

TRACES OF THE SLAVE PATROL: NOTES ON BREED-SPECIFIC LEGISLATION

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ABSTRACT

This Article explores the ways in which antiblackness haunts nationwide breed-specific legislation of today. Dogs have long featured as a constitutive element in the antiblack dynamics of police power. Central to slave patrols of the past, dogs remain essential to current law enforcement practices. The blackening of breed-specific legislation in legal and political discourse is a critical, subtle, and sophisticated way in which white Americana enacts its humanity and continues to regulate blackness. In bringing together historical and legal material, this Article explores how breed-specific legislation intervenes to define the boundaries of blackness. In other words, this Article investigates how breed-specific legislation helps make blackness legible and familiar in an era defined by shifts in racial identity. Ultimately, this Article is concerned with how racial slavery lives on in modern times and how breed-specific legislation is part of a long unbroken sequence of antiblack violence, punishment, and surveillance.

“Antiblackness, whose name is legion, eagerly disguises but never fully discloses its diabolical nature under numerous pseudonyms: slavery, segregation, prejudice, discrimination, and racism.”¹

“Law is sublimated slavery.”²

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1. Joseph R. Washington, *The Religion of Antiblackness*, 38 THEOLOGY TODAY 146, 146 (1981).
2. Anthony Paul Farley, *Law as Trauma & Repetition*, 31 NYU REV. L. & SOC. CHANGE 613, 624 (2006) [hereinafter Farley, *Law as Trauma*].

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INTRODUCTION

This Article starts from the paradigmatic premise that policing and law require violent distinction, rather than something practiced and/or applied unfairly, that is, as a mistake in real time. It starts from the premise that there is a history and structure of (non)recognition of those officially and legally invited to the fraternal fellowship of personhood and those indefinitely uninvited. The legal archive of racial slavery casts light – albeit not total light – on the distinction between blackness and personhood.³ More precisely, this history highlights those deprived of personhood and, by extension, those deprived of rights. In doing so, an ontology of rights is created. For example, non-blackness as coextensive with personhood is a reality made legally clear with the 1857 *Dred Scott* decision that declared black people as “beings of an inferior order” with no rights “which the white man was bound to respect.”⁴ In this sense, policing is always in the name of the people, but a deputized people,⁵ who are recognized as persons with rights, not merely

3. See, e.g., CHARLES W. MILLS, *THE RACIAL CONTRACT* 77–80 (1997); Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation – An Argument*, 3 CR: THE NEW CENTENNIAL REV. 257 (2003).

4. *Scott v. Sandford*, 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

5. See generally Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 SOC. IDENTITIES 169 (2003) (arguing that white interaction with law enforcement is distinctly different than black interaction and it is this difference that allows whites to ignore or deny instances of racial profiling and police violence).

those with legal personality.⁶ Therefore, what this Article suggests is that we can take something as benign as breed-specific legislation (BSL) and see it as part of a long unbroken chain of antiblack police practices, a trace of racial slavery, and a method of “white-over-black.”⁷ In other words, BSL allows us to explore the perdurance of antiblackness as the constant and incessant policing of black people that is nothing more than the “repetitions of the original accumulation.”⁸ More specifically, this Article explores the intersection of policing, law, and the cynoracial (*dog in black*) as a way to explore the impunity of surveillance which creates the condition for (re)capture. Simply put, this Article briefly explores how BSL can serve as a mechanism to maintain the system: that is to maintain the slavocracy.⁹

While BSL might seem amusing on the surface, especially as it relates to race and policing, it does allow us to mine the depth and transmogrification of antiblack legal agendas. BSL, as it relates to the structural antagonism of blackness,¹⁰ reveals the ways in which dogs, particularly the pit bull, are central to black emergence and being in the late twentieth and early twenty-first century.¹¹ The canine is a useful diagnostic of police power (we

6. See, e.g., FALGUNI SHETH, TOWARD A POLITICAL PHILOSOPHY OF RACE 120 (2009); DERRICK DARBY, RIGHTS, RACE, AND RECOGNITION 87–88 (2009).

7. See Farley, *Law as Trauma*, supra note 2, at 618, 623 (exploring the concept of white-over-black); see also Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229, 1230 n.6, 1235–36, 1238–39 (2004) (continuing the discussion and defining the concept of white-over-black).

8. Anthony Paul Farley, *Shattered: Afterword for Defining Race, a Joint Symposium of the Albany Law Review and the Albany Journal of Science and Technology*, 72 ALB. L. REV. 1053, 1055 (2009) [hereinafter Farley, *Shattered*].

9. For discussions on slavocracy, see P. KHALIL SAUCIER AND TRYON WOODS, CONCEPTUAL APHASIA IN BLACK: DISPLACING RACIAL FORMATION 4 (2016); Stephen Sabot, *Jacksonian Slavocracy*, JACOBIN (Apr. 11, 2017), <https://jacobinmag.com/2017/04/trump-jackson-bannon-indian-removal-act>.

10. The structural antagonism of blackness refers specifically to the ontological coordinates of the person/non-person divide. See FRANK WILDERSON III, RED, WHITE & BLACK: CINEMA AND THE STRUCTURE OF US ANTAGONISMS 5–8 (2010) (discussing the antagonism of blackness present in linguistics); see also P. KHALIL SAUCIER & TRYON WOODS, ON MARRONAGE: ETHICAL CONFRONTATIONS WITH ANTIBLACKNESS 12–15 (P. Khalil Saucier & Tyron Woods eds., 2015).

11. What we are dealing with is, in part, an ontological problem: that there is no proper place for black people to be. See generally Tendayi Sithole, *The Concept of the Black Subject in Fanon*, 47 J. BLACK STUD. 24 (2016) (discussing the idea that *being black* in this world is violent and dangerous).

might recall it is modern man's best friend), and in tracking how the dog has long been featured as a constitutive element of anti-black police power we are able to see that the dog and the slave have always been legally bound. As a result, this Article is neither about animal rights, nor the welfare of animals, dogs in particular.¹² It does not explore breed discriminatory legislation as a form of "canine racism." Nor is it concerned with the study of human-animal relations in order to register insights about universal subjectivity.¹³ The issue here is the *centrality* of BSL and how it can illuminate a culture of jurisprudence that insists on using blackness to fulfill an antiblack agenda, such as "policing as punishment."¹⁴ This requires a reframing of the time-scales of race and policing and the linear and chronological progression away from slavery's practices. These traditions and practices resist, so it is written and often assumed, periodization into past, present, and future, for "[t]ime ceases with the original accumulation."¹⁵ Part of the problem in discussing BSL is the elision of its connection to blackness, as *kind* and by extension social (non)recognition, which prevents us from seeing the *long duree* of racial slavery. That is to say that BSL is haunted by the structural entanglements of antiblackness and, specifically,

12. For discussions on this topic, see Maneesha Deckha, *Animal Justice, Culture Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 J. ANIMAL L. & ETHICS 189 (2007); Megan H. Glick, *Animal Instincts: Race, Criminality, and the Reversal of the "Human"*, 65 AM. Q. 639 (2013); Sara Salih, *Filling Up the Space Between Mankind and Ape: Racism, Speciesism and the Androphilic Ape*, 38 ARIEL: A REV. INT'L ENG. LITERATURE 95 (2007).

13. See generally DONNA HARAWAY, *THE COMPANION SPECIES MANIFESTO: DOGS, PEOPLE, AND SIGNIFICANT OTHERNESS* (2003) (advocating for the study of companionship between humans and dogs and how such companionship shapes technosciences); CLAIRE JEAN KIM, *DANGEROUS CROSSINGS: RACE, SPECIES AND NATURE IN A MULTICULTURAL AGE* (2015); Kay Anderson, *'The Beast Within': Race, Humanity, and Animality*, 18 ENV'T & PLANNING D: SOC'Y & SPACE 301 (2000) (discussing the clash between animal rights and cultural practices); Billy-Ray Belcourt, *Animal Bodies, Colonial Subjects: (Re)Locating Animality in Decolonial Thought*, 5 SOCIETIES 1 (2015); Paul Nadasy, *The Gift in the Animal: The Ontology of Hunting and Human-Animal Sociality*, 34 AM. ENTHOLOGIST 25 (2007).

14. See Donald F. Tibbs & Tryon P. Woods, *Requiem for Laquan McDonald: Policing as Punishment and Abolishing Reasonable Suspicion*, 89 TEMP. L. REV. 763, 763-67 (2016) (discussing anti-black legalisms).

15. Farley, *Shattered*, *supra* note 8, at 1054.

the Fugitive Slave Acts,¹⁶ *Dred Scott*,¹⁷ and other legal measures that restricted black movement.¹⁸ In this sense, their temporalities are collapsed and anchored in black fungibility that exceeds chronological and legal progression, as well as legal historicity.

This Article suggests, *pace* David Marriott, that BSL is another legal measure, one of many, that prescribes to blacks that they live under the command of death whose prime value is a rule of life defined by its symbolic fungibility. Marriott continues, “racism is not strictly a question of meaning, but one of [repetitive] performance.”¹⁹ Simply put, this Article is interested in the performance and creation of legislation and statutory law, which ultimately is the enactment of negrophobia.²⁰ As an analytical framework, black fungibility calls attention to the ways in which municipal ordinances mediate the ways blackness is policed. By fungibility, this Article calls attention to the premium in western modernity on rendering blackness useful for any and all purpose.²¹ *Pace* Hortense Spillers,²² Saidiya Hartman,²³ and Anthony Farley,²⁴ black fungibility is conceptualized

16. See *Fugitive Slave Acts*, HISTORY, <https://www.history.com/topics/black-history/fugitive-slave-acts> (last visited Mar. 26, 2018).

17. *Scott v. Sandford*, 60 U.S. 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

18. See, e.g., *The Southern “Black Codes” of 1865–66*, CONST. RTS. FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> (last visited Mar. 26, 2018).

19. See Farley, *Shattered*, *supra* note 8, at 1054 (suggesting that the creation of race is produced through violent repetition); Barnor Hesse, *White Sovereignty (...), Black Life Politics: “The N****r They Couldn’t Kill”*, 116 SOUTH ATLANTIC Q. 581, 586 (2017); David Marriott, *Judging Fanon*, RHIZOMES (2016), <http://www.rhizomes.net/issue29/pdf/marriott.pdf>.

20. See generally FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1986) (discussing self-perception and the loss of cultural origin).

21. See generally SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH CENTURY AMERICA* (Arnold Rambersad & Shelly Fisher Fishkin eds., 1997) (discussing the concept of black fungibility); NAOMI GREYSER, *ON SYMPATHETIC GROUNDS: RACE, GENDER, & EFFECTIVE GEOGRAPHIES IN NINETEENTH-CENTURY NORTH AMERICA* 88–89 (2018) (discussing the western modern trend of using blackness).

22. See Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 DIACRITICS 65, 65–68 (1987).

23. See generally HARTMAN, *supra* note 21 (exploring racial subjugation during and after slavery).

24. See generally Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997) (discussing the interrelated boundaries of race).

as the capacity of blackness for unfettered “replaceability and interchangeability” in all realms of human life (e.g., political, economic, psychic).²⁵ Blackness becomes a symbol, metaphor, and trope of criminality, violence, and much more. Saidiya Hartman notes that the juridical structure of slavery is based on fungibility and accumulation of black bodies, which are then arranged and rearranged within the symbolic and discursive “afterlife of slavery,”²⁶ expressed by the “badges and incidents” of slavery.²⁷ In other words, blackness as abstraction, is always already moving and available for the expansion of the law.²⁸

The *dog in black* is a canine that has a constructed, socially supported, deviance attached to its nature of being—a blackened ontology. More specifically, the pit bull becomes an open signifier of fear for black fungibility, the discursive and symbolic ground from which antiblackness stands, and the screen from which non-black personhood is propagated.²⁹ In assuming an interchangeable function, the pit bull goes from an American icon to a vicious and dastardly beast, a “ghetto pup,” a dog in black.³⁰ Black fungibility illustrates that despite the various cases that draw a hard line between human and animal, BSL suggests that canines are juridically blackened, commensurate with black criminality. Reflecting on the City of Baltimore’s breed-specific legislation in *The Baltimore Sun*, Lawrence Grandpe wrote, “Over time, it seems that ‘pit bull’ has become

25. See HARTMAN, *supra* note 21, at 21.

26. See generally SAIDIYA V. HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* (2008) (discussing the concept of the afterlife of slavery).

27. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).

28. See, e.g., COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* (2007) (examining the dehumanization of the U.S. legal system, including tracing jurisprudence on acceptable punishment under the Eight Amendment to the “slave codes”).

29. See Yasmin Nair, *Racism and the American Pit Bull*, CURRENT AFF. (Sept. 19, 2016), <https://www.currentaffairs.org/2016/08/racism-and-the-american-pit-bull>.

30. See BRONWEN DICKEY, *PIT BULL: THE BATTLE OVER AN AMERICAN ICON* (2016) [hereinafter DICKEY, *PIT BULL*].

a synonym for 'black.'"³¹ Rather than look solely at the constitution of police violence,³² BSL enables new, uncanny, and solemn ways of thinking about the "normalized, routine, institutional practices of disciplining and regulating black people."³³ This Article provides an alternative, albeit brief, reading practice of BSL. Theorizing the *dog in black* as a surrogate of black criminality, a blackened prosthetic, rather than an aggressive canine, enables, at least momentarily, legal reflection on the "perfection of slavery."³⁴

I. DOGS IN THE SLAVOCRACY: A SHORT HISTORY

The centrality and importance of the dog to the surveillance and punishment of blackness is undeniable. At the Exposition Universelle of 1900 in Paris, W.E.B. DuBois's *The Black Code of Georgia (1732-1899)* exhibit featured notable commentary on the use of dogs as part and parcel of slave patrols.³⁵ Commentaries found in the Works Progress Administration papers make frequent mention of the slave patrols that rode through the countryside and cities with flesh eating dogs in tow, all in the name of getting back their slave.³⁶ Abolitionists trying to build a moral case against the institution of chattel slavery frequently acknowledged the use of savage dogs as tools of intimidation and violence. As abolitionist Reverend Francis Hawley noted, "[r]unaway slaves are frequently hunted with guns and

31. Lawrence Grandpe, *You Can't Separate Pit Bull Prejudice From Racial Prejudice*, BALT. SUN (May 1, 2012, 1:16 PM), <http://www.baltimoresun.com/news/opinion/readersrespond/bs-ed-pit-bull-facts-letter-20120501-story.html>.

32. Martinot & Sexton, *supra* note 5.

33. Hesse, *supra* note 19, at 583.

34. For a discussion on the "perfection of slavery," see Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225 (2004) [hereinafter Farley, *Perfecting Slavery*].

35. See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 251 (2011) [hereinafter DAYAN, *LAW IS A WHITE DOG*].

36. See *Runaways: Selections From the WPA Interviews of Formerly Enslaved African Americans*, NAT'L HUMAN. CTR. RESOURCE TOOLBOX (2009), <http://nationalhumanitiescenter.org/pds/maai/enslavement/text8/runawayswpa.pdf> (presenting the use of dogs by slave patrols); see also SALLY HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); ROBERT WINTERSMITH, *POLICE AND THE BLACK COMMUNITY* (1974).

dogs.”³⁷ In addition, dogs were specifically bred for the systematic use of putting down slave rebellions, canine warfare,³⁸ colonial enterprising,³⁹ and torture.⁴⁰ That is, dogs played a significant role in the repressive machinery of bondage and captivity – admired by slave catchers and feared by slaves.

Post-emancipation, dogs featured prominently in quelling civil rights protest as captured by the black-and-white photography of Charles Moore and the nightly television news feeds of the 1960s.⁴¹ As drug-sniffing agents and weapons of terror, canines were at the forefront of Ronald Reagan’s “War on Drugs.” Today, canines continue to be used by police departments and their varied specialized units to, as a recent Department of Justice report suggests, “inflict punishment.”⁴² Briefly, the dog has always been, and continues to be, at the forefront of “policing the colorline,”⁴³ a badge of slavery, new and old. Whether it was raiding homes, checking passes, or preventing insurgency, dogs have served as a weapon in the daily operations of the police for centuries; a means of lethal violence and tool for domestic militarism.⁴⁴ For the purposes of this Article,

37. BRITISH AND FOREIGN ANTI-SLAVERY SOCIETY, *SLAVERY AND THE INTERNAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA* 120 (1841), <https://ia800604.us.archive.org/33/items/slaveryinternals00brit/slaveryinternals00brit.pdf>.

38. For a longer historical account of the use of dogs in warfare, see GEORGE P. RAWICK, *FROM SUNDOWN TO SUNUP* (1972); *SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES* (John Blassingame ed., 1977); Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 385 (1955); James W. Covington, *Cuban Bloodhounds and the Seminoles*, 33 FLA. HIST. Q. 111 (1954).

39. See DAYAN, *LAW IS A WHITE DOG*, *supra* note 35, at 124–27.

40. See Sara Johnson, “You Should Give Them Blacks to Eat:” *Waging Inter-American Wars of Torture and Terror*, 61 AM. Q. 65, 67 (2009) (discussing the use of dogs as a torture mechanism).

41. See, e.g., *Birmingham, Alabama: Charles Moore 1963*, TIME: 100 PHOTOS, <http://100photos.time.com/photos/charles-moore-birmingham-alabama> (last visited Mar. 26, 2018).

42. U.S. DEP’T JUSTICE, CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 33 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

43. Christian Parenti, *Policing the Color Line*, NATION (Sept. 13, 2001), <https://www.the.nation.com/article/policing-color-line/>. Slave patrols are tied to the concept of surveillance; that is “[t]he patrols were technologies of observation and intimidation, while the attendant system of slave passes and wanted posters were embryonic forms of identification.” *Id.*; see also CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* 17–22 (2004).

44. See Larry H. Spruill, *Slave Patrols, “Packs of Negro Dogs” and Policing Black Communities*,

the author is not interested in the “weaponization” of dogs, nor does the author suggest that the weaponization of dogs has ceased. Moreover, a recent Department of Justice report has suggested that the police in Ferguson, Missouri, for instance, use dogs that “are almost guaranteed to produce an injury of some type.”⁴⁵ Rather, this Article is interested in the transmogrification and fungibility of the dog as a surveillance device, and as a pretext for search, seizure, and punishment.

II. DOG IN BLACK

Pit bulls have been reimagined from loyal family pet to violent outlaw.⁴⁶ As a result, they have become the focus of ordinances, restrictions, and bans. “Pit bull” is a protean canine, diachronically influx and unanchored, a vacuous canine classification. Over time, the pit bull has been discursively (re)imagined and constructed for the needs of police power. The rise and fall of pit bulls’ reputation in the United States reveals a dog that was of great cultural import.⁴⁷ In the early 20th century, at vortex of a burgeoning patriotism, they were the closest thing to a national dog.⁴⁸ They were featured on U.S. recruiting posters during World Wars I and II, corporate and university mascots, cast as ideal family dogs in television and movies, and publicly loved by well-known American figures.⁴⁹ In

53 *PHYLON* 42, 44–48 (2016) (discussing the use of dogs as means of police violence and racism, stemming from the Civil War).

45. CIVIL RIGHTS DIV., U.S. DEP’T JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 33 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; see also Third Amended Complaint for Damages and Declaratory and Injunctive Relief at 3, *Lawson v. Gates*, BC 031232 (Cal. App. Dep’t Super. Ct. Aug. 17, 1993), <https://www.clearinghouse.net/chDocs/public/PN-CA-0006-0001.pdf> (arguing that the LAPD used excessive force in the form of attack dogs against members of the African American and Latino communities).

46. CLAIRE JEAN KIM, *DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE* 271–75 (2015).

47. See DICKEY, *PIT BULL*, *supra* note 30, at 8–42.

48. See Simon Worrall, *The Most Feared Dogs May Also Be the Most Misunderstood*, *NAT’L GEOGRAPHIC* (July 3, 2016), <https://news.nationalgeographic.com/2016/07/pit-bull-ban-aggressive-dog-breed-bronwen-dickey/>; see also KAREN DELISLE, *THE PIT BULL PLACEBO: THE MEDIA, MYTHS, AND POLITICS OF CANINE AGGRESSION*, at xv (2007).

49. See John Davidson, *The History of Pit Bulls Includes the Good and The Bad*, *DENVER POST*:

addition, they were embraced by commercial companies such as Buster Brown Shoe Company and RCA.⁵⁰ Their temperament around children was revered and their loyalty celebrated.⁵¹

More recently, however, the breed has become demonized, facing everything from a media-driven reputation for being predators to legislation that seeks to outlaw their existence. Pit bulls are now considered “dangerous breeds” and, by extension, “untrustworthy, unpredictable, and particularly dangerous around children.”⁵² Paradoxically, pro-animal organizations, such as the Humane Society and PETA, consider the pit bull a “dangerous breed” and have endorsed BSL.⁵³ By the mid-1980s, the pit bull was an object and representation of violent urbanity—a maker and representation of black urban space.⁵⁴ Dogs and the black body were conjoined to create *the* “menace to society.” They have gone from respected and admired to being marked and known as voracious predators—inherently and irreparably criminal.⁵⁵ They are thought of as weapons, guard dogs for drug dealing and other gang-related activity, evidence of a culture of deviance, and criminal possibility.⁵⁶ In short, pit bulls have become a surrogate for a form of racialized anxiety about violence and social breakdown, which, in turn, makes them targets for surveillance and policing.

While a target of police power in itself, however, the dog as

FETCH (June 19, 2010), <http://blogs.denverpost.com/fetch/2010/06/19/the-history-of-pit-bulls-includes-the-good-and-the-bad/1224/>.

50. See Jake Flanagan, *The Tragedy of America's Dog*, PAC. STANDARD (Feb. 28, 2014), <https://psmag.com/environment/tragedy-americas-dog-pit-bull-75642>.

51. See *id.*

52. Hillary Twining et al., *Managing the Stigma of Outlaw Breeds: A Case Study of Pit Bull Owners*, 8 SOC'Y & ANIMALS 1, 8-9 (2000); see also *Toledo v. Tellings*, 871 N.E.2d 1152, 1154 (Ohio 2007) (upholding an Ohio law designed to limit ownership of pit bulls and other vicious dogs).

53. See Letter from Teresa Chagrin, Animal Care & Control Specialist, PETA, to Rogers Anderson, Mayor of Williamson Cty., Tenn. (Mar. 15, 2013), <http://www.nathanwinograd.com/wp-content/uploads/2013/04/PETAWilliamson.pdf>.

54. Lynn Marmer, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. CIN. L. REV. 1067, 1067-69 (1984). In 1984, pit bulls were banned in Tijeras, New Mexico. See *Debate Widens on Plan to Restrict Pit Bull Dogs*, N.Y. TIMES (Dec. 30, 1985), <http://www.nytimes.com/1985/12/30/us/debate-widens-on-plans-to-restrict-pit-bull-dogs.html>.

55. See VICKI HEARN, *BANDIT: DOSSIER OF A DANGEROUS DOG* 31-35 (1991).

56. See *id.*

companion, possession, and friend also serves a fiduciary duty to police power: a “black luminosity, in law.”⁵⁷ By situating the pit bull in American life, we are able to explore the fungibility of blacknesses. In the case of the pit bull, it becomes dangerous not because of its supposed canine superpowers,⁵⁸ but because of its relationship to blackness. Thus, the pit bull is exploited as a supervisory device and part of a legal framework that marks black people, a non-corporeal measure that extends and fortifies the boundaries of blackness. In other words, the pit bull is blackened due to its intimacy with rituals of punishment, death, and surveillance, not the reverse. Because of the pit bull’s blackened position in society, BSL can be read diagnostically, illuminating “the structuring presence of antiblackness” in legislative and statutory production.⁵⁹ For this reason, BSL must be contextualized within an understanding of the ontological conditions and coordinates of antiblackness, for it might suggest an overlooked way in which black people continue to *be* supervised.

III. BSL IN COURT

Historically, dogs are capacious legal entities and objects, meaning they are subject to regulation in many legal areas, including nuisance,⁶⁰ taxation,⁶¹ prevention of cruelty (humane treatment),⁶² canine-control ordinances,⁶³ and much more. BSL regulates the individual possession of certain types of canines.⁶⁴

57. Simone Browne, *Everybody's Got a Little Light Under the Sun: Black Luminosity and the Visual Culture of Surveillance*, 26 *CULTURAL STUD.* 542, 553 (2012).

58. For example, pit bulls are thought to have locking jaws. See Jasmine Kleine, *Pit Bull Locking Jaw Myth Busted (& Other Pit Bull Facts)*, K9 MAG. (Jan. 27, 2013), <http://www.k9magazine.com/blog/pit-bull-locking-jaw-myth-busted-pit-bull-facts/>.

59. Christina Sharpe, *The Lie at the Center of Everything*, 1 *BLACK STUD. PAPERS* 189, 207 (2014).

60. See, e.g., *Brown v. Carpenter*, 26 Vt. 638, 642–43 (Vt. 1854); *Brill v. Flagler*, 23 Wend. 354, 359–60 (N.Y. Sup. Ct. 1840).

61. See, e.g., *McGlone v. Womack*, 111 S.W. 688, 689 (Ky. 1908).

62. See, e.g., *United States v. Stevens*, 559 U.S. 460, 487 (2009).

63. See, e.g., *Vanater v. South Point*, 717 F. Supp. 1236, 1236–41 (S.D. Ohio 1989).

64. *Breed-Specific Legislation*, ASPCA, <https://www.asPCA.org/animal-cruelty/dog-fighting/what-breed-specific-legislation> (last visited Apr. 23, 2018).

BSL exists in various forms in 900 cities,⁶⁵ but all forms are motivated by a single rationally related goal: to maintain public order, health, and safety.⁶⁶ Regardless of nuance, BSL identifies a breed and imposes restrictions on said breed.⁶⁷

To some degree, all canine-control ordinances are rooted in *Sentell v. New Orleans & Carrollton Railroad Co.*,⁶⁸ which suggests two things: (1) all people have property rights in their dogs and, by extension, are protected by the Fourteenth Amendment; and (2) all dogs are subject to police power.⁶⁹ Thus, property ownership of dogs can, at the discretion of the legislature, be severely limited.⁷⁰ In other words, “there is only a conditional property in dogs.”⁷¹ *Sentell*, therefore, exposes the fungibility of *the* dog and the range of police power. In delivering the *Sentell* opinion, Justice Brown stated:

It is true that under the Fourteenth Amendment no state can deprive a person of his life, liberty or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but, so far as it is dangerous to the safety or health

65. *Breed-Specific Laws State-by-State*, DOGSBITE.ORG, <https://www.dogsbite.org/legislating-dangerous-dogs-state-by-state.php> (last modified Mar. 14, 2018).

66. Linda S. Weiss, *Breed-Specific Legislation in the United States*, MICH. ST. U.: ANIMAL LEGAL & HIST. CTR. (2001), <https://www.animallaw.info/article/breed-specific-legislation-united-states>.

67. *See id.*

68. 166 U.S. 698, 700-04 (1897).

69. *See id.*; *see also* *Toledo v. Tellings*, 871 N.E.2d 1152, 1156-57 (Ohio 2007) (supporting the Supreme Court’s proposition discussed in *Sentell*); *Vanater v. South Point*, 717 F. Supp. 1236, 1241-43 (S.D. Ohio 1989).

70. *See Sentell*, 166 U.S. at 702-04.

71. *Id.* at 706.

of the community, due process of law may authorize its summary destruction.⁷²

Lawsuits challenging BSL have focused on constitutional concerns such as equal protection, substantive due process, and by extension vagueness of statute.⁷³

Equal protection arguments are predicated on the idea that BSL unfairly singles out owners of specific breeds, namely pit bulls.⁷⁴ The courts have, however, rejected these claims because owners of “dangerous” dogs do not constitute a suspect class, ownership of dogs is not a constitutional right, and public safety concerns override any right in keeping the dogs.⁷⁵

Relatedly, due process concerns, as evinced in *Colorado Dog Fanciers*, assert that BSL violates a person’s constitutional right to due process before depriving an individual of life, liberty, and happiness.⁷⁶ This constitutional argument is subtended by the vagueness of BSL, since no breed standard exists for the pit bull. Although pit bulls are difficult to recognize, people generally know when they see one.⁷⁷ Rather than referring to a specific breed, pit bull is a classification that indicates a set of shared physical traits with a cluster of officially recognized terrier dogs: the Stafford Bull terrier, the American Staffordshire terrier, and the American Pit Bull terrier.⁷⁸ In addition to physical traits, behavioral traits feature as part of the classificatory schema: that is the pit bull is generally thought to be highly aggressive. This assumption might seem to have some value, especially given that pit bulls descend from breeds of terriers

72. *Id.* at 705.

73. See *Colo. Dog Fanciers, Inc. v. Denver*, 820 P.2d 644, 650–53 (Colo. 1991).

74. See *Bess v. Bracken Cty. Fiscal Court*, 210 S.W.3d 177 (Ky. Ct. App. 2006); *Dog Fed’n of Wis. v. South Milwaukee*, 504 N.W.2d 375 (Wis. Ct. App. 1993).

75. See *Vanater v. S. Point*, 717 F. Supp. 1236, 1242 (S.D. Ohio 1989).

76. 820 P.2d at 648–50.

77. Kate S. Alexander, *Experts Say ‘Pit Bulls’ Don’t Exist*, WASH. POST (Aug. 28, 2012), https://www.washingtonpost.com/local/experts-say-pit-bulls-dont-exist/2012/08/28/b0c410b8-f14c-11e1-b74c-84ed55e0300b_story.html?utm_term=.da767128cd4e.

78. *Id.*

used for the sport of bull baiting in nineteenth century England.⁷⁹ Studies from the American Veterinary Medical Association to the National Canine Research Council have concluded, however, that canine aggression, and, by extension dog-bite incidents, are not inherent to pit bulls.⁸⁰ As research suggests, BSL does little to reduce dog-bite incidents.⁸¹ Again, the courts have rejected such claims based on the idea that in order to maintain public safety, laws and ordinances require legal flexibility.

Most BSL will survive the minimum scrutiny analysis allowed by the due process and equal protection clauses of the Constitution's Fifth and Fourteenth Amendments because there is no fundamental right at issue,⁸² and the law being challenged is rationally related to a legitimate government goal and purpose: *salus populi*. For example, in *Hearn v. City of Overland Park*,⁸³ the court concluded that BSL serves a legitimate government purpose and satisfies the rational basis test.⁸⁴ In addition, courts have concluded that communities under police power may apply "reasonable regulation" to "the whole canine race."⁸⁵ All in all, "pit bull" is a loose categorization that conforms to the public imagery of dangerous and criminal, hence the resulting BSL legislation and wide community support. For some, the

79. *American Staffordshire Terrier*, AM. KENNEL CLUB, <http://www.akc.org/dog-breeds/american-staffordshire-terrier/detail/> (last visited Mar. 8, 2018).

80. *Dog Bite Risk and Prevention: The Role of Breed Literature Review*, AVMA, https://www.avma.org/KB/Resources/LiteratureReviews/Pages/The-Role-of-Breed-in-Dog-Bite-Risk-and-Prevention.aspx?utm_source=facebook&utm_medium=socmed&utm_campaign=observ&utm_content=dog-bite (last visited Apr. 27, 2018).

81. See Nanci Creedon & Páraic S. Ó Súilleabháin, *Dog Bite Injuries to Humans and the Use of Breed-Specific Legislation: A Comparison of Bites from Legislated and Non-Legislated Dog Breeds*, IRISH VETERINARY J. 70.23, 2 (2017); Douglas Anthony Cooper, *The Academic Imposter Behind the Pit Bull Hysteria*, HUFFINGTON POST (Sept. 24, 2014), https://www.huffingtonpost.com/douglas-anthony-cooper/merritt-clifton-pit-bulls_b_5866176.html; Gary J. Potronek & Janis Bradley, *No Better than Flipping a Coin: Reconsidering Canine Behavior Evaluations in Animal Shelters*, 15 J. VETERINARY BEHAV.: CLINICAL APPLICATIONS & RES. 66, 66-77 (2016).

82. Ann L. Schiavone, *Unleashing the Fourteenth Amendment*, WIS. L. REV. FORWARD 27, 27-28 (2016).

83. 772 P.2d 758 (Kan. 1989).

84. *Id.* at 765-68.

85. See, e.g., *Sentell v. New Orleans & Carrollton R. R. Co.*, 166 U.S. 698, 703-04 (1897).

vacuous definition begets misunderstanding, but this vacuousness has purpose and consequence.

In this sense, courts have not had trouble finding that BSL is rationally related to the goal of protecting the public.⁸⁶ If we are to reach into the black archive for a legal history, we quickly find evidence of the continuity between antebellum slave codes and “public safety” ordinances as “operative” for black people “anywhere and anytime.”⁸⁷ Illustrative of this point would be the direct connection between the black codes of South Carolina that sought to “regulate the apparel of slaves”⁸⁸ and the saggy pants laws of today.⁸⁹ In other words, public safety concerns have always been predicated on the assumption that “blackness presumptively poses a danger to public welfare.”⁹⁰ As a result, ordinances serve a pre-conditional function in which black bodies can be found guilty at any time.

IV. ADDRESSING BSL’S SPIRIT

BSL brings into relief the inner workings of the intersection of antiblackness, legislation, and policing. It is this author’s understanding that BSL cannot be understood without recourse to the history of the slavocracy and the link between blackness and its structural position; that is its fungibility and ontological dereliction.⁹¹ This dereliction, the matter that configures “the color-line,” must always be managed and maintained. Its policing assures the health and safety of the public. Blackness, as dereliction, as lack, as violent, and as criminal cannot move freely if the public is to *be* safe. Thus, the spirit of the Fugitive Slave Acts

86. See *id.*; see also *Hearn*, 772 P.2d at 765–68.

87. Jared Sexton, *Racial Profiling and the Societies of Control*, in *WARFARE IN THE AMERICAN HOMELAND: POLICING AND PRISON IN A PENAL DEMOCRACY* 197, 211 (Joy James ed., 2007).

88. SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 66 (2015).

89. See Onika K. Williams, *The Suppression of a Saggin’ Expression: Exploring the “Saggy Pants” Style within First Amendment Context*, 85 *IND. L.J.* 1169, 1169 (2010); Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, *N.Y. TIMES* (Aug. 30, 2007), <http://www.nytimes.com/2007/08/30/fashion/30baggy.html>.

90. Tibbs & Woods, *supra* note 14, at 777.

91. What the Author calls “ontological dereliction,” Fanon refers to as “absolute dereliction.” See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 37 (1968).

(known as the Bloodhound Bills) passed by Congress in 1793 and 1850 that provided for the seizure and return of runaway slaves haunts the present moment.⁹²

In the post-antebellum and post-civil rights periods, black people have greater freedom of movement, or at least, an assumed freedom of movement based on the lack of explicit anti-black measures. Despite legal progress in certain domains of life, antiblackness inheres in the production and creation of legislation and jurisprudence itself. Perfected post-racial forms of surveillance have become a required legal necessity, and legal creations, such as BSL, help structure the modern dynamics of legality and guideposts that help maintain and fortify the coherence and material continuation of blackness as lack, as negation—that is, blackness as criminal. BSL helps make blackness legible—a generative mechanism for racially benign surveillance. For its part, BSL helps undergird a methodology of regulation that has yet to end.

Black people are disproportionately stopped by the police—a practice of punishment that can result in arrest, injury, death or more.⁹³ Thus, why not see in BSL something more profound than the legislating of dog ownership, but also a blackening prosthetic for policing and surveillance that enables the continued production of power and dominion rooted in social logic and the historical trajectory of racial slavery. Furthermore, increased mobility begets new and old ways to keep the public safe. Therefore, one could claim that the dog, in BSL, serves as an *ex ante* basis for criminality; that is, BSL is a forewarning based on imminent violation. As briefly addressed above, the Article suggests that the dog—the pit bull to be more precise—serves as an *ex rel* basis for criminality: BSL arises out of its relation to blackness, subject of kind. As a result, police power has extended its reach and capacity, expanding police impunity,

92. Fugitive Slave Act of Feb. 12, 1793, ch. 7, §§ 3, 4, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of September 18, 1850, ch. 60, 9 Stat. 464 (repealed 1864).

93. *Stop-and-Frisk Data*, N.Y. C.L. UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Mar. 9, 2018); see Tibbs & Woods, *supra* note 14, at 765 n.90.

but also expanding the ability to qualify its immunity from constitutional thresholds.⁹⁴

Recognizing the similarity between BSL and post-antebellum black codes, we are able, through the “compulsion of legality,”⁹⁵ to discover what David Dyzenhaus calls “legal grey holes,” legislation and legality that hide the relations of power.⁹⁶ Or, as Anthony Farley has astutely observed, the perfection of slavery.⁹⁷ In the case of BSL, the relations of power are vested in dogs not necessarily in people. Although certain owners are responsible for their choice in canine, they are not granted rights before the law. The justification for a stop is the *canine* as a transgression. In other words, BSL, while related to dogs, is one of the many ways in which legislative acts and ordinances work with the police to, as Leonard Feldman has argued, “immunize police violence”⁹⁸ and inoculate the police from constitutional transgression. One is not profiled or stopped for being black, but for possessing a pit bull and, therefore, endangering the community. BSL provides the capacity to skirt intention and explicit bias.⁹⁹ As Radley Balko points out, pit bulls serve as “proxies by which uneasy majorities can register their suspicions about race, class and ethnicity of the people who own those dogs.”¹⁰⁰ BSL provides reasonable justification for an encounter

94. Leonard Feldman, *Police Violence and the Legal Temporalities of Immunity*, 20 THEORY & EVENT 329, 340–42 (2017) (discussing “qualified immunity” of police officers). Feldman argues that “qualified immunity” is established in court cases, such as in the appellate court decision *Cordova v. Aragon*, 569 F.3d 1183 (10th Cir. 2009), and others, such as *Saucier v. Katz*, 533 U.S. 194 (2001), and *Pearson v. Callahan*, 555 U.S. 223 (2009). The Author looks to these cases simply to illustrate that BSL legislation can grant reasonable legality, rather than lack of legality.

95. See generally DAVID DYZENHAUS, EMERGENCIES AND THE LIMITS OF LEGALITY 33–59 (2008) (discussing the impact of states of emergency on legal theory).

96. DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006).

97. Farley, *Perfecting Slavery*, *supra* note 34, at 226.

98. Feldman, *supra* note 94, at 345–47.

99. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 880 (2004); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204 (2010); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).

100. Radley Balko, *The Dirty Secret Behind Banning Certain Dog Breeds*, WASH. POST (Oct. 26, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/10/26/the-dirty->

and eliminates the officer's subjective motive, *pace Whren v. United States*;¹⁰¹ it is valid under the Fourth Amendment. Relatedly, under Fourteenth Amendment jurisprudence, racial profiling is not a concern unless a person's race was the *sole* factor for the stop. The dog eliminates the question of trigger. Similar to *Terry v. Ohio*,¹⁰² BSL helps establish an avenue that circumvents the standard of "reasonable suspicion" and "probable cause" set forth by the fourth amendment protection.¹⁰³ BSL renders black bodies as notable without the use of race. Owning a dog, a certain type of dog, is a form of expressive conduct that relates to hunches and intuitions. In fact, BSL provides the possibility to even circumvent the End Racial Profiling Act of 2001, which seeks to eliminate racial bias "to any degree."¹⁰⁴ BSL is one way to provide evidence of "reasonable suspicion," "probable cause," and more.¹⁰⁵ In short, BSL provides a way to circumvent the implicit associations between black corporeality and criminality. It gives facility to (re)entrench notions of color-blind policing and greater faculty to declare as the former police commissioner of New York City once stated, "We have a policy against racial profiling."¹⁰⁶ The encounter is not racialized, but rationalized via the canine.

While the vicious tracking of black bodies has explicitly ended, the use of dogs, and specific dogs for that matter, never fails to resurface, keeping the long history of policing black people with dogs in relief or in legal view.¹⁰⁷ Dogs have, and continue to serve, an important role in the organization of policing

secret-behind-banning-certain-dog-breeds/?utm_term=.4f40e41be18f.

101. 517 U.S. 806 (1996).

102. 392 U.S. 1 (1968).

103. See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *Whren*, 517 U.S. at 808.

104. End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. § 505(1) (2001).

105. See *Wardlow*, 528 U.S. at 123; *Whren*, 517 U.S. at 808.

106. Malcolm Gladwell, *Troublemakers: What Pit Bulls Can Teach Us About Profiling*, NEW YORKER (Feb. 6, 2006), <https://www.newyorker.com/magazine/2006/02/06/troublemakers-2>.

107. See generally *Florida v. Harris*, 568 U.S. 237 (2013) (discussing the standard to establish for the reliability of drug dog detection); *Florida v. Jardines*, 569 U.S. 1 (2013) (discussing whether a dog sniff at the front door of a home requires probable cause and a search warrant); *United States v. Place*, 462 U.S. 696 (1983) (holding that the sniffing of personal items of person

practices and the perdurance of police power.¹⁰⁸ The dog in black is sutured to black bodies underscoring Chief Justice Taney's proclamation that black autonomy and self-possession is a legal fiction.¹⁰⁹ The blackness of the dog extends the "stigma, of the deepest degradation,"¹¹⁰ while also depriving black people of "life, liberty, and property."¹¹¹ As Colin Dayan has cogently observed, "The summary justice of police power regulates the keeping of dogs, as it once did the possession of slaves."¹¹²

V. SURVEILLANCE OF THE UNTHOUGHT¹¹³: A BRIEF NOTE

In the era of big data, electronic surveillance, biometric observation, high-tech racial profiling, rudimentary technologies go unacknowledged. Take for example the Movement for Black Lives's (M4BL) Policy Platform. M4BL's demands are many, but in general it demands an "end to the war on black people."¹¹⁴ Demand number seven is of particular interest. It demands "[a]n end to the mass surveillance of Black communities, and the end to the use of technologies that criminalize and target our communities (including IMSI catchers, drones, body cameras, and predicative policing software (e.g., Electronic Frontier Foundation))."¹¹⁵ All references to surveillance tools are mechanized and/or computerized with no specific reference to the crude and simple.¹¹⁶ M4BL goes on to state that these

in a public place by a dog was not a search under the Fourth Amendment).

108. See *Police Canines in History*, DOGS FOR LAW ENFORCEMENT, <https://dogsforlawenforcement.org/index.php/police-canines-in-history/> (last visited Mar. 29, 2018) (discussing the history of police canines).

109. See *Scott v. Sandford*, 60 U.S. 393 (1857).

110. *Id.* at 409.

111. *Id.* at 450 (citing U.S. CONST. amend. V).

112. DAYAN, *LAW IS A WHITE DOG*, *supra* note 35, at 250.

113. Saidiya V. Hartman & Frank B. Wilderson, *The Position of the Unthought*, 13 *QUI PARLE* 182 (2003), <http://www.jstor.org/stable/20686156> (providing the basis for the title of this section).

114. *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> (last visited Mar. 25, 2018).

115. *Id.*

116. *Id.*

practices create “multiple points of entry” and that “[t]hese practices violate the First- and Fourth-Amendment rights of Black people in the U.S.”¹¹⁷ Without guiding policies, practices, principles or regulatory parameters, these surveillance technologies supersize the potential for discriminatory policing.¹¹⁸ The M4BL platform is useful for providing an example of the ways in which surveillance is thought and, as a result, highlights the “surveillance of the unthought”: that is “a simple device [and object] made for visual surplus where technology met surveillance.”¹¹⁹ In the age of hyper-technology we would be remiss not to maintain focus on the mundane forms of supplemental surveillance that help facilitate and immunize police power.

CONCLUSION

BSL suggests a transformation in the form, not necessarily the content, of antiblackness (part of the perfection of slavery). BSL is not rooted in the politics of canine aggression, but becoming black in kind. The pit bull within BSL, which is to say the *dog in black*, provides the possibility for crafting a visual vocabulary to recognize the black body without reference to it. The dog and the black body merge to create the criminal *par excellence*. In other words, BSL is part of a matrix of domination and punishment capable of marshalling antiblack fears without violating equalitarian norms. Thus, hiding the condition of truth, blackness as the crime. BSL is connected to the symbolic and discursive instruments of a captive society, in addition to the physical instruments used to control black people. It engenders greater impunity under the cover of law and the legislative framework for policing the colorline, while at the same time acting as a mechanism to keep the public safe. It helps facilitate the process of blackening, hiding any articulation of “Look, a Negro!”¹²⁰ In the end, BSL helps reproduce the habitus of the slaveocracy;

117. *Id.*

118. *Id.*

119. BROWNE, *supra* note 88, at 79.

120. FANON, *supra* note 20, at 93.

creating the condition for immanent violation and incapacitation of black movement. Like the hounds of the past, the dog in black is “man’s best friend.”