://perma.cc/6GM7-HTXR>].

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See The Fair Housing Act*, *supra* note 13.

82. 42 U.S.C. § 3604.

83. *See* 42 U.S.C. § 3603.

84. 42 U.S.C. § 12102(1).

85. *The Fair Housing Act*, *supra* note 13.

86. *Id.*

87. Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 929–30 (1994).

the 27,528 fair housing complaints with the United States Department of Housing and Urban Development (“HUD”) were disability complaints, which include discrimination based on both mental and physical disabilities.⁸⁸ These obstacles are even greater for those with psychiatric disabilities due to the stigma surrounding mental disability.⁸⁹ For example, individuals with mental disabilities, as compared to those without, are less likely to receive a response to an inquiry about housing, less likely to be told an advertised unit is available, and less likely to be invited to inspect the available unit.⁹⁰

A plaintiff may prove housing discrimination under the FHA by showing a failure to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”⁹¹ A reasonable accommodation is “a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with disabilities to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces”⁹² An accommodation is reasonable under the FHA if “it is both efficacious and proportional to the costs to implement it.”⁹³ Accommodations which impose undue financial or administrative burdens are not required.⁹⁴

HUD has set out some examples of reasonable accommodations: assigning an accessible parking spot for an individual with a mobility impairment, allowing a tenant to transfer to the ground floor, adding a grab bar to a tenant’s bathroom, and permitting an assistance animal in a “no pets” building.⁹⁵ Once a plaintiff proves discrimination, the court may award actual and punitive damages, a permanent or temporary injunction, a temporary restraining order,⁹⁶ and attorney’s fees.⁹⁷

C. *The Americans with Disabilities Act (ADA)*

The Americans with Disabilities Act (“ADA”), passed in 1990, “is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and

88. JOY HAMMEL, JANET SMITH, SUSAN SCOVILL, RON CAMPBELL & RUI DUAN, U.S. DEP’T OF HOUS. & URB. DEV., RENTAL HOUSING DISCRIMINATION ON THE BASIS OF MENTAL DISABILITIES: RESULTS OF PILOT TESTING 2 (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf> [<https://perma.cc/2EYX-J4DK>].

89. Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 26 (1993–1994) (“[M]ental disabilities are the most negatively perceived of all disabilities.”).

90. HAMMEL ET AL., *supra* note 88, at vii.

91. 42 U.S.C. § 3604(f)(3)(B).

92. *Reasonable Accommodations and Modifications*, U.S. DEP’T OF HOUS. & URB. DEV., www.hud.gov/program_offices/fair_housing_equal_opp/reasonable_accommodations_and_modifications#_Examples_1 (last visited Jan. 23, 2021) [<https://perma.cc/2RNT-SG46>].

93. *Wilkinson v. City of Arapahoe*, 926 N.W2d 441, 449 (Neb. 2019).

94. *Id.*

95. *Reasonable Accommodations and Modifications*, *supra* note 92.

96. 42 U.S.C. § 3613(c)(1).

97. *Id.* § 3613(c)(2).

private places”⁹⁸ The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities . . . ; a record of such impairment; or being regarded as having such impairment.”⁹⁹ Although the ADA does not include a list of conditions included under the definition of disability, conditions that are generally considered to be covered include: deafness, blindness, diabetes, intellectual disabilities, epilepsy, autism, mobile impairments, missing limbs, and certain psychiatric disorders.¹⁰⁰ On the contrary, the ADA does provide a list of conditions *not* included under the Act, including: homosexuality, kleptomania, psychoactive substance use disorders, sexual behavior disorders, and gender identity disorders.¹⁰¹

The ADA applies to employment, state and local government, public accommodations, and telecommunications,¹⁰² but does not address housing. Even so, the ADA extends into the housing realm because the FHA uses the ADA’s definition of disability.¹⁰³ Essentially, the FHA extends the ADA’s protection, propelling the right of reasonable accommodations into the housing sphere.

D. Assistance Animals Under Federal Law

1. Service Animals

The ADA defines “service animals” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability”¹⁰⁴ Service animals have been recognized by the ADA since its inception in 1990.¹⁰⁵ As of 2016, there were 500,000 registered service dogs in the United States¹⁰⁶ assisting some of the nearly 90 million people living with disabilities.¹⁰⁷ Although the definition requires that a service animal be a dog, under special circumstances, miniature horses are also acceptable.¹⁰⁸ Examples of dogs that are covered under the ADA’s definition of “service animal” include guide dogs or seeing eye dogs, hearing or signal dogs, psychiatric service dogs, sensory

98. *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT’L NETWORK [hereinafter *What Is the ADA?*], <https://adata.org/learn-about-ada> (last visited Jan. 23, 2021) [<https://perma.cc/4EN2-K3E8>].

99. 42 U.S.C. § 12102.

100. *Does the Americans with Disabilities Act (ADA) Provide a List of Conditions that Are Covered Under the Act?*, SHRM (Nov. 5, 2019) [hereinafter *ADA Conditions*], https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/cms_011495.aspx [<https://perma.cc/45VF-KTPD>].

101. *Id.*

102. *What Is the ADA?*, *supra* note 98.

103. *The Fair Housing Act*, *supra* note 13.

104. *Service Animals*, *supra* note 3.

105. See 28 C.F.R. § 36.302(c) (2016).

106. Mark Trainer, *Service Dogs Save Lives*, SHAREAMERICA (Sept. 30, 2016), <https://share.america.gov/service-dogs-save-lives/> [<https://perma.cc/5J6G-8FJU>].

107. DANIELLE M. TAYLOR, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2014, at 2 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf> [<https://perma.cc/6QJQ-T47L>] (stating that 85.3 million people living in the United States had a disability and 55.2 million had a severe disability).

108. *Service Animals and Emotional Support Animals*, ADA NAT’L NETWORK, <https://adata.org/publication/service-animals-booklet> (last visited Jan. 23, 2021) [<https://perma.cc/UMS7-ZZJT>].

signal dogs, and seizure response dogs.¹⁰⁹ Service animals may perform a variety of tasks for an individual with a disability, such as “guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.”¹¹⁰

There are no federal certification processes or requirements for service dog registration.¹¹¹ The Department of Justice (“DOJ”) has declined to set minimum standards for service animals, stating that the current standards were “inclusive of the varied services provided by working animals on behalf of individuals.”¹¹² Despite the lack of minimum standards, the majority of service dogs go through training; many programs exist to raise service dogs to fulfill the needs of their disabled owner.¹¹³ These programs focus on socialization and basic obedience training, making sure the animal is calm in unfamiliar settings, alert but not reactive, and reliable in performing repetitive tasks.¹¹⁴ For example, a group called Guide Dogs for the Blind “will train dogs for four months, but . . . the standards are so stringent only 42% actually make it to become working guides”¹¹⁵

Service animals are allowed in all public facilities, even if the building has a “no pets” policy.¹¹⁶ Additionally, a public accommodation or facility is not allowed to ask for proof of training, disability, or licensing.¹¹⁷ The owner is also exempt from any pet surcharges the public accommodation or facility may normally charge.¹¹⁸ Under the ADA, an individual may only ask someone with a service animal two questions: (1) “[i]s the animal required because of a disability?”; and (2) “[w]hat work or task has the animal been trained to perform?”¹¹⁹ Any additional questions may subject the individual to liability under the ADA.¹²⁰

109. *Id.*

110. Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1175 (2010).

111. *Service Dogs and the Americans with Disabilities Act (ADA): An Overview for Retail Businesses*, AM. HUMANE, https://www.americanhumane.org/app/uploads/2018/05/Service-Dog-Laws-for-Businesses_3_7_18_compressed.pdf (last visited Jan. 23, 2021) [<https://perma.cc/E3MJ-AEAN>].

112. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, 34521 (proposed June 17, 2008) (to be codified at 28 C.F.R. pt. 36).

113. *See, e.g., Service Dog Training*, USA SERVICE DOG REGISTRATION, <https://usaservicedogregistration.com/service-dog-training/> (last visited Jan. 23, 2021) [<https://perma.cc/W8HZ-5CJL>]; DOG ALLIANCE, https://www.thedogalliance.org/learning_academy#FAQ-TrainYourOwnServiceDog (last visited Jan. 23, 2021) [<https://perma.cc/J48H-2E29>].

114. 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/8G9C-V23L>].

115. Nelson Garcia, *Storytellers: Fake Service Dogs Not a Harmless Crime*, 9NEWS (Nov. 3, 2019, 10:16 PM), <https://www.9news.com/article/news/local/storytellers-impact-of-real-service-dogs/73-afb0b27e-c8d2-4d6e-9ad8-5ae922028a7a> [<https://perma.cc/AL2J-54GK>].

116. *See generally* 28 C.F.R. § 36.302(c) (2016).

117. *See* 28 C.F.R. § 36.302(c)(6) (2016); *Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1041 (N.D. Iowa 2011).

118. 28 C.F.R. § 36.302(c)(8) (2016).

119. Patricia Marx, *Pets Allowed*, NEW YORKER (Oct. 13, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed> [<https://perma.cc/7DX5-D7TE>].

120. *Id.*

Traditionally, service animals have been respected,¹²¹ although, with the increasing popularity of ESAs, those with service animals are being questioned on the legitimacy of their animals' status.¹²² Generally, "service dogs are more likely to be perceived as helping with a legitimate need, and their access to public space is viewed favorably."¹²³ However, it can be incredibly difficult to distinguish a service animal from an ESA, especially when the handler has a non-apparent disability.¹²⁴ Since an individual may only ask a handler whether the animal is needed for a disability and what tasks the animal is trained to perform,¹²⁵ this adds to the difficulty of ascertaining whether the animal is a service animal or an ESA. Given these rules: "The law is fuzzy. If you ask one too many questions, you're in legal trouble for violating the Americans with Disabilities Act and could face fines of up to a hundred thousand dollars."¹²⁶ In addition, because there is no requirement that service animals must have a vest or another distinguishing feature,¹²⁷ there is nothing physical to differentiate the two. This has led to a widespread distrust of people who have their animals with them in traditionally animal-free areas.¹²⁸ For example, individuals with service animals have been harassed in airports, restaurants, and taxi cabs, among other places.¹²⁹ Tom Panek, an advocate for the blind, stated, "As a person who is blind, my access rights are being infringed upon when somebody passes off a fake service dog."¹³⁰

Service animals serve an important role in our society. They perform a variety of tasks for disabled individuals and are almost always trained to perform these tasks with ease and little disruption to others.¹³¹ They are also completely protected under the ADA; individuals who are in need of one may have one and take it with them wherever they go.¹³² Despite some similarities between service animals and ESAs, ESAs differ greatly.

121. Jason Haag, *Phony Service Dogs Hurt Veterans*, WALL ST. J.: OP. (Jan. 26, 2020, 3:47 PM), <https://www.wsj.com/articles/phony-service-dogs-hurt-veterans-11580071621> [<https://perma.cc/S6LL-GZAH>].

122. See, e.g., David Leonhardt, *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/Y3K9-32ZC>].

123. 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, 1 (2017).

124. Huss, *supra* note 110, at 1178.

125. Marx, *supra* note 119.

126. *Id.*

127. U.S. DEP'T OF JUST., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA (2015), https://www.ada.gov/regs2010/service_animal_qa.pdf [<https://perma.cc/2TYM-WN2D>].

128. See Leonhardt, *supra* note 122.

129. See, e.g., *id.*

130. *Id.*

131. Huss, *supra* note 110, at 1175.

132. See 28 C.F.R. § 36.302(c)(7) (2016).

2. *Emotional Support Animals (ESAs)*

An ESA is “a companion animal that provides therapeutic benefit to an individual with a mental or psychiatric disability.”¹³³ ESAs are not considered “service animals” under the ADA.¹³⁴ Despite the numerous benefits that ESAs provide to their owners, they do not have “special training to perform tasks that assist people with disabilities”¹³⁵ because “[t]he crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks”¹³⁶ Although the ADA specifies that a service animal must be a dog or miniature horse,¹³⁷ because ESAs have no such requirement, people have been allowed to keep a variety of animals, such as pigs,¹³⁸ monkeys,¹³⁹ peacocks, penguins, turkeys, lobsters, and ducks as ESAs.¹⁴⁰

Because ESAs are not service animals, no government agency oversees them,¹⁴¹ and the requirements to register an ESA are much more lenient than registering a service animal.¹⁴² To register an ESA, an owner must obtain documentation.¹⁴³ This documentation, usually in the form of a written letter, may certify “(1) that the tenant or a member of his or her family is a person with a disability; (2) the need for the animal to assist the person with that specific disability; and (3) that the animal actually assists the person with a disability.”¹⁴⁴ In most states, this documentation is incredibly easy to obtain. Although the law requires that an individual receive a letter from a licensed mental health practitioner testifying to the benefits of the pet’s presence, it does not require that the mental health practitioner see the owner in person, meet the animal, or evaluate the owner and pet together.¹⁴⁵ In fact, it is incredibly rare, and often frowned upon, for a psychologist to “prescribe” an ESA to a patient,¹⁴⁶ as the therapeutic

133. Rebecca F. Wisch, *FAQs on Emotional Support Animals*, ANIMAL LEGAL & HIST. CTR. (2019), <https://www.animallaw.info/article/faqs-emotional-support-animals> [<https://perma.cc/UP5F-RXCN>].

134. *Service Animals and Emotional Support Animals*, *supra* note 108.

135. *Id.*

136. 18 C.F.R. § 36.104 (2016).

137. *Service Animals*, *supra* note 3.

138. Stockman, *supra* note 1.

139. *See* Alfonso III, *supra* note 6.

140. Gillett, *supra* note 7.

141. Ellen Hendriksen, *Are Emotional Support Animals Necessary or Just Glorified Pets?*, SCI. AM. (Sept. 26, 2018), <https://www.scientificamerican.com/article/are-emotional-support-animals-necessary-or-just-glorified-pets/> [<https://perma.cc/93LH-9TNM>].

142. Adrienne Matei, *The Number of Fake Emotional Support Dogs Is Exploding—Why?*, GUARDIAN (Aug. 16, 2019, 11:43 AM), <https://www.theguardian.com/lifeandstyle/2019/aug/12/fake-emotional-support-animals-service-dogs> [<https://perma.cc/L9SK-9QGF>].

143. *Id.*

144. *Service Animals and Emotional Support Animals*, *supra* note 108.

145. Olga Oksman, *An Emotional Support Animal Is Just a Mouse Click Away*, GUARDIAN (Sept. 20, 2017, 2:21 PM), <https://www.theguardian.com/lifeandstyle/2016/jul/28/emotional-support-animal-service-pet-flying-housing> [<https://perma.cc/D66R-89YT>].

146. Thayer, *supra* note 29.

benefits of ESAs are unclear and because writing an ESA letter “requires an administrative determination that can actually interfere with the therapeutic process.”¹⁴⁷

Several websites claim to be national registries where owners may receive a certification, such as The Official US Service Animal & Support Animal (ESA) Registry (www.usserviceanimals.org), United Support Animals (www.united-supportanimals.org), and The ESA Registration Of America (www.esaregistration.org).¹⁴⁸ If an individual “pay[s] them a fee in the \$150 – \$200 range [and] fill[s] out an open-ended questionnaire online . . . within 24 hours, . . . [his or her] ferret could be sitting on [their] lap during that Thanksgiving flight home, with no extra airline fee.”¹⁴⁹

Additionally, it is not a difficult task to pass off an ESA for an actual service dog or to pass off a non-registered pet as an ESA. For example, one can buy an “emotional support” harness on Amazon for \$12.99.¹⁵⁰ ESA dog tags are also offered online.¹⁵¹ If a pet has one of these, even if it is not registered, it is unlikely the owner will be questioned on the validity of their “ESA.” This loophole has made it difficult for individuals with service animals and ESAs for legitimate conditions—with the increase of misrepresentation of ESAs as service animals to gain illegitimate benefits comes the increase of “skepticism and scrutiny of legitimate [service] animals.”¹⁵² This skepticism and scrutiny “mak[es] it difficult for those with disabilities to move around without being questioned or confronted about their animals.”¹⁵³ Jackie Panos, a woman who is legally blind and uses a service animal to help guide her, created the Facebook page Service Dog Rules—Know the Rules, Stop the Fraud.¹⁵⁴ This page is filled with testimonials about how the misrepresentation of assistance animals makes life more difficult for those with legitimate service animals.¹⁵⁵

147. Hal Herzog, *Emotional Support Animals: The Therapist's Dilemma*, PSYCH. TODAY (Jul. 19, 2016), <https://www.psychologytoday.com/us/blog/animals-and-us/201607/emotional-support-animals-the-therapists-dilemma> [<https://perma.cc/AF36-M78G>].

148. See, e.g., US SUPPORT ANIMALS, <https://usserviceanimals.org/certification> (last visited Jan. 23, 2021) [<https://perma.cc/QV4J-8KH7>]; UNITED SUPPORT ANIMALS, <https://www.unitedsupportanimals.org/> (last visited Jan. 23, 2021) [<https://perma.cc/KE93-LZRG>]; ESA REGISTRATION AM., <https://www.esaregistration.org> (last visited Jan. 23, 2021) [<https://perma.cc/R35T-CFT4>].

149. Oksman, *supra* note 145.

150. See PLUTUS PET Emotional Support Dog Vest with 2 Free Removable Emotional Support Animal Patches, Reflective Lightweight Cool Mesh Dog Vests for Service Dogs, AMAZON, <https://www.amazon.com/Plutus-Pet-Reflective-Lightweight-Embroidery/dp/B07FYBMLK1> (last visited Jan. 23, 2021) [<https://perma.cc/5S5C-MRSF>].

151. Oksman, *supra* note 145.

152. Schoenfeld-Tacher et al., *supra* note 123, at 9.

153. *Fake Emotional Support Animals: How It Costs Those in Need*, CNBNEWS (June 15, 2020), <https://www.gloucestercitynews.net/clearysnotebook/2020/06/fake-emotional-support-animals-how-it-costs-those-in-need.html> [<https://perma.cc/8YGQ-ERY5>].

154. *Id.* Although the Facebook page is private, it may be accessed through this link: https://www.facebook.com/groups/153331838636359/?ref=group_header [<https://perma.cc/6JXK-T7CY>].

155. *Id.*

While the ADA recognizes ESAs because of their “innate or other characteristics that allow them to provide companionship as part of a plan to treat psychiatric disorders,”¹⁵⁶ there are few studies that actually examine the effectiveness of ESAs, and those that have been conducted draw mixed conclusions.¹⁵⁷ Multiple studies have found that patients with ESAs showed no significant improvements in their mental wellbeing.¹⁵⁸ Essentially, “[t]he research on dogs is inconclusive. The research on emotional support peacocks and hamsters doesn’t exist.”¹⁵⁹

3. *Prevalence of ESAs*

According to the National Service Animal Registry (“NSAR”), a “for-profit company that sells official-looking vests and certificates for owners,” as of 2019, almost 200,000 people in the United States have ESAs.¹⁶⁰ Because the NSAR only keeps track of its own customers, this number is underinclusive – without a national registry, it is impossible to know the actual number of ESAs.¹⁶¹ In 2016, over a million ESAs flew on airplanes.¹⁶² The vast majority of these ESAs are dogs,¹⁶³ but because no government agency oversees ESAs and there is no national registry,¹⁶⁴ statistics do not exist on the type of animals used as ESAs. Although it is common to hear about exotic species ESAs, such as monkeys, it is more likely that people are keeping “normal” pets as ESAs.¹⁶⁵

ESA ownership is not limited to a defined group of people; a wide array of the population has an ESA or knows someone with an ESA.¹⁶⁶ A study done in 2017 in the *International Journal of Environmental Research and Public Health* showed that 38.4% of people had a friend or family member who owned an ESA.¹⁶⁷ One area of the population in which ESAs are undoubtedly increasing

156. Ligatti, *supra* note 26, at 142 (citing *Auburn Woods I Homeowners Ass’n v. Fair Emp. & Hous. Comm’n*, 18 Cal. Rptr. 3d 669, 682 (Ct. App. 2004)).

157. Thayer, *supra* note 29.

158. See e.g., Helen Louise Brooks et al., *The Power of Support from Companion Animals for People Living With Mental Health Problems: A Systematic Review and Narrative Synthesis of the Evidence*, 18 *BMC PSYCHIATRY* 1, 10 (2018); Martina Lundqvist, Per Carlsson, Rune Sjö Dahl, Elvar Theodorsson & Lars-Åke Levin, *Patient Benefit of Dog-Assisted Interventions in Health Care: A Systematic Review*, 17 *BMC COMPLEMENTARY & ALT. MED.* 1, 10 (2017); Azharul Islam & Tony Towell, *Cat and Dog Companionship and Well-Being: A Systematic Review*, 3 *INT’L J. APPLIED PSYCH.* 149, 153 (2013).

159. Brian Resnick, *The Surprisingly Weak Scientific Case for Emotional Support Animals*, *VOX* (Nov. 19, 2018, 12:33 PM), <https://www.vox.com/science-and-health/2018/2/23/17012116/emotional-support-animal-airplane-psychology-research-dogs> [<https://perma.cc/49JL-6JY6>].

160. Stockman, *supra* note 1.

161. See *id.*

162. Michael Goldstein, *Will 2020 Mark the End of Emotional Support Animals on Airlines?*, *FORBES* (Dec. 19, 2019, 9:11 PM), <http://forbes.com/sites/michaelgoldstein/2019/12/19/will-2020-mark-the-end-of-emotional-support-animals-on-airlines/#665f66d2f7a8> [<https://perma.cc/XS8Y-NLYD>].

163. *Id.*

164. See Hendriksen, *supra* note 141.

165. See Stockman, *supra* note 1 (stating that the vast majority of ESAs are dogs).

166. Schoenfeld-Tacher et al., *supra* note 123, at 5.

167. *Id.*

in popularity is among university students.¹⁶⁸ For example, in 2011, Washington State University received two requests for ESAs.¹⁶⁹ In 2018, the university received seventy-five requests.¹⁷⁰ At Ohio State University, approximately 175 ESAs live with students in the residence halls.¹⁷¹ This is attributable to both the ease with which one can obtain documentation for an ESA and the high prevalence of mental disorders among university students.¹⁷²

According to the American College Association, 63% of students surveyed reported experiencing overwhelming anxiety in the past year and 42% reported they found it “difficult to function because they were depressed.”¹⁷³ In fact, 75% of mental disorders “have first onset by the typical college age range of 18-24.”¹⁷⁴ To cope with these mental disorders, “college students are increasingly asking administrators to allow them to bring animals to campus and to exempt them from the institution’s rules and practices that traditionally have upheld ‘no-pets’ policies”¹⁷⁵

E. ESAs and the Courts

There has never been a case holding that an ESA caused a breach of the covenant of quiet enjoyment. But a review of the cases involving ESAs give further insight into what courts do and do not consider to be legitimate.

1. The Bronk Test

Cases filed under the FHA regarding service animals and ESAs often turn on the training the animal has received.¹⁷⁶ In *Bronk v. Ineichen*, the Seventh Circuit set out two standards a disabled person must meet to receive accommodations: (1) the accommodation must facilitate a disabled person’s ability to function, and (2) the disabled person must show that the service animal ameliorates the effects of his disability.¹⁷⁷ Waiving a no-pet rule for a disabled tenant with a service animal is considered a reasonable accommodation in most circumstances.¹⁷⁸ Under the *Bronk* test, ESAs also often meet these requirements.¹⁷⁹

168. Jeremy Bauer-Wolf, *Dog Days in Dorms*, INSIDE HIGHER ED (May 21, 2019), <https://www.insidehighered.com/news/2019/05/21/colleges-see-rise-popularity-emotional-support-animals> [https://perma.cc/CF7J-5NL4].

169. *Id.*

170. *Id.*

171. *Id.*

172. *See id.*

173. *Id.*

174. C.W. Von Bergen, *Emotional Support Animals, Service Animals, and Pets on Campus*, 5 ADMIN. ISSUES J. 15, 16 (2015).

175. *Id.* at 17.

176. Huss, *supra* note 110, at 1196.

177. *Id.* at 1196–97.

178. *Prindable v. Ass’n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1257 (D. Haw. 2003).

179. *See Bhogaita v. Alamonte Heights Condo. Assn.*, 765 F.3d 1277, 1286–87 (11th Cir. 2014); *Warren v. Delvista Towers Condo. Ass’n*, 49 F.Supp. 3d 1082, 1089 (S.D. Fla. 2014); *Chavez v. Aber*, 122 F. Supp. 3d 581, 597 (W.D. Tex. 2015).

2. Cases Granting Accommodations

Other cases involving ESAs hold that a relationship must be established between the handler's disability and the need for an ESA.¹⁸⁰ In *Bhogaita v. Alameda Heights Condominium Association, Inc.*, resident Bhogaita suffered from post-traumatic stress disorder.¹⁸¹ He brought an action under the FHA after his landlord demanded he remove his emotional support dog because its weight violated the condominium's "pet weight policy."¹⁸² Because Bhogaita offered doctors' notes which stated that the ESA helped Bhogaita in "coping with his disability" and that without the dog, Bhogaita's "social interactions would be so overwhelming that he would be unable to perform work of any kind," the court concluded that Bhogaita produced sufficient evidence for a reasonable fact finder to conclude his ESA was a reasonable accommodation.¹⁸³

In *Castellano v. Access Premier Realty, Inc.*, tenant Castellano brought suit under the FHA after her landlord sent her a letter demanding she remove her emotional support cat from her apartment or face eviction, as she was in violation of the apartment's "no-pet policy."¹⁸⁴ The court held that the apartment violated the FHA by failing to provide reasonable accommodations, as Castellano "suffer[ed] from mental and physical impairments that substantially limited her major life activities."¹⁸⁵ Castellano's coverage under the FHA was proven by doctors' letters, which stated that "she suffered from mental illness and physical handicaps" and that her cat gave her emotional and mental support.¹⁸⁶

In sum, courts are more inclined to hold that an ESA is a reasonable accommodation when the tenant can produce sufficient evidence that he or she suffers from a mental illness and their ESA alleviates the symptoms of that mental illness.

3. Cases Denying Accommodations

In *Overlook Mutual Homes, Inc. v. Spencer*, Overlook Mutual Homes filed suit against its residents, claiming it was not required to accommodate their ESA.¹⁸⁷ The residents adopted a dog in October 2005, which was not originally prescribed as an ESA.¹⁸⁸ After the residents realized that the dog "had a calming effect on [their daughter], allowing her to remain in a room alone and sleep in her own bed," the residents obtained a letter from their daughter's psychologist

180. See *Bhogaita*, 765 F.3d at 1289; *Overlook Mut. Homes, Inc. v. Spencer*, 415 Fed. App'x 617, 622 (6th Cir. 2011); *Majors v. Hous. Auth. of the Cnty. of DeKalb*, 652 F.2d 454, 458 (5th Cir. Unit B Aug. 1981); *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798, 806 (E.D. Cal. 2016).

181. *Bhogaita*, 765 F.3d at 1281.

182. *Id.*

183. *Id.* at 1289.

184. *Castellano*, 181 F. Supp. 3d at 802.

185. *Id.* at 805, 809.

186. *Id.* at 806.

187. *Overlook Mut. Homes, Inc. v. Spencer*, 415 Fed. App'x 617, 619 (6th Cir. 2011).

188. *Id.* at 618.

which recommended a “service dog.”¹⁸⁹ After the residents informed Overlook of their dog, the apartment requested, among other things, their daughter’s medical diagnosis, the contact information of her medical providers, a description of her treatment, a description of the services provided by the dog and the training it had received, and her school and medical records.¹⁹⁰ Overlook refused to grant an accommodation until it received the requested records, but the residents refused to provide them.¹⁹¹ Ultimately, the court decided in favor of Overlook, as Overlook was not given enough information to “verify that a qualifying disability existed or that the proposed accommodation was related to the disability.”¹⁹²

In *Gill Terrace Retirement Apartments, Inc. v. Johnson*, the court concluded that “tenant [Johnson] was not entitled to a reasonable accommodation for a specific emotional support animal.”¹⁹³ After Johnson provided the proper documentation to her landlord, he approved her request to keep her ESA in the building, but “did not approve of Dutchess [the ESA] as the specific animal because of the dog’s hostility, complaints from other residents, and the tenant’s inability to restrain the dog.”¹⁹⁴ The court ultimately held that Johnson was entitled to an ESA, but she was not entitled to the “specific animal in question,” citing the ESA’s aggressive tendencies.¹⁹⁵

In conclusion, courts decline to hold an ESA is a reasonable accommodation when tenants are unable to produce the proper documentation to show the ESA is needed.¹⁹⁶ In addition, even if the tenant can produce the proper documentation, the court will not consider an ESA a reasonable accommodation if the animal is considered hostile or the owner cannot control it.¹⁹⁷

F. *Changes and Reform in How States Address Emotional Support Animals*

Some states have passed laws cracking down on ESAs.¹⁹⁸ As of 2019, thirty-one states have laws banning the use of fraudulent service animals, while five others have related laws.¹⁹⁹ In addition, many airlines have begun requiring proof of a pet’s training, vaccinations, and the owner’s diagnosis before allowing

189. *Id.*

190. *Id.*

191. *Id.* at 619.

192. *Id.* at 622.

193. *Gill Terrace Ret. Apartments, Inc. v. Johnson*, 177 A.3d 1087, 1088 (Vt. 2017).

194. *Id.* at 1090.

195. *Id.*

196. *Overlook Mut. Homes, Inc.*, 415 Fed. App’x at 622.

197. *Id.*

198. See, e.g., McKenzie Stauffer, *Utah Bill Would Make Lying About Emotional Support Animals a Class C Misdemeanor*, KUTV (Jan. 29, 2019), <https://kutv.com/news/local/utah-bill-would-make-lying-about-emotional-support-animals-a-class-c-misdemeanor> [<https://perma.cc/XP6J-LL7K>]; see also *Virginia To Require Therapeutic Relationship for Emotional Support Animal Requests*, NAT’L APARTMENT. ASS’N (Apr. 11, 2017) [hereinafter *Therapeutic Relationship*], <https://www.naahq.org/news-publications/virginia-require-therapeutic-relationship-emotional-support-animal-requests> [<https://perma.cc/X586-WY86>].

199. Mich. State Univ. Coll. of Law, *Fraudulent Service Dogs*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/content/fraudulent-service-dogs> (last visited Jan. 23, 2021) [<https://perma.cc/6M9F-FW9Z>].

an animal on a plane.²⁰⁰ The Department of Transportation stated that “[t]he new rules are designed to crack down on passengers traveling with unconventional pets like peacocks, possums, or snakes. They are designed to ‘[reduce] the likelihood that passengers wishing to travel with their pets on aircraft will be able to falsely claim their pets are service animals[.]’”²⁰¹

Furthermore, in August 2019, the American Psychological Association published an article on tightening ESA regulations.²⁰² The authors proposed a “four-point evaluation system developed to empirically ensure not only that the individual in question suffers from a psychological disability that impairs their functioning, but that the specific animal they want to certify both behaves appropriately to access the spaces where they are permitted and objectively improves the handler’s symptoms.”²⁰³ In other words, the American Psychological Association suggests that practitioners understand and apply the laws regulating ESAs properly, conduct

[a] thorough valid assessment of the individual requesting an ESA certification . . . [a]n assessment of the animal in question to ensure it actually performs the valid functions of an ESA . . . [and] [a]n assessment of the interaction between the animal and the individual to determine whether the animal’s presence has a demonstrably beneficial effect on that individual.²⁰⁴

1. Utah

Utah recently passed a statute criminalizing the misrepresentation of a pet as a service animal or support animal.²⁰⁵ The statute provides that:

[a]n individual is guilty of a class C misdemeanor if . . . the individual intentionally and knowingly falsely represents to another person that an animal is a service animal or support animal . . . the individual knowingly and intentionally misrepresents a material fact to a health care provider for the purpose of obtaining documentation from the health care provider necessary to designate an animal as a service animal or a support animal . . . or . . . the individual, except for an individual with a disability, uses an animal to gain treatment or benefits only provided for an individual with a disability.²⁰⁶

In other words, an individual who intentionally misrepresents an animal to be a service animal or ESA may be found guilty of a misdemeanor.²⁰⁷ Types of

200. Thayer, *supra* note 29.

201. Irina Ivanova, *DOT Could Let Airlines Ban Emotional Support Animals from Flight*, CBS NEWS (Jan. 22, 2020, 2:27 PM), <https://www.cbsnews.com/news/emotional-support-animals-dot-could-allow-ban-on-airlines/> [https://perma.cc/4ZHU-GHN9].

202. Matei, *supra* note 142.

203. *Id.*

204. Univ. of N.M., *The Growing Trend of Emotional Support Animals*, SCI. DAILY (Aug. 6, 2019), <https://www.sciencedaily.com/releases/2019/08/190806131437.htm> [https://perma.cc/RQ2E-B82Y].

205. See UTAH CODE ANN. § 62A-5b-106 (West 2019).

206. See *id.*

207. See *id.*

misrepresentation include lying to a medical provider to obtain an ESA letter or pretending an animal is an ESA or service dog to, for example, get special accommodations in housing, like living with an animal in a pet-free dwelling or avoiding the pet fee.²⁰⁸

The passage of the bill came shortly after a Utah mental health counselor became the subject of controversy when she wrote a letter “recommending an emotional support animal for someone who didn’t need one.”²⁰⁹ The mental health counselor did not discuss mental health or disabilities with the recipient of the letter, and, thus, gave a flawed assessment of the patient.²¹⁰

While it is unclear if the bill’s passage had anything to do with this incident, ultimately, the state sought to pass this bill because of the “growing trend that has made national news with people who have brought ‘emotional support’ peacocks, snakes, and squirrels with them.”²¹¹ According to Utah State Senator Curt Bramble, “there’s been a lot of real or perceived abuses, taking liberties with [ESAs].”²¹² The Humane Society of Utah, which ardently supported the passage of the bill, stated that “it can create a potentially dangerous and inconvenient situation for both people and pets if an animal is falsely portrayed as a service animal.”²¹³

2. *Kentucky*

Of the many states with fraudulent representation laws, Kentucky has one of the most stringent. The law in Kentucky currently provides:

A person commits the offense of misrepresentation of an assistance animal if the person knowingly . . . [m]isrepresents . . . to maintain an assistance animal in a dwelling that the person has a disability. . . . [m]akes materially false statements for the purpose of obtaining documentation for the use of an assistance animal in housing . . . [p]rovides a document to another falsely stating that an animal is an assistance animal for use in housing . . . [f]its an animal, which is not an assistance animal, with a harness, collar, vest, or sign that the pet is an assistance animal . . . or . . . [p]rovides documentation as a part of a request for an assistance animal in housing to a person for the primary purpose of obtaining a fee.²¹⁴

208. *See id.*

209. Michael Locklear, *Bogus Emotional Support Animal Letter Gets Utah Mental Health Counselor in Trouble*, KUTV (Aug. 14, 2019), <https://kutv.com/news/local/bogus-emotional-support-animal-letter-gets-utah-mental-health-counselor-in-trouble> [https://perma.cc/66GU-3Q7J].

210. *Id.*

211. Ben Winslow, *Bill in the Utah Legislature Seeks to Regulate Emotional Support Animals*, FOX 13 SALT LAKE CITY (Jan. 12, 2019, 10:59 AM), <https://fox13now.com/2019/01/12/bill-seeks-to-regulate-support-animals/> [https://perma.cc/4JCA-FKG6].

212. *Id.*

213. *Id.*

214. KY. REV. STAT. ANN. § 383.085(6) (West 2019).

In other words, similar to Utah's statute,²¹⁵ Kentucky prohibits individuals from misrepresenting their animal as an assistance animal in many different circumstances.²¹⁶ Under this law, officers would be "allowed to investigate, issue a citation, and require an individual to remove their [animal] from areas designated for service animals only."²¹⁷

The statute mostly focuses on misrepresentation of an animal to obtain beneficial treatment in housing situations.²¹⁸ It prohibits individuals from misrepresenting their animal as an assistance animal to keep it in a pet-free dwelling or to avoid paying a pet-fee.²¹⁹ The statute also goes farther than Utah's does, as it prohibits "[f]it[ting] an animal, which is not an assistance animal, with a harness, collar, vest, or sign that the pet is an assistance animal."²²⁰ Kentucky's legislature fought to pass this new statute to "help discourage individuals from continuing to bend the loose federal and state laws" after seeing "numerous news articles and media clips about the increasing abuse of service and assistance animals."²²¹

3. Virginia

In 2017, Virginia passed a statute which allows a person who receives a request to accommodate an assistance animal in a dwelling, such as a landlord, to require documentation from "any person with whom the person with a disability has or has had a therapeutic relationship."²²² The statute defines therapeutic relationship as:

[T]he provision of medical care, program care, or personal care services, in good faith, to the person with a disability by . . . a mental health service provider . . . an individual or entity with a valid, unrestricted state license, certification, or registration to serve persons with disabilities . . . a person from a peer support or similar group that does not charge service recipients a fee . . . and who has actual knowledge about the requester's disability . . . or . . . a caregiver, reliable third party, or government entity with actual knowledge of the requester's disability.²²³

Virginia passed the statute after a significant spike in requests for ESAs in apartment complexes.²²⁴ For years, landlords in Virginia complained of "tenants . . . faking disability certifications to qualify their pets as emotional support

215. See UTAH CODE ANN. § 62A-5b-106 (West 2019).

216. See KY. REV. STAT. ANN. § 383.085(6) (West 2019).

217. Garrett Wymer, *Lawmaker Proposing Legislation Crack Down on Service Dog Misuse*, WKYT (June 25, 2019, 5:10 PM), <https://www.wkyt.com/content/news/Lawmaker-proposing-legislation-to-crack-down-on-service-dog-misuse-511802072.html> [<https://perma.cc/W6KX-4LRG>].

218. See § 383.085(6).

219. See *id.*

220. *Id.*

221. Angela M. Dial, *The Working Public's Perceptions of Service Dogs: A Phenomenological Investigation of Gatekeepers' Experiences*, W.V. UNIV. RSCH. REPOSITORY 1, 33 (2019).

222. See VA. CODE ANN. § 36-96.3:1 (West 2017).

223. See *id.*

224. *Therapeutic Relationship*, *supra* note 198.

animals and get around lease restrictions.”²²⁵ The Virginia Apartment Management Association advocated for the passage of the statute to “fight back against online companies that charge a few hundred bucks to connect people with licensed counselors willing to issue a disability certification based on the results of a quick survey.”²²⁶

This law allows the state to “crack[] down on websites that promise to provide E.S.A. verification letters for a fee”²²⁷ In fact, state regulators recently fined a counselor \$1,000 after determining he was issuing ESA letters to patients online.²²⁸ This “was the first and only case of its kind in the state,”²²⁹ but with the new law, it is more likely that cases like this will continue to be prosecuted.

While many states have passed laws criminalizing the misrepresentation of service animals or ESAs, the problem persists, especially given the HUD’s recommendations: (1) landlords may not require a healthcare professional to use a specific form, provide an individual’s diagnosis, or give other information about the individual’s condition; (2) landlords may not request access to an individual’s medical records or insist on a medical examination; (3) a diagnosis and letter from an online medical professional suffices to qualify an individual for an ESA.²³⁰

III. ANALYSIS

This Part will first address arguments in favor of ESAs. It will then consider the problems with current laws, which include social consequences, harm to animals’ wellbeing, and the direct conflict between ESAs and the covenant of quiet enjoyment. Lastly, it will address the need for change in current laws. In doing so, it will seek to determine whether individuals have a right to ESAs and if imposing new restrictions on ESAs would be a denial of those rights.

A. Addressing Arguments in Favor of ESAs

Despite the ease with which one can bypass a no-pet restriction with an ESA, there are many individuals who need an ESA or can greatly benefit from one. Studies have shown that ESAs can help alleviate symptoms stemming from

225. Ned Oliver, *Therapist Fined for Issuing Fake Emotional Support Animal Certification. ‘It’s Just So Rampant,’* VA. MERCURY: GOV’T & POL. (June 20, 2019), <https://www.virginiamercury.com/blog-va/therapist-fined-for-issuing-fake-emotional-support-animal-certification-its-just-so-rampant/> [https://perma.cc/5BRV-6FRF].

226. *Id.*

227. Stockman, *supra* note 1.

228. Oliver, *supra* note 225.

229. *Id.*

230. See U.S. DEP’T OF HOUS. & URB. DEV., ASSESSING A PERSON’S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 13–14 (2020), <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf> [https://perma.cc/5VV7-SVMU].

psychotic, mood, and anxiety disorders, can benefit people with Alzheimer's, dementia, and autism, and can help reduce blood pressure.²³¹

The prevalence of anxiety disorders is soaring in the United States, especially among millennials.²³² Approximately one in four adults experience a mental health impairment in any given year and one in seventeen live with a serious mental illness.²³³ Psychological disorders account for the second greatest number of disability claims.²³⁴ With such a high prevalence of mental health impairment, the number of ESAs has greatly increased.²³⁵ Moreover,

[Emotional support] animals perform a variety of critical functions that accommodate the needs of many individuals with psychiatric disabilities, including alleviating symptoms of post traumatic stress disorder, anxiety disorders and panic disorders by calming the handler and reducing physical and mental effects such as anxiety, fear, flashbacks, hyper vigilance, hallucinations, intrusive imagery, nightmares, muscle tension, trembling, nausea, and memory loss.²³⁶

Poor mental health can also cause physical health problems, such as heart disease and respiratory disease.²³⁷ An ESA can alleviate symptoms of mental illnesses without any specialized training,²³⁸ the companionship provided by an ESA is usually what has the greatest effect.²³⁹ Thus, it is incredibly important that those who need ESAs are able to obtain them and any restrictions placed on ESAs should be placed with those who have mental disabilities in mind.

ESAs have been shown to alleviate the symptoms of psychiatric disorders, including post-traumatic stress disorder,²⁴⁰ with studies showing that animal companionship has unique benefits for individuals with mental or psychiatric disorders.²⁴¹

231. Steven Feldman, *Alleviating Anxiety, Stress and Depression with the Pet Effect*, ANXIETY & DEPRESSION ASS'N OF AM. (Nov. 2018), <https://adaa.org/learn-from-us/from-the-experts/blog-posts/consumer/alleviating-anxiety-stress-and-depression-pet> [<https://perma.cc/LR59-3TFW>].

232. Kashmiri Gander, *Millennials are the Most Anxious Generation, New Research Shows*, NEWSWEEK (May 9, 2018, 11:24 AM), <https://www.newsweek.com/millennials-most-anxious-generation-new-research-shows-917095> [<https://perma.cc/NGU3-R9NJ>].

233. Von Bergen, *supra* note 174, at 16.

234. *Id.*

235. *See* Stockman, *supra* note 1.

236. Kristin M. Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 U. LOUISVILLE L. REV. 197, 206 (2009) (quoting Regulations.gov, Document Details, Comment Submitted by Erika Hagensen, The Arc of the United States and United Cerebral Palsy, <https://beta.regulations.gov/comment/DOJ-CRT-2008-0016-1590>) (last visited Jan. 12, 2021) [<https://perma.cc/7UTN-W3UZ>].

237. *Physical Health and Mental Health*, MENTAL HEALTH FOUND., <https://www.mentalhealth.org.uk/a-to-z/p/physical-health-and-mental-health> (last visited Jan. 23, 2021) [<https://perma.cc/74UH-58LW>].

238. Mammoser, *supra* note 8.

239. *E.g.*, Bourland, *supra* note 236, at 207.

240. Ligatti, *supra* note 26, at 141–42.

241. Von Bergen, *supra* note 174, at 18.

B. Problems with Current Laws

While one cannot doubt the positive effects ESAs have for their handlers, it is important to recognize the potential negative effects. Despite the comfort they may provide to those with psychiatric disorders, ESAs may also be noisy,²⁴² dangerous,²⁴³ or unsanitary.²⁴⁴ In addition to the trouble ESAs may cause for humans, there may also be dire consequences for animals who “work” as ESAs.²⁴⁵

1. Social Consequences

The prevalence of ESAs, especially if the system continues to be abused, may lessen the validity of legitimate service dogs.²⁴⁶ Many individuals who see handlers with ESAs feel that those handlers have found a way to “game the mental health system.”²⁴⁷ This skews people’s perception of service dogs and legitimate ESAs, making it more difficult for people with legitimate disorders, especially because it is difficult to tell the difference between an ESA and a service animal.²⁴⁸

For veterans, many of whom “rely on highly skilled service animals to make it through [their] days,” the skewed perception of service dogs caused by ESAs is incredibly harmful.²⁴⁹ With approximately 20% of Iraq combat veterans suffering from PTSD, service animals which “sense panic attacks or flashbacks . . . interrupt their owners during a night terror . . . [or] retrieve medication” can play a vital role in their handlers’ lives.²⁵⁰ Because service animals receive rigorous training and know “how to tune out distractions . . . behave in public . . . not to growl, bite or lunge at people . . .”²⁵¹ it makes sense why those with service dogs are concerned about the impact of ESAs.

Although bearing many similar characteristics to service animals, ESAs are not service animals.²⁵² Unlike service animals, ESAs have no disability-specific

242. Marx, *supra* note 119.

243. See *Most Controversial Emotional Support Animal Stories of 2018*, FOX NEWS (Dec. 19, 2018) [hereinafter *Controversial ESA Stories*], <https://www.foxnews.com/travel/craziest-emotional-support-animal-stories-of-2018> [https://perma.cc/R3PT-EJZ4].

244. See *id.*; Lindsey Konkel, *Nothing to Sneeze at: Cats Worse Than Dogs for Allergies*, LIVESCIENCE (May 30, 2013), <https://www.livescience.com/36578-cat-worse-dogs-allergies-pets.html> [https://perma.cc/3CC5-YS28].

245. See generally Ian Sample, *Dogs Mirror Stress Levels of Owners, Researchers Find*, GUARDIAN (June 6, 2019, 9:29 AM), <https://www.theguardian.com/science/2019/jun/06/dogs-mirror-stress-levels-of-owners-researchers-find> [https://perma.cc/77EA-RNP8].

246. Matei, *supra* note 142.

247. *Id.*

248. *Id.*

249. Haag, *supra* note 121.

250. *Id.*

251. *Id.*

252. Huss, *supra* note 110, at 1177.

training.²⁵³ Instead, the value of an ESA comes from its “innate or other characteristic[] that allow[s] them to provide companionship as part of a plan to treat psychiatric disorders.”²⁵⁴

2. *Consequences for Animal Welfare*

Because the main focus in the ESA debate is the individual and the legitimacy of his or her animal, the consequences for animal welfare are often ignored. Not only do certain types of ESAs mirror their handlers’ emotions,²⁵⁵ but the stress they feel may be heightened when they are inevitably left at home all day because of the restrictions on ESAs.

Dogs are the most susceptible to mirroring their handlers’ emotions,²⁵⁶ with studies showing that “[dogs] are not oblivious to their owners’ anxieties [and] mirror the amount of stress the [ir owners] feel.”²⁵⁷ Dogs mainly mirror their handlers’ personality traits; neuroticism, openness to experience, and conscientiousness all influence long-term cortisol concentrations in dogs.²⁵⁸ But dogs aren’t the only animals sensitive to their owners’ emotions.²⁵⁹ For example, “[h]orses are emotional mirrors . . . [t]hey can absorb and understand what [a human is] feeling without any hesitation.”²⁶⁰ Studies have also found that cats,²⁶¹ primates,²⁶² and rats²⁶³ also mirror the emotions of humans.

Because those with ESAs cannot bring them many places, such as restaurants or certain workplaces,²⁶⁴ there is concern for an animal who is left at the owner’s home all day. While there are no studies which conclusively show the effects of leaving an animal home all day, the “loose” consensus among trainers and veterinarians is that most dogs should not be left alone for more than four hours.²⁶⁵ Studies have shown that “dogs are stressed when left alone. Levels of

253. Ligatti, *supra* note 26, at 142.

254. *Id.*

255. *See generally* Sample, *supra* note 245.

256. *Id.*

257. *Id.*

258. Marc Bekoff, *Dogs Mirror Our Stress and We Know More About How and Why*, PSYCH. TODAY (June 8, 2019), www.psychologytoday.com/us/blog/animal-emotions/201906/dogs-mirror-our-stress-and-we-know-more-about-how-and-why [<https://perma.cc/8PE5-99KP>].

259. Thayer, *supra* note 29.

260. *Id.*

261. Robin Wylie, *Your Cat Can Pick Up on How You Are Feeling*, BBC (Oct. 14, 2015), <http://www.bbc.com/earth/story/20151015-your-cat-can-pick-up-on-how-you-are-feeling> [<https://perma.cc/S6YZ-529P>].

262. *See* Terry Gross, *Sex, Empathy, Jealousy: How Emotions and Behavior of Other Primates Mirror Our Own*, WBFO: NPR (Mar. 19, 2019), <https://news.wbfo.org/post/sex-empathy-jealousy-how-emotions-and-behavior-other-primates-mirror-our-own> [<https://perma.cc/Y372-5GQQ>].

263. Keyzers Group, *I Feel You: Emotional Mirror Neurons Found in the Rat*, NETH. INST. FOR NEUROSCIENCE (Apr. 11, 2019), <https://nin.nl/emotional-mirror-neurons-found-rat/> [<https://perma.cc/8BP2-KNDM>].

264. Marx, *supra* note 119.

265. Jessica Pierce, *When Leaving a Dog Home Alone, How Long Is Too Long?*, PSYCH. TODAY (Feb. 21, 2018), <https://www.psychologytoday.com/us/blog/all-dogs-go-heaven/201802/when-leaving-dog-home-alone-how-long-is-too-long> [<https://perma.cc/BN47-8SVB>].

cortisol in the blood increase, and sometimes spike . . . [d]ogs certainly experience loneliness.”²⁶⁶ While other animals, such as cats, known for their independence, can be left alone for longer, they can still have the same reaction.”²⁶⁷ As for the “untraditional” ESAs, “there are no circumstances under which one could argue that other kinds of animals – *e.g.*, lizards, birds, pigs, or horses – would be better off [in a home than] in a natural setting suited to the animal’s adaptive nature and needs.”²⁶⁸

Furthermore, “[i]f you think flying is stressful, just imagine how the experience must impact an innocent, unknowing dog or cat when packed away in the cargo hold of a commercial jet.”²⁶⁹ In a cargo hold, the “temperature can fluctuate wildly, noise can be tremendous and air pressure can drop significantly”²⁷⁰ Kirsten Theisen, of the Humane Society of the United States, suggests that people leave their animals at home when flying.²⁷¹

In sum, while ESAs can be incredibly helpful in alleviating the symptoms of their handler’s disabilities, ESAs may be subjected to extreme stress, unhappiness, or danger. While the wellbeing of individuals with mental disabilities or disorders is important, so too is the welfare of our animals.

3. *Direct Conflict Between ESAs and Covenant of Quiet Enjoyment*

Although there has never been a case holding that an ESA caused a breach of the covenant of quiet enjoyment, the impact of an ESA can be compared to many other instances in which breaches have been found. The presence of secondhand smoke has been found by multiple courts to potentially be a breach of the covenant of quiet enjoyment.²⁷² Secondhand smoke can be directly compared with ESAs; both emit allergens and smells which would otherwise not be present. Similarly, consistently loud music or noises have been found to breach the covenant of quiet enjoyment.²⁷³ Like loud neighbors, loud animals can make it impossible for a tenant to sleep, work, or otherwise enjoy his or her dwelling, thus breaching the covenant of quiet enjoyment.

The covenant of quiet enjoyment guarantees the tenants “the right of possession, occupancy, and beneficial use of every portion of the leased premises.”²⁷⁴ As of 2017, there were 43 million American renters.²⁷⁵ This means that an enormous number of Americans could lose the right to the beneficial use of

266. *Id.*

267. *How Long Can You Leave a Cat Alone?*, PURINA ONE, <https://www.purina.co.uk/cat/purina-one/advice/health/article/leave-cat-at-home> (last visited Jan. 23, 2021) [<https://perma.cc/Z334-XSGN>].

268. Herzog, *supra* note 28.

269. Alastair Bland, *Is Taking Your Pet on an Airplane Worth the Risk?*, SMITHSONIAN MAG. (Mar. 20, 2013), <https://www.smithsonianmag.com/travel/is-taking-your-pet-on-an-airplane-worth-the-risk-6241533/> [<https://perma.cc/F7TV-WRSA>].

270. *Id.*

271. *Id.*

272. *See generally* Dworkin v. Paley, 638 N.E. 2d 636, 639 (Ohio Ct. App. 1994).

273. *See generally* Bocchini v. Gorn Mgmt. Co., 515 A.2d 1179, 1184–86 (Md. App. 1986).

274. Talbott v. English, 59 N.E. 857, 859 (Ind. 1901).

275. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING 2017, at 7 (2017).

their property because of an ESA. ESAs may be disruptive, injure other tenants, or have adverse health consequences, all scenarios which may breach the covenant of quiet enjoyment.²⁷⁶

i. Noise and Disruption to Other Tenants

Because ESAs cannot go everywhere with their handler,²⁷⁷ these animals must often be left at home, which could lead to disruption to other tenants. According to a 2003 study, 33% of landlords who allowed pets in their buildings received noise complaints and approximately 48% had received general complaints about the animals.²⁷⁸ In buildings where animals aren't allowed and tenants signed a lease with that understanding, numbers are likely to be even higher. While it is a breach of contract for a tenant to keep a pet in a no-pet building, the landlord doesn't breach the lease by allowing exceptions for the no-pet clause, especially because he or she is mandated by law to accept a tenant with an ESA or service animal.²⁷⁹

An article in Brigham Young University's *The Universe* addressed this exact concern.²⁸⁰ The article told the story of Tew, a tenant, who "would come home to the sound of restless barking from behind her roommate's locked door. The roommate would keep her registered emotional support dog in her bedroom daily while she attended classes and work."²⁸¹ The article also addressed Tew's experience with another ESA, her roommate's cat, which was often left alone without food and meowed loudly.²⁸² Tew recalled having to care for the cat, even making sure the cat was fed before leaving her apartment.²⁸³ These problems are not exclusive to Brigham Young University. A student at Northwestern University moved off campus after too many students complained to Residential Services about her ESA's barking.²⁸⁴

Even outside student housing, where loud ESAs are presumably more troublesome because of the tight living quarters, ESAs disturb residents. In Jacksonville, Florida, residents complained after a neighbor's emotional support

276. O'Reilly-Jones, *supra* note 35, at 460.

277. Marx, *supra* note 119.

278. O'Reilly-Jones, *supra* note 35, at 444.

279. See Tara A. Waterlander, *Some Tenants Have Tails: When Housing Providers Must Permit Animals to Reside in "No-Pet" Properties*, 18 ANIMAL L. 321, 335–36 (2012).

280. See Marina McNairy, *Emotional Support Animals a Growing Surprise in Student Housing*, DAILY UNIVERSE (Jan. 24, 2020), <https://universe.byu.edu/2020/01/24/byus-surprise-roommates-living-with-an-animal/> [<https://perma.cc/P5HG-AEWS>].

281. *Id.*

282. *Id.*

283. *Id.*

284. Neya Thanikachalam, *Some Students with Emotional Support Animals Say They Don't Feel Supported by NU's Residential Services*, DAILY NW (Apr. 28, 2019), <https://dailynorthwestern.com/2019/04/28/latest-stories/some-students-with-emotional-support-animals-say-they-dont-feel-supported-by-nus-residential-services/> [<https://perma.cc/9EDT-J6LJ>].

rooster's crowing woke them up every morning.²⁸⁵ In Lee County, Florida, neighbors complained about the noise made by a woman's four chickens.²⁸⁶

ii. Risk to Public Safety

ESAs can also be dangerous. Because ESAs are untrained, they pose a risk to both humans and other animals – they may growl, bite, or become agitated.²⁸⁷ Many people believe that allowing ESAs in public “would increase the risk of . . . bites or other injuries related to the interaction between [animals] and humans.”²⁸⁸

Approximately 4.5 million Americans are bitten by dogs each year, many of whom “require[] medical attention.”²⁸⁹ The majority of those bitten are young children.²⁹⁰ In December 2017, an emotional support dog bit a five-year-old girl in the face, leaving her with permanent scars, a severed tear duct, and a disfigured upper lip.²⁹¹ In June 2017, a man was left with permanent scarring, numbness, and intermittent speech issues after he was attacked by an ESA which lunged at his face.²⁹² Delta Airlines recently changed its policy on ESAs, citing an 84% increase in animal incidents since 2016.²⁹³

Additionally, animals, especially dogs, are highly receptive to human emotions and often absorb them, causing extreme stress.²⁹⁴ When an animal is not a traditional pet, it can be even more difficult to meet its needs and control its stress.²⁹⁵ For example, in a psychologist's evaluation of a woman interacting with her three emotional support monkeys, there were “numerous manifestations of extreme stress on the part of the monkeys: yawning, pacing, thumb-sucking,

285. Jamarlo Phillips, *'Emotional Support Rooster' Ruffling Feathers in Jacksonville Neighborhood*, ACTION NEWS JAX (Nov. 1, 2019, 8:02 PM), <https://www.actionnewsjax.com/news/local/-emotional-support-rooster-ruffling-feathers-in-jacksonville-neighborhood/1004162644/> [<https://perma.cc/9Q9A-ETK8>].

286. Leslie DelasBour, *Woman Fighting to Keep Emotional Support Chickens Now Filing Federal Charges Against Lee County*, FOX4 (Nov. 8, 2020, 2:09 PM), <https://www.fox4now.com/news/local-news/woman-fighting-to-keep-emotional-support-chickens-now-filing-federal-charges-against-lee-county> [<https://perma.cc/MKV6-J89A>].

287. See *Controversial ESA Stories*, *supra* note 243.

288. Chelsea Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals?*, 21 RICH. PUB. INT. L. REV. 313, 337 (2018).

289. *Healthy Pets, Healthy People: Dogs*, CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH AND HUMAN SERVS., <https://www.cdc.gov/healthypets/pets/dogs.html#dog-bites> (last visited Jan. 23, 2021) [<https://perma.cc/ZE22-Z2CB>]; *Dog Bite Statistics (How Likely Are You to Get Bit?)*, Canine J., <https://www.caninejournal.com/dog-bite-statistics/#sources> (May 27, 2020) [<https://perma.cc/GPQ5-7XS6>].

290. See *Healthy Pets, Healthy People: Dogs*, *supra* note 289.

291. Meagan Flynn, *An 'Emotional Support' Pit Bull Mauled a 5-Year-Old Girl in an Airport Terminal, Lawsuit Says*, WASH. POST (Feb. 29, 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/4R7T-JCTB>].

292. Paulina Firozi, *An 'Emotional-Support Dog' Attacked Him on a Flight. He's Suing Delta and the Owner.*, WASH. POST (May 29, 2019, 3:09 PM), <https://www.washingtonpost.com/transportation/2019/05/29/an-emotional-support-dog-attacked-him-flight-hes-suing-delta-owner/> [<https://perma.cc/B6VM-9P5R>].

293. *Id.*

294. Herzog, *supra* note 28.

295. See *id.*

etc.”²⁹⁶ Stressed out animals may pose an even higher danger than regular animals.

Furthermore, because an ESA can be any type of animal,²⁹⁷ there is the potential that people will keep exotic animals as ESAs. An exotic pet is any animal other than cats, dogs, fish, or horses.²⁹⁸ Those who keep traditionally more dangerous animals expose the public to greater risk.²⁹⁹ Individuals have registered monkeys, pigs, chickens, kangaroos, penguins,³⁰⁰ peacocks, squirrels,³⁰¹ horses, ducks, turkeys, and more as ESAs.³⁰² Many states have restrictions on the types of animals an individual may keep as a pet.³⁰³ For example, in most states, including Arizona, Idaho, and Illinois, primates may not be kept as pets.³⁰⁴ But even so, monkeys are commonly kept as ESAs.³⁰⁵ Restrictions on animals are created to protect citizens;³⁰⁶ exotic animals may carry diseases and, in some cases, pose a serious threat of injury.³⁰⁷

The likelihood of falling ill after an interaction with an exotic pet is not slim.³⁰⁸ Approximately 15,000 primates are kept as pets in the United States,³⁰⁹ of which 80% to 90% of all macaque monkeys, carry Herpes-B virus, a virus which is fatal in humans.³¹⁰ Any person bit, scratched, or sneezed on by a macaque monkey runs the risk of contracting the virus.³¹¹ In addition, 90% of all reptiles, including iguanas, snakes, lizards, and turtles, carry and shed salmonella in their feces.³¹² There are approximately 93,000 cases per year of salmonella

296. *Id.*

297. See Stockman, *supra* note 1.

298. Robin Micheli, *Exotic Pets: A Growing American Fad*, CNBC (Feb. 13, 2014, 1:24 PM), <https://www.cnn.com/2014/02/10/american-fad.html> [<https://perma.cc/4GFV-SYUU>].

299. *Keeping Wild Animals—Unsafe, Illegal, and Inhumane*, PAWS, <https://www.paws.org/resources/keeping-wild-animals-unsafe-illegal-and-inhumane/> (last visited Jan. 23, 2021) [<https://perma.cc/H92A-RNP6>].

300. Francesca Street, *Should Emotional Support Animals Be Allowed on Board Airplanes?*, CNN TRAVEL (Oct. 23, 2019), <https://www.cnn.com/travel/article/emotional-support-animals-airplanes/index.html> [<https://perma.cc/7H86-5S55>].

301. *Controversial ESA Stories*, *supra* note 243.

302. Ronan J O’Shea, *Strangest Emotional Support Animals Taken on Planes from Peacocks to Monkeys*, INDEP. (Feb. 2, 2018, 4:00 PM), <https://www.independent.co.uk/travel/news-and-advice/emotional-support-animals-planes-flights-peacocks-marmoset-horse-a8190576.html> [<https://perma.cc/2GM8-C9ME>].

303. *Map of Private Exotic Pet Ownership Laws*, ANIMAL LEGAL & HIST. CTR., <https://www.animal-law.info/content/map-private-exotic-pet-ownership-laws> (last visited Jan. 23, 2021) [<https://perma.cc/3VXD-8L3G>].

304. *Id.*

305. See, e.g., Alfonso III, *supra* note 6.

306. Martha Drouet, *Brief Summary of Exotic Pets Laws*, ANIMAL LEGAL & HIST. CTR. (2014), <https://www.animallaw.info/intro/exotic-pets-update-2013> [<https://perma.cc/DAH5-R8HP>].

307. *The Dangers of Keeping Exotic Pets*, BORN FREE USA [hereinafter *Dangers of Exotic Pets*], born-freeusa.org/campaigns/animals-in-captivity/the-dangers-of-keeping-exotic-pets/ (last visited Jan. 23, 2021) [<https://perma.cc/4NCE-TTKH>].

308. See *Are the Health Risks of Keeping Exotic Pets Increasing?*, BBC NEWS (Nov. 15, 2014), <https://www.bbc.com/news/health-30053262> [<https://perma.cc/BU4C-GPQ7>].

309. Maryann Mott, *The Perils of Keeping Monkeys as Pets*, NAT. GEOGRAPHIC (Sept. 16, 2003), <https://www.nationalgeographic.com/animals/2003/09/news-monkeys-primates-pets-trade-ethics/> [<https://perma.cc/E63X-U5H8>].

310. *Dangers of Exotic Pets*, *supra* note 307.

311. *Id.*

312. *Id.*

by exposure to reptiles in the United States.³¹³ Children under five, the elderly, and those with underlying conditions are most at risk for contracting illnesses from animals.³¹⁴

Apart from the chance of illness, “[e]xotic animals are inherently dangerous to the individuals who possess them, to their neighbors, and to the community at large.”³¹⁵ Born Free USA, a wildlife charity and non-profit organization with a goal of ensuring wild animals “are treated with compassion and respect and able to live their lives according to their needs,”³¹⁶ keeps a database of all incidents involving exotic animals.³¹⁷ The database sorts incidents by state, species, type of incident (animal death, escape/attack resulting in human death, etc.), and facility type.³¹⁸ The database lists several attacks within the last five years, including a woman in Shawano, Wisconsin, who suffered permanent nerve damage after being attacked by a neighbor’s pet lemur, a woman in Shallotte, North Carolina, who was bit and scratched by a neighbor’s pet snow monkey, a woman in Oxford, Indiana, who died after her eight-foot-long python wrapped around her neck and strangled her, and a man in Alachua County, Florida, who died after his exotic bird, a Cassowary, attacked him.³¹⁹ An even starker example of the dangers of exotic pets occurred in 2009, when a Connecticut woman’s face was torn off by her friend’s chimpanzee.³²⁰

Although cats and dogs are the most popular pets, as of 2013, 19.4 million U.S. households owned exotic pets.³²¹ This number is likely higher, given that many do not register their exotic animals³²² because of high fees, background checks, and other requirements.³²³ For example, in Ohio, exotic animal owners must apply for a permit, “pay fees, pass background checks, own at least an acre of land, establish and submit a plan if the animal escapes, and demonstrate through two years of experience or a written examination that they are capable of caring for the animal.”³²⁴ The high number of celebrities who own exotic animals also likely encourages individuals to obtain these pets; Justin Bieber has a

313. *Id.*

314. *Id.*

315. *Id.*

316. *About Us*, BORN FREE USA, <https://www.bornfreeusa.org/about-us/> (last visited Jan. 23, 2021) [<https://perma.cc/3W2V-PUF9>].

317. *Databases*, BORN FREE USA, <https://www.bornfreeusa.org/databases/> (last visited Jan. 23, 2021) [<https://perma.cc/Z5KM-J8MR>].

318. *Search Exotic Incidents Database*, BORN FREE USA, <https://www.bornfreeusa.org/exotic-incidents-database/> (last visited Jan. 23, 2021) [<https://perma.cc/FZ9M-CTDZ>].

319. *Id.*

320. Micheli, *supra* note 298.

321. *Id.*

322. Eric Frazier, *Few Owners Register Their Exotic Animals*, DISPATCH (June 19, 2004, 9:36 AM), www.the-dispatch.com/news/20040619/few-owners-register-their-exotic-animals [<https://perma.cc/4PYU-TUA9>].

323. See Steven Matthews, *Few Owners Register Exotic Animals*, J.—NEWS (June 13, 2013), <https://www.journal-news.com/news/few-owners-register-exotic-animals/BDcTRSz3OBV9RPPGiQNfIN> [<https://perma.cc/BT34-UUK6>].

324. *Id.*

pet monkey, Mike Tyson owns several tigers,³²⁵ and George Clooney and Miley Cyrus have pet pigs.³²⁶ The popularity of television shows like *Tiger King: Murder, Mayhem and Madness* on Netflix and *Fatal Attractions* on Animal Planet also glorify, to some extent, exotic pet ownership.³²⁷

Thus, while it may seem unlikely that an individual would keep a monkey, alligator, or raccoon as an ESA, it is more common than most people think.³²⁸ Allowing individuals to keep these types of animals as ESAs will only increase the chance of animal attacks and adverse health consequences.

4. Risk to Public Health

The presence of ESAs in multitenant dwellings and public places may also create health concerns. Although tenants may present a legitimate need for an ESA, this need may cause risks to other tenants' health.

i. Allergies

Approximately 10% of adults and 14% of children are allergic to household pets.³²⁹ For some, an allergy to animal dander would make it "impossible . . . to 'eat or work next' to an emotional support animal."³³⁰ Those who are severely allergic to pets may choose to live in a pet-free dwelling to avoid allergies at all costs, so when a tenant with an ESA moves in, the landlord is left with the choice to either deny accommodations or tell the tenant with allergies to leave. More likely, the tenant with allergies will be forced to leave so the landlord does not violate the law.³³¹

Removal of the individual with allergies, rather than removal of the individual with the ESA, has been common practice on airlines.³³² In fact, some airlines require more proof from a passenger who claims to have allergies to certain

325. *12 Celebrities Who Own(ed) Crazy Exotic Pets*, FOX NEWS, <https://www.foxnews.com/entertainment/12-celebrities-who-owned-crazy-exotic-pets> (last visited Jan. 23, 2021) [<https://perma.cc/M44D-NHPJ>].

326. Maria Azua, *14 Celebrities with Tigers, Turtles, and More Exotic Pets*, POP SUGAR (Feb. 8, 2018) <https://www.popsugar.com/celebrity/photo-gallery/44498050/embed/44498060/Reese-Witherspoon-Her-Donkeys> [<https://perma.cc/U4QF-BE5A#photo-44498060>].

327. See Kelly Wynne, *Netflix's 'Tiger King' Raises Questions About Tiger Captivity. What Are U.S. Restrictions on Owning Big Cats?*, NEWSWEEK (Mar. 20, 2020, 8:00 AM), <https://www.newsweek.com/netflix-tiger-king-raises-questions-about-tiger-captivity-what-are-us-restrictions-owning-1493253> [<https://perma.cc/7B7K-KND3>].

328. See Merrit Kennedy, *Federal Government May Tighten Restrictions on Service Animals on Planes*, NPR (Jan. 23, 2020, 5:00 AM), <https://www.npr.org/2020/01/23/798662547/federal-government-may-tighten-restrictions-on-service-animals-on-planes> [<https://perma.cc/9RZF-XWGH>].

329. See Konkel, *supra* note 244.

330. Jake Butwin, Note, *Emotional Support Animals are More Than Just Pets: It is Time for the Department of Justice to Align its Emotional Support Animal Policies with other Anti-Discrimination Laws*, 47 *FORDAM URB. L.J.* 195, 206 (2019) (quoting Chelsea Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals*, 21 *RICH. PUB. INT. L. REV.* 313, 337 (2018)).

331. See generally McNairy, *supra* note 280; Joanna Fantozzi, *A Woman with a Life-Threatening Animal Allergy was Dragged Off a Flight – Here's What You Need to Know About Flying with Pets*, *INSIDER* (Sept. 28, 2017, 9:35 PM), <https://www.insider.com/flying-with-pet-allergies-2017-9> [<https://perma.cc/KP6G-Z5YY>].

332. Fantozzi, *supra* note 331.

animals than they require from those with ESAs.³³³ For example, Southwest Airlines requires a passenger claiming to have an allergy to provide a medical certificate to prove a life-threatening allergy.³³⁴ Many passengers have reported being removed from a plane or relocated because of their allergies; in 2018, a fifteen-year-old girl was removed from an Alaska Airlines flight because of severe allergies to an emotional support cat sitting next to her.³³⁵ The girl was subsequently blamed for not informing the airline of her allergy before boarding.³³⁶

Asthma is even more daunting than allergies. Over 25 million Americans have asthma.³³⁷ Asthma accounts for 9.8 million doctor's office visits and 1.8 million emergency department visits each year.³³⁸ Each day, ten Americans die from asthma.³³⁹ An asthma attack "feel[s] as if someone is sitting on your chest or there's a cloud in your lungs."³⁴⁰

Allergies and asthma are strongly correlated.³⁴¹ Allergies impact 60% of people with asthma; an allergy can either worsen an asthma attack or trigger it.³⁴² In addition, allergies are considered a risk factor for asthma.³⁴³ An allergic response occurs when antibodies

mistakenly identify a harmless substance . . . as an invader. In an attempt to protect your body from the substance, antibodies bind to the allergen. The chemicals released by your immune system lead to allergy signs and symptoms . . . [f]or some people, this same reaction also affects the lungs and airways, leading to asthma symptoms.³⁴⁴

Although the Asthma and Allergy Foundation of America suggests asthmatics stay away from allergens altogether,³⁴⁵ there are a few things that a pet owner can do to reduce the risk of allergies or asthma, including vacuuming fre-

333. *Id.*

334. *Id.*

335. Bill Murphy Jr., *Alaska Airlines Had to Choose Between an 'Emotional Support Cat' and a 15-Year-Old Passenger with Allergies. Want to Guess Who Won?*, INC. (Aug. 11, 2018), <https://www.inc.com/bill-murphy-jr/Alaska-airlines-had-to-choose-between-an-emotional-support-cat-a-15-year-old-passenger-with-allergies-wanguess-who-won.html> [<https://perma.cc/RNX9-Y3HQ>].

336. *Id.*

337. *Asthma Facts and Figures*, ASTHMA & ALLERGY FOUND. AM., <https://www.aafa.org/asthma-facts/> (last visited Jan. 23, 2021) [<https://perma.cc/QP2E-KFXF>].

338. *Id.*

339. *Id.*

340. *Asthma Attack*, AM. COLL. ALLERGY, ASTHMA & IMMUNOLOGY, www.acaai.org/asthma/symptoms/asthma-attack (last visited Jan. 23, 2021) [<https://perma.cc/VQ9Y-GVSA>].

341. *Allergies and Asthma: Is There a Connection?*, HEALTHLINE, <https://www.healthline.com/health/allergies/allergy-induced-asthma> (last visited Jan. 23, 2021) [<https://perma.cc/X547-YXG4>].

342. *Id.*

343. Libby A. Kelly, Elizabeth A. Erwin & Thomas A. E. Platts-Mills, *The Indoor Air and Asthma: The Role of Cat Allergens*, 18 CURRENT OP. PULMONARY MED., 29, 29 (2012).

344. *Allergies and Asthma: They Often Occur Together*, MAYO CLINIC (Nov. 6, 2018), <https://www.mayoclinic.org/diseases-conditions/asthma/in-depth/allergies-and-asthma/art-20047458> [<https://perma.cc/UQM6-VWEM>].

345. *Allergens and Allergic Asthma*, ASTHMA & ALLERGY FOUND. AM., <https://www.aafa.org/allergic-asthma/> (last visited Jan. 23, 2021) [<https://perma.cc/MY9R-ZVLP>].

quently, practicing good hair removal, and using shampoos and sprays to neutralize dander.³⁴⁶ Nonetheless, an ESA owner without allergies is not likely to take these steps because he is not affected. Thus, an individual with allergies or asthma may have no recourse but to move out when an ESA lives in the same building.

ii. Unsanitary Conditions

Aside from allergies, ESAs can pose a risk to public health by creating unsanitary conditions.³⁴⁷ Because ESAs are untrained, and are often left at home, this leaves open the potential that animals will defecate in the multitenant dwelling, causing problems for fellow tenants' health.³⁴⁸ For example, in August 2019, Minneapolis Animal Control seized a man's emotional support pigs because "[t]he animals weren't being properly cared for and . . . [were] 'found to be in extremely unsanitary conditions . . .'"³⁴⁹ There are countless other examples of ESAs urinating and defecating in public places,³⁵⁰ such as a passenger on Delta Airlines who found "dog poop all over his seat and the surrounding floor."³⁵¹

Unsanitary conditions can lead to a wide range of health problems, including "respiratory infections, asthma, lead poisoning, injuries, and mental health" issues.³⁵² Evidence shows that ineffective waste disposal, such as animal feces, contributes "to the spread of infectious diseases."³⁵³ For example, approximately 49% of dogs and 45% of stray cats carry the bacterium *Campylobacter* in their feces, which can cause diarrhea, cramping, abdominal pain, and fever.³⁵⁴ Other common diseases spread via animal feces include salmonellosis, toxoplasmosis, and parrot fever.³⁵⁵

While an ESA is more likely to pee on the carpet than it is to defecate, this act does not come without problems. Residual animal urine in carpets can lead to an ammonia odor, which has a negative effect on those with Chronic Obstructive Pulmonary Disease, asthma, emphysema, or allergies and can cause growth

346. Madeline R. Vann, *Living with Pets When You Have Asthma*, EVERYDAY HEALTH (Oct. 2, 2013), <https://www.everydayhealth.com/hs/allergic-asthma-in-adults/living-with-pets-and-asthma/> [https://perma.cc/8CVP-BC6T].

347. See *Controversial ESA Stories*, *supra* note 243.

348. See Catharine Hamm, *Elite Delta Flier Reportedly Sits in Feces on Flight, Gets an Apology and 50,000 Miles*, L.A. TIMES (Nov. 7, 2018, 6:23 AM), <https://www.latimes.com/travel/la-tr-delta-dog-feces-20181107-story.html> [https://perma.cc/8T6E-XAC5]; *Controversial ESA Stories*, *supra* note 243; Marx, *supra* note 119.

349. Erin Adler, *Minneapolis Man Fights to Regain 'Emotional Support' Pigs, Not Allowed by the City*, STAR TRIB. (Aug. 12, 2019, 9:32 PM), <https://www.startribune.com/minneapolis-man-fights-to-regain-emotional-support-pigs-not-allowed-by-the-city/538509922/> [https://perma.cc/AL28-G6LL].

350. See generally Butwin, *supra* note 330, at 205–06.

351. *Id.*

352. James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758 (2002).

353. *Id.*

354. Honor Whiteman, *Pets: Are you Aware of the Risks to Human Health?*, MED. NEWS TODAY (Apr. 22, 2015), <https://www.medicalnewstoday.com/articles/292829> [https://perma.cc/6R78-QBA9].

355. *Id.*

of bacteria or mold, some of which can cause respiratory symptoms or long-term lung conditions.³⁵⁶ In addition, dirty carpeting “is an important reservoir for dust [and] allergens” which can result in “allergic, respiratory, neurological, and hematologic illnesses.”³⁵⁷

C. *A Need for Change*

Similar to service animals, ESAs are covered by the FHA, but not the ADA, meaning that landlords must make reasonable accommodations for tenants who want to keep their ESA in a no-pet dwelling.³⁵⁸ Because ESAs are not covered by the ADA, ESAs are not subject to the restrictions which service animals are subject to, but are also not protected in the same way service animals are.³⁵⁹ ESAs are not restricted by breed, have no training requirements, and are not overseen by any governmental agencies.³⁶⁰ Despite these lenient requirements, ESAs are not protected in public areas.³⁶¹

Although no government agency oversees ESAs, several websites claim to be national registries where owners may receive a certification.³⁶² The advent of technology has streamlined the process “and sometimes compromised in unscrupulous gray markets as well.”³⁶³ Because of this streamlined process, “nothing can stop people from lying, or exploiting others’ confusion by using the terms ‘service animal’ an[d] ‘ESA’ interchangeably.”³⁶⁴

D. *Changes in the Law*

1. *Are Utah, Kentucky, and Virginia Taking the Right Approach?*

While Utah, Kentucky, and Virginia have stricter laws than most, these laws still are not doing enough. Utah³⁶⁵ and Kentucky’s³⁶⁶ statutes will not play a large role in deterring the misrepresentation of service animals because, for an individual to be caught violating the statute, he or she must be reported by another individual. The likelihood of this occurring is small, whether it be because friends and family do not want to report friends and family or because people don’t find it worthwhile to report. Virginia’s statute, while a step in the right

356. *The Dangers of Residual Animal Urine in Carpets*, ALPINE SPECIALTY CLEANING (Apr. 15, 2016), <https://www.alpineclean.com/the-dangers-of-residual-animal-urine-in-carpets/> [https://perma.cc/7P7G-PFCL].

357. Krieger & Higgins, *supra* note 352, at 758.

358. *See* Waterlander, *supra* note 279, at 335.

359. *See* Mammoser, *supra* note 8.

360. *Id.*

361. Marx, *supra* note 119.

362. *See, e.g.*, US SUPPORT ANIMALS, *supra* note 148; *see also* U.S. DOG REGISTRY, <https://usdogregistry.org/about-emotional-support-animals> (last visited Jan. 23, 2021) [https://perma.cc/8MMB-ECM6].

363. Mammoser, *supra* note 8.

364. Matei, *supra* note 142.

365. *See* UTAH CODE ANN. § 62A-5b-106 (West 2019).

366. *See* KY. REV. STAT. ANN. § 383.085(6) (West 2019).

direction, is underinclusive – because the statute does not require that a therapeutic relationship meet a certain time frame,³⁶⁷ this doesn't prevent medical professionals from “prescribing” an ESA on the first visit.

Utah's statute, which criminalizes the misrepresentation of a pet as a service animal or support animal,³⁶⁸ will undoubtedly deter people from misrepresenting their animal. Despite its deterrent effect, the efficacy of the statute depends on the willingness of others to ask questions. If a landlord or a business owner does not demand the handler present proof that his or her animal is an ESA, no one will ever discover the handler is misrepresenting the animal.

Kentucky's statute, which also criminalizes the misrepresentation of a pet as a service animal or support animal,³⁶⁹ goes further than Utah's statute. While Utah's statute focuses mainly on an individual's representation of the animal to others,³⁷⁰ Kentucky's statute outlaws the mechanisms individuals use to pass their animals off as ESAs.³⁷¹ For example, any individual who “[f]its an animal, which is not an assistance animal, with a harness, collar, vest, or sign that the pet is an assistance animal for use in housing” violates the statute.³⁷² Despite its additional requirements, the statute falls short in the same way that Utah's statute does. It all depends on another person's willingness to ask for the proper documentation or to challenge a handler.

Conversely, Virginia's statute limits who may “register” their ESA by requiring the existence of a therapeutic relationship.³⁷³ Virginia's statute will curb the number of ESAs while allowing those with mental health problems to obtain ESAs. Even with its limitations, the statute doesn't go far enough because it does not place a minimum time constraint on the therapeutic relationship.³⁷⁴

While these statutes show promise, the only way to combat the misrepresentation of ESAs is to make it much more difficult for people to “register” ESAs and to increase the penalties for those who continue to misrepresent their animal.

2. *United States Department of Transportation's Recently Issued Guidelines*

The U.S. Department of Transportation (“DOT”) recently issued guidelines to airlines on how to handle assistance animals.³⁷⁵ In its statement, the DOT announced that it does not intend to take action against an airline for asking users of any type of service animal to provide documentation related to vaccination, training, or behavior so long as it is reasonable to believe that

367. See VA. CODE ANN. § 36-96.3.1 (2017).

368. UTAH CODE ANN. § 62A-5b-106 (West 2019).

369. KY. REV. STAT. ANN. § 383.085(6) (West 2019).

370. UTAH CODE ANN. § 62A-5b-106 (West 2019).

371. KY. REV. STAT. ANN. § 383.085(6) (West 2019).

372. *Id.*

373. VA. CODE ANN. § 36-96.3.1 (2017).

374. *See id.*

375. David Oliver, *2 Passengers, Emotional Support French Bulldogs Booted off Norwegian Air Flight*, USA TODAY (Oct. 24, 2019, 3:35 PM), <https://www.usatoday.com/story/travel/airline-news/2019/10/24/emotional-support-dogs-passengers-booted-off-norwegian-flight/4084871002/> [https://perma.cc/FR52-DK55].

the documentation would assist the airline in making a determination as to whether an animal poses a direct threat to the health or safety of others.³⁷⁶

These guidelines allow airlines to deny specific animals, to require documentation, to require advanced notice, and to prohibit animals younger than four-months from flying.³⁷⁷

The recent changes come after a series of disturbances involving ESAs on flights.³⁷⁸ A 2018 study found that 61% of flight attendants had seen an ESA cause a disturbance midflight.³⁷⁹ These disturbances include aggressive or threatening behavior by the animal, ESAs failing to fit in their designated spaces, ESAs getting loose in the cabin, and ESAs defecating or urinating in the cabin.³⁸⁰

E. *The Right to ESAs*

ESAs can provide psychological, social, and physiological benefits to individuals with mental or emotional disabilities.³⁸¹ Studies have shown that ESAs can help alleviate symptoms stemming from psychotic, mood, and anxiety disorders, can benefit people with Alzheimer's, dementia, and autism, and can help reduce blood pressure.³⁸² In short, the complete denial of ESAs would have severe consequences for those who need them.

The denial of an ESA to someone who may not have a diagnosed mental disorder is not a denial of rights. Because the FHA and ADA were passed to combat discrimination, those who are "normal" are not protected under the Acts.³⁸³ Thus, the only people with a right to an ESA are those with disabilities as defined in the ADA.

IV. RECOMMENDATION

Despite the benefits of ESAs for those with mental disabilities, in light of the problems with the current laws, including the social consequences for handlers with legitimate service animals and the direct conflict between ESAs and the covenant of quiet enjoyment, there is a need for change.

Some combination of each law discussed in Section II.F.³⁸⁴ would likely address all the issues with ESAs while also protecting those who need ESAs for

376. *U.S. Department of Transportation Issues Final Statement of Enforcement Priorities Regarding Service Animals on Flights*, U.S. DEP'T TRANSP. (Aug. 8, 2019), <https://www.transportation.gov/briefing-room/us-department-transportation-issues-final-statement-enforcement-priorities-regarding> [https://perma.cc/EZ2G-C2RZ].

377. *Id.*

378. *See id.*

379. Janine Puhak, *61 Percent of Flight Attendants Say Emotional Support Animals Have Caused Trouble Midflight: Survey*, FOX NEWS (Sept. 14, 2018), <https://www.foxnews.com/travel/61-percent-of-flight-attendants-say-emotional-support-animals-have-caused-trouble-midflight-survey> [https://perma.cc/4V9Q-46LH].

380. *Id.*

381. Butwin, *supra* note 330, at 204.

382. *Id.*

383. *See generally* 42 U.S.C. §§ 3604, 12101–12213.

384. *See supra* Section II.F.

treatment of their disabilities. By implementing a stricter registration process, states will ensure that people who need ESAs are able to obtain them while also curbing abuse.

A. *Ongoing Therapeutic Relationship*

One of the main problems with the current ESA system is the ease with which an individual can obtain certification. Some states have recognized this, implementing laws which mandate a patient have a therapeutic relationship with the prescriber of the ESA.³⁸⁵ Requiring that a patient have an actual, ongoing therapeutic relationship with a mental health provider will curb the abuse of the system while also ensuring that those with mental disabilities will be able to receive certification. It is incredibly easy to pretend to have anxiety or depression when filling out an online form without any human interaction.³⁸⁶ But it is much more difficult to lie continually and in-person. Thus, those who have mental disabilities will be able to seek help, or continue to seek help, and will have a genuine relationship with a mental health provider who can help take him or her through the ESA process and decide if an ESA would be useful. Those who are feigning mental disability solely to allow their pet to live in a non-pet dwelling will have a much more difficult time obtaining permission to keep an ESA.

B. *Evaluation of Living Conditions*

Additionally, a mental health professional should evaluate the patient with the animal and learn more about the patient's living situation. Although ESAs have worked for many people, research suggests that ESAs may not have as great of an effect as once thought.³⁸⁷ By evaluating a patient's interactions with his or her ESA, a mental health provider will be able to determine if the ESA is actually helping the patient's mental disability and formulate alternative or additional plans if it is not. Furthermore, evaluating the patient with its ESA allows the mental health professional to ensure that the ESA is being properly cared for and is not in too much distress. Because animals, especially dogs, mirror the emotions of their handlers, it is possible that an ESA can exhibit signs of distress or experience the same disability their handler is experiencing.³⁸⁸ Unhappy animals or animals in distress tend to be louder and more violent than those that are happy.³⁸⁹ Thus, evaluating the animal will alleviate the potential burden placed on tenants living near the patient.

385. See VA. CODE ANN. § 36-96.3.1 (2017).

386. See, e.g., Marx, *supra* note 119.

387. See, e.g., Brooks, et al., *supra* note 158, at 1; Lundqvist et al., *supra* note 158, at 1; Islam & Towell, *supra* note 158, at 149.

388. Herzog, *supra* note 28.

389. See Rachel Adelson, *Hormones, Stress and Aggression—a Vicious Cycle*, AM. PSYCH. ASS'N (Nov. 2004), <https://www.apa.org/monitor/nov04/hormones> [<https://perma.cc/8BGP-ZWUF>] (“A team of behavioral neuroscientists . . . has found in rats a fast positive feedback loop between . . . stress . . . and their brains’ aggression systems.”).

C. *Changing of the Reasonable Accommodation Standard*

Another possible solution is to change the reasonable accommodation standard set out by the FHA based on the severity of the person's mental health problems. Under the FHA, discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling"³⁹⁰ A burden is unreasonable if it imposes undue financial or administrative burdens on an individual.³⁹¹ What is reasonable is fact-specific and varies case-to-case.³⁹² The reasonableness of an accommodation clearly varies by person and disability but changing the reasonable accommodation standard to vary by person may alleviate some of the tension between tenants and landlords.

There are multiple ways a state may change the reasonable accommodation standard. States may decide to change the standard based on the documentation provided. For example, if a tenant provides an online, boilerplate form as documentation of his ESA, the amount of reasonable accommodation necessary to comply with the law may be less than a tenant who provides a letter and proof of his ongoing therapy. States may also change the reasonable accommodation standard based on the training of the animal. In this situation, the amount of reasonable accommodation necessary to comply with the law may be less for a tenant with an untrained animal than for a tenant who can prove his or her animal is trained and will not cause problems for the landlord or other tenants. Finally, states may change the reasonable accommodation standard based on the type of animal. A tenant with a "normal" pet, such as a cat, dog, or bird, may receive more protection than a tenant who wants their emotional support alligator or monkey to live with them.

Although implementing tighter restrictions on the registration of ESAs will place a larger burden on mental health professionals, it will allow those professionals to continually evaluate their patients and formulate the best treatment plan. Moreover, tighter restrictions will curb abuse of the ESA system and make it less likely than non-legitimate ESAs will disrupt tenants. In turn, curbing abuse of the ESA system will increase the legitimacy of both ESAs and service dogs.

States should implement stricter regulations for the registration of ESAs. An ESA should only be prescribed by a licensed mental health physician who has treated the patient in person and knows of his or her condition. Additionally, when prescribing an ESA, the physician should evaluate the interactions between the animal and its owner and consider the living circumstances of the animal. Implementing stricter regulations for the registration of ESAs would allow those with mental disorders to obtain them, curb abuse of the system, and allow tenants the right to quiet, safety, and health.

390. 42 U.S.C. § 3604(f)(3)(B).

391. *Reasonable Accommodations and Modifications*, *supra* note 92.

392. *Id.*

V. CONCLUSION

States and leasing agencies should implement stricter rules for ESAs. Although ESAs may be incredibly beneficial to those with mental disabilities, states have made it increasingly easy to obtain documentation for an ESA, which has led to abuse. The covenant of quiet enjoyment gives tenants a right to quiet, safety, and health in their homes.

In many cases, ESAs may conflict with that right. Because ESAs cannot go everywhere with their handler,³⁹³ these animals must often be left at home, which could lead to disruption to other tenants. Additionally, untrained animals may attack other individuals or service dogs³⁹⁴ and animals may lead to unsanitary conditions³⁹⁵ or allergies.³⁹⁶

Implementing stricter rules for ESAs will allow those who live in multiple-tenant buildings the right to quiet, safety, and health, curb the abuse of ESAs while still allowing those who need them to get permission, and reaffirm the validity of service animals for people who need them.

393. See, e.g., Marx, *supra* note 119.

394. See *Controversial ESA Stories*, *supra* note 243.

395. See *id.*

396. See Konkel, *supra* note 244.

