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Irrational, Ineffective, and Unethical: Breed Specific Legislation Defies Common Sense

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“[W]hile it is one thing for the public to buy into fear mongering, hysteria, misinformation and unproven claims, it is quite another matter for laws to be passed based on unsubstantiated claims and media-driven rhetoric.’”¹

SLATER’S STORY

When the Miami Marlins traded pitcher Mark Buehrle to Toronto, he learned that pit bulls were banned in his new city. This meant his dog Slater was not welcome. Although living apart was not ideal, the Buehrle family could afford to pay for a house in Toronto for Mark Buehrle and also the family’s Florida home where Slater was legal. Most families affected by breed specific legislation are not so lucky; many families are forced to surrender their family dogs to animal control because their beloved family pet is deemed vicious based on physical appearance.

COCO’S STORY

The Arnold family did not know their dog Coco was illegal when they brought her into their home. Why would they know? While Denver enacted breed specific legislation in 1989 that banned pit bulls and dogs whose physical characteristics resemble pit bulls, previously the ban had not been enforced. Further, Coco was considered a gentle family member. The fact that she may be illegal never crossed their minds.

In 2003, animal control seized Coco as part of a genocidal round up of dogs deemed illegal based on breed and physical appearance. The Arnolds could only save Coco from death if they signed an admission stating Coco was a pit bull; agreed to remove Coco from Denver; and provided a third party attesting to their willingness to keep Coco. Shocked and bewildered, but desperate to save Coco’s life, the Arnolds placed Coco in a home outside of Denver.

Coco lived with the third party until the Arnold’s became concerned about the quality of care Coco was receiving. The Arnolds desperately searched for another
home for Coco outside of Denver, but ultimately failed. With nowhere to turn, the Arnold's brought Coco back into their Denver home. After a neighbor informed animal control that Coco was in the home, animal control went to the Arnold’s home, removed Coco from the Arnold’s backyard, and brought her to the shelter where they planned to kill her.

The Arnold’s requested a hearing to contest the determination that Coco was a pit bull. To the Arnold’s dismay, animal control informed the Arnolds they had waived their right to a hearing when Coco was seized in 2003. The Arnold’s hired an attorney who scheduled a hearing for Coco. While animal control officers agreed that Coco displayed only 11 of 25 physical characteristics that would qualify her for the ban, they nonetheless deemed Coco a pit bull. A hearing officer upheld the determination; Coco was labeled a “pit bull”. Despite Coco’s sweet temperament, position as part of the Arnold’s family, and history of good behavior, Coco would be killed.

The Arnolds and their attorney tried again to save Coco by requesting animal control allow placement with a willing family outside of Denver. Animal control declined the request. An animal control officer leashed Coco, walked her to the euthanasia room, and proceeded to kill Coco. The animal control kennel volunteers were heart-broken over Coco’s death, describing Coco as a gentle and loving dog. The Arnold’s retrieved Coco’s body from animal control in a garbage bag.

Unfortunately for humans and dogs alike, Coco’s story is not unique. Too often, humans are forced to give up beloved pets based on physical appearance
without considering the individual dog’s temperament and the human’s ability to manage the dog.

ROADMAP

This paper will demonstrate that breed specific legislation is irrational, ineffective, and unethical. Part One of this paper will define breed specific legislation; explain that dogs are not a significant threat to public safety while also explaining society’s tendency to demonize all dogs of a particular breed based on a subset of the breed. Part Two will describe a brief history of breed specific legislation, explain that media frenzy and public ignorance are the primary reasons why breed specific legislation is passed, and explore several reasons why breed specific legislation is ineffective. Finally, Part Three will summarize legal challenges to breed specific legislation and offer suggestions for moving forward.

PART ONE

DEFINING BREED SPECIFIC LEGISLATION

Breed specific legislation (BSL) is a law or ordinance that bans or restricts ownership and possession of certain dog breeds and mixes.¹ Breed specific bans outlaw ownership and possession of dogs that are presumed to be the target breed. Breed specific restrictions include imposing separate mandatory requirements such as: spay-neuter, muzzling, special liability insurance, special licensing, confinement, and breed-specific pet limits.² BSL creates a legal presumption that a particular breed of dog is vicious without evaluating dogs as individuals.

² Id.
DOGS ARE NOT A SIGNIFICANT THREAT TO PUBLIC SAFETY

Currently, 73.6 million dogs live in the United States, with 39% percent of households owning at least one dog. This means millions of people live in close proximity to dogs, interacting with them daily. Yet, dog bite reports to public health agencies have significantly declined since the 1970s, despite significant increase in human and dog populations. On average, dog bites cause between one to two dozen human deaths per year in the United States, accounting for less than 0.5% of total human hospitalizations.

In fact, humans are more likely to be killed by front porch steps, kitchen utensils, five gallon buckets, bathtubs, strollers, stoves, coffee table corners, Christmas trees, slippers, or balloons. Authors of a Journal of the American Veterinary Medical Association study calculated a city or town would have to kill over 100,000 dogs in order to prevent only one serious dog bite-related injury.

SOCIETY CREATES DEMONS

Society’s inventions of “demons” and the practice of demonization have had serious consequences. One need only look to the Salem witch-hunts as a well-known example of society-created demons. Like the witch hunts, society has created demon

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6 Delise, supra, at 1.
7 National Canine Research Council, Denver’s Breed-Specific Legislation: Brutal, Costly, and Ineffective 1 (2013).
8 Janis Bradley, Dogs Bite: But Balloons and Slippers are More Dangerous 11 (2005).
dogs by instilling supernatural or evil powers in these dogs, thereby allowing these demon dogs to be treated as separate from other dogs. Some BSL defines pit bulls as so different than other dogs that they are considered exotic animals, included in bans with piranhas and mountain lions.

Society demonizes groups of dogs when the dogs’ most publicized function is negative. Society demonized Bloodhounds after Bloodhounds were used in slave catching. Doberman Pinschers replaced Bloodhounds because of their association with the Nazi regime during World War II. German Shepherds replaced Doberman Pinschers and soon Rottweilers followed suit. Despite their early reputation as family dogs with only one documented case of a fatal attack in the United States between 1966 and 1975, pit bulls are the current “demon” dog.

When the Federal government amended the Animal Welfare Act to criminalize trafficking dogs for the purpose of fighting, it undoubtedly had good intentions. However, the media focused largely on the dogs when it began covering raids of dog fighting operations. The small number of pit bulls engaged in negative publicized conduct defined the breed to the public without considering all the pit bulls that do not engage in negative conduct.

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10 Delise, supra, at 79.
11 Delise, supra, at 105.
13 Id.
14 Delise, supra, at 65.
15 Delise, supra, at 95.
17 Id.
18 Delise, supra, at 96.
In demonizing the pit bull, society created a series of myths that gave pit bulls supernatural powers, which have been debunked by modern science. There are no scientific studies or evidence to validate the myths. In contrast, evidence exists to show pit bulls do not have a unique jaw that allows them to lock onto a victim; pit bulls do not have an astronomical bite pounds per square inch of force; and pit bulls do feel pain just as others dogs do.

PART TWO

BRIEF HISTORY OF BREED SPECIFIC LEGISLATION

BSL is expected to be a silver bullet; it is proposed to protect communities from the alleged demon dogs. In 1925, a New York City magistrate claimed German Shepherds should be banned. However, the first official breed ban occurred in 1929 when Australia banned import of German Shepherds. BSL is a slippery slope that has targeted thirty-six breeds and countless mixed breed dogs based on appearance. Since inception of BSL, hundreds of municipalities throughout the United States have adopted either a breed-based ban or breed-based restrictions. Promisingly, the National Canine Research Council found that from January 2012 to May 2013, three

19 Delise, supra, at 109.
20 Id.
21 Dr. Brady, Dangerous Encounters: Bite Force (2005).
22 Delise, supra, at 117.
23 Berkey, Dog Breed Specific Legislation, supra.
24 Delise, supra, at 75.
times as many American communities have considered and rejected or repealed a breed-specific ordinance, as have enacted BSL.\textsuperscript{27}

\textbf{WHY BREED SPECIFIC LEGISLATION IS PASSED}

\textbf{Media Frenzy}

Stanley Cohen, Emeritus Professor of Sociology at the London School of Economics, claims society’s impressions of a group are formed through a media filter.\textsuperscript{28} The media tells society pit bulls are demons\textsuperscript{29} and report pit bull attacks differently than other dog attacks. Because fear-based stories about demon pit bulls garner emotion, the media spins into overdrive,\textsuperscript{30} producing sensationalized claims.\textsuperscript{31} The media offer editorial columns about the vicious nature of certain breeds and sensationalized headlines of dog attacks, offering instant “proof” of the vicious nature of some dogs.\textsuperscript{32} Even when a pit bull is not involved, the media may reference pit bulls to spice up their report.

A 2008 National Canine Research Council report on media bias compared media reporting on dog attacks that occurred over a four-day period.\textsuperscript{33}

- On day one, a Labrador mix attack resulted in hospitalization of an elderly man.\textsuperscript{34} One article in the local paper reported on the attack.\textsuperscript{35}

\textsuperscript{27}National Canine Research Council-FAQ, \textit{supra}.
\textsuperscript{29} See Rolling Stone, \textit{A Boy and His Dog in Hell} (1987); Sports Illustrated, \textit{Beware of this Dog} (1987); Time, \textit{Time Bomb on Legs} (1987).
\textsuperscript{30} Delise, \textit{supra}, at 96.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} Delise, \textit{supra}, at xvii.
\textsuperscript{34} \textit{Id.}
• On day two, a mixed breed dog killed a child. Two articles in the local paper reported on the attack.\textsuperscript{36}

• On day three, a mixed breed dog attack resulted in hospitalization of a child.\textsuperscript{37} One article in the local paper reported on the attack.\textsuperscript{38}

• On day four, a pit bull attack resulted in hospitalization of a woman. Two hundred and thirty articles, including national and international newspapers, and major cable news networks reported on the attack.\textsuperscript{39}

Public Ignorance Thrives

Ideally, our laws should be based on scientific data, proven theories, or expert testimony and evidence.\textsuperscript{40} However, when BSL is enacted, experts are rarely consulted. When experts are invited to speak, their testimonies are often discarded in favor of sensationalized headlines or victim testimonials.\textsuperscript{41}

Separating fact from fiction is tedious and confirmation bias allows people to favor information that confirms their preconceptions.\textsuperscript{42} The myths that create a category of demon dog combined with the media frenzy of misinformation make it difficult for the public not to believe pit bulls are different than other breeds. The public likely does not even know that “pit bull” is not a breed. In fact, “pit bull” describes a group of dogs including American Staffordshire Terriers, Staffordshire

\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Delise, \textit{supra}, at 102.
\textsuperscript{41} Id.
Bull Terriers, American Pit Bull Terriers, other pure breeds and presumed mixes of those breeds based on physical characteristics.  

**BREED SPECIFIC LEGISLATION IS INEFFECTIVE**

Extensive research led the National Canine Research Council to conclude, “BSL has not succeeded in reducing dog bite-related injuries wherever in the world it has been enacted.”

Virtually all animal organizations that work with domestic animals have spoken out against BSL. Additionally the Department of Justice and the Obama Administration have spoken out against BSL as ineffective and a waste of public resources. In 2012, the American Bar Association passed a resolution urging all BSL be repealed because BSL raises Due Process issues, wastes government resources, fails to produce safe communities, and infringes on property rights.

**No Dog Breed or Group is Disproportionately Dangerous**

There is no scientific evidence that one breed of dog is more likely to injure humans over another breed. Contrariwise, there is scientific evidence that suggests no breed of dog is more likely than another breed to hurt humans. Furthermore, evidence from a 2012 study of dog bites spanning forty years led researchers to conclude that no breed of dog is more disproportionally dangerous than any other

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44 National Canine Research Council-FAQ, supra.
48 National Canine Research Council-FAQ, supra.
breed.\textsuperscript{50} The American Temperament Test Society paralleled these results when it found that the American Pit Bull Terrier, a dog uniformly classified as pit bull, scored as one of the most tolerant dogs tested.\textsuperscript{51} These are the very dogs BSL aims to eliminate.

**Epidemiological Studies Show BSL Has No Effect on Reducing Dog Bites**

There is no proof that BSL reduces the rate or severity of dog bite related injuries.\textsuperscript{52} Sixteen states have prohibited or restricted their municipalities from enacting BSL. In prohibiting BSL, these states expressly or impliedly acknowledge BSL is wrong.\textsuperscript{53} A 2007 Journal of Veterinary Behavior study found the number of dog bites in Spain remained the same before and after BSL was passed.\textsuperscript{54} In 2008, the Netherlands repealed a 15-year breed ban after a study showed BSL’s inefficacy in reducing dog bite incidents.\textsuperscript{55} Italy repealed BSL in 2009 for the same reasons.\textsuperscript{56} A 2010 survey in Ontario, Canada showed no significant decrease in number of dog bites after BSL was enacted.\textsuperscript{57}

Dr. Randall Lockwood, a researcher who uses epidemiology to analyze dog bites and attacks found an attempt to correlate dog bites and attacks with the single

\textsuperscript{52} American Veterinary Medical Association, *supra*.
\textsuperscript{53} National Canine Research Council-FAQ, *supra*.
factor of breed is 19th century thinking. Rather, dog bites are complex societal problems that deal with a wide range of human behaviors that put people and animals at risk.

**Visual Breed Identification is Unreliable and is Discredited by Modern Science**

To avoid misinformation, it is important to look at the reliability of breed identification before drawing conclusions about breed. A study on breed identification found that 87% of breeds identified by DNA analysis were not the breeds stated by adoption agencies. That means, adoption agency workers guessed a dog’s breed correctly only 12.5% of the time. Further, a study in the Journal of Applied Animal Welfare Science found that only 25% of dogs identified by adoption agencies were at least one of the breeds proposed by the adoption agencies after DNA analysis. This suggests that even if targeted breeds were more dangerous than non-targeted breeds, BSL would still be ineffective because visual breed identification is inaccurate.

**BSL Mandates a Dog’s Death or Restriction Based on Physical Characteristics**

BSL mandates killing or restricting dogs based solely on their appearance due to the mistaken notion that regulating dogs solely based on their appearance will make a community safer. By solely focusing on appearances, humans ignore what does

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58 Cleary, *supra* at xi.
59 *Id.*
60 Delise, *supra*, at 21.
62 *Id.*
63 Donald Cleary, *supra*.
64 Best Friends Animal Society, *Breed-Discriminatory Legislation: An Ineffective Response to Negligent or Reckless Owners*
matter including individual temperament and how humans allow and expect their dogs to behave. Although a dog’s physical characteristics do not change once the dog is developed, behavioral characteristics are open to human influence, control, and manipulation.\textsuperscript{65}

**BSL Kills Innocent Dogs**

Denver, Colorado is a prime example for explaining how BSL kills innocent dogs because Denver heavily enforces its pit bull ban.

Denver passed BSL in 1989, banning all pit bulls within city limits. The Colorado State Legislature outlawed BSL in 2004. However, Denver challenged Colorado’s BSL prohibition and a judge ruled that Denver’s BSL could stand under the “home rule” exception.\textsuperscript{66} Since the ban passed, thousands of innocent pit bulls have been seized and killed in Denver. All dogs determined to be pit bulls based on a checklist of physical characteristics are killed. This includes family pets that live in Denver, stray dogs that enter the shelter, and dogs passing through Denver in vehicles, even when the dogs’ owners do not know of the ban. Animal control officers determine whether to kill a dog based on the dog’s label as a pit bull, not on the dog’s past actions or temperament.

Thousands of “pit bulls” have been killed in Denver’s attempt to exterminate pit bulls from the city. Yet, after the ban, Denver citizens continue to suffer more dog bite related hospitalizations than citizens of breed-neutral Colorado counties.\textsuperscript{67} Despite

\[\text{http://bestfriends.guerrillaeconomics.net/Home/Download/34e7673a-3402-4506-9fb9-c5be40d240f6 (last visited Dec. 2, 2013).}\]
\textsuperscript{65} Delise, \textit{supra}, at 20.
\textsuperscript{66} Campbell, \textit{supra}.
\textsuperscript{67} National Canine Research Council-Brutal, Costly, Ineffective, \textit{supra}, at 1.
destruction of all dogs appearing to be pit bulls, Denver bite rates are at their highest.\textsuperscript{68}

A Journal of Pediatric Surgery reports that injuries are rarely caused by pit bulls because pit bulls are illegal in Denver.\textsuperscript{69} This suggests pit bulls are not the problem.

\textbf{PART THREE}

\textbf{LEGAL CHALLENGES TO BSL}

Both federal and state courts have addressed legal challenges to BSL. While there is no United States Federal BSL, the United States Army\textsuperscript{70} and Marine Corps\textsuperscript{71} have enacted BSL that bans certain types of dogs from military bases and housing. Typically, most legal challenges to BSL occur at the state level because local and state governments are free to regulate the animals within their jurisdiction.\textsuperscript{72}

\textbf{Constitutional Challenges}

Although different courts rule differently on similar challenges to BSL, court challenges on constitutional grounds such as due process, equal protection, and vagueness have been largely unsuccessful.\textsuperscript{73} More than any other attorney, Dana Campbell, eloquently summed up these challenges:

Most BSL will survive the minimum scrutiny analysis allowed by the due process clauses of the Constitution’s Fifth and Fourteenth Amendments because there is no fundamental right at issue. This analysis requires that the law being challenged must be rationally related to a legitimate government goal or purpose. Because state and local jurisdictions enjoy broad police powers, including protecting the public’s safety and welfare, courts have not

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 2.
\textsuperscript{71} United States Marine Corps, Marine Corps Housing Management (2009).
\textsuperscript{73} Campbell, supra.
had trouble finding BSL is rationally related to the goal of protecting the public from allegedly dangerous breeds. [...] Challenges based on equal protection arguments are similarly difficult to sustain. Here courts are looking at whether there is a rational purpose for treating pit bull breeds differently from other dog breeds. Dog owners have attacked the rational purpose requirement by arguing either that BSL is over-inclusive, because it bans all dogs of a breed when only certain individuals within the breed have proven to be vicious, or under-inclusive, because many types of dogs have injured people and the BSL fails to include those other breeds. However, again under minimum scrutiny review, BSL will survive as long as the government can establish that the BSL is rationally related to its purpose, even if the law is found to be over-inclusive or under-inclusive.

Claims that BSL is unconstitutionally vague have brought dog owners mixed success. Procedural due process requires that laws provide the public with sufficient notice of the activity or conduct being regulated or banned. Here owners of pit bulls or other banned breeds argue that the breed ban laws do not adequately define just what is a “pit bull” (or other banned breed) for purposes of the ban. Another argument is that the laws are too vague to help the dog-owning public or the BSL enforcement agency—such as animal control or police—to be able to identify whether a dog falls under the BSL if the dog was adopted with an unknown origin or is a mixed breed.74

**Arbitrary and Capricious**

BSL has been shown ineffective, which would make passing BSL irrational. Courts have the power to set aside irrational laws if the law is shown to be arbitrary and capricious. Although not a popular challenge, this could be another angle to challenge BSL.

**Deprivation of Property**

BSL is subject to property doctrines because animals are legally recognized as property.75 United States Code Title 42 Section 1983 applies to deprivation of property when a government actor’s conduct results in loss or killing of a person’s dog.76 Some

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74 Campbell, *supra*.
75 Wagman et al., *supra*.
76 *Id.*
courts have awarded monetary damages in these cases while others have found
property can be taken in the exercise of police power.\textsuperscript{77}

**MOVING FORWARD**

As history shows, fear and ignorance cause rational people to make irrational
decisions. Despite modern scientific revelations and clear ethical issues, when BSL is
successfully enacted, it is difficult to challenge in court resulting in countless innocent
dogs dying based solely on their physical appearance. Ultimately, the best solution to
BSL may be education and lobbying to show that BSL is ineffective, irrational, and
unethical.\textsuperscript{78} Innocent family pets should not face discrimination or death because a dog
with similar physical characteristics engaged in negative conduct. Stray dogs and dogs
that enter animal shelters should be judged by their unique temperament, not by the
conduct of a different dog. To avoid ineffective, irrational, and unethical practices, all
dogs should be judged individually and no dog should be killed based solely on breed
or physical appearance.

\textsuperscript{77} Id.
\textsuperscript{78} Id.