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Attacking the Innocent: Why Breed Specific Legislation Cannot Achieve its Stated Goals

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Attacking the Innocent:

Why Breed Specific Legislation Cannot Achieve its Stated Goals

Shaw Williams

TABLE OF CONTENTS

I. <u>Introduction</u>	3
II. <u>A Brief History of Breed-Specific Legislation in the United States</u>	6
A. The Dog Bite Problem	6
B. Breed Specific Legislation – The Legislative Panic Button	9
III. <u>BSL in The Courts – An Unsettled Debate</u>	14
A. BSL vs. The ADA	15
B. Constitutional Challenges	16
1. Due Process Claims	17
2. Equal Protection Claims	19
3. Void for Vagueness	22
IV. <u>The State of BSL – By State</u>	24
V. <u>Why BSL is Problematic</u>	29
A. Enforcement Problems	30
B. Ineffective Policy	31
C. Misguided and Factually Unsupported Policy	33
D. Fundamentally Unfair/No Recourse	36
E. Other Collateral Damage	39
VI. <u>Addressing the Cause – Alternative Solutions</u>	40
A. Spay and Neuter Requirements	41
B. Improved Enforcement of Existing Laws	42
C. Individualized Exemptions	43
D. Community Approach	44
E. Education	45
F. A New Approach to Licensing Requirements	47
VII. <u>Conclusion</u>	48

I. Introduction

The term “Breed-specific legislation”, or “BSL”, is a term in United States and foreign law which refers to any law that focuses on the regulation of a particular breed of animal. As one can imagine, there are a multitude of incarnations of BSL at the municipal and state government levels of the United States and even at national levels in some foreign countries. These laws generally seek to promote the proper care and control of various breeds of animals in an effort to prevent risks to both human and animal health and safety.

BSL attempts to address the human safety issue of dog-bites and vicious attacks on humans by singling out breeds as inherently vicious or problematic and imposing regulations on only certain breeds in an attempt to protect the general welfare of society.¹ It has been embraced by some communities, shunned by others, and strongly opposed by a number of dog owners and canine interest organizations.² The promulgation and implementation of laws that ban specific breeds from a state or municipality have become hotly debated topics, both in town hall meetings and in courts, and a number of Constitutional law issues have been at the forefront of the debate.³

BSL is generally considered to be rooted in valid sources of “home-rule” type law and legislative power where it seeks to avoid allowing animals and people to enter situations where health and/or safety might be compromised.⁴ As a result, BSL in the United States has generally withstood legal challenges alleging it amounts to violation of constitutionally guaranteed rights of equal protection and freedom from persecution without due process of law.⁵

However, like any legislative trend, there are tipping points where the purported goal of

¹ Devin Burstein, *Breed Specific Legislation: Unfair Prejudice & Ineffective Policy*, 10 ANIMAL L. 313, 317 (2004)

² Linda S. Weiss, *Breed Specific Legislation in the United States*, Animal Legal and Historical Web Center (2001).

³ *Id.*

⁴ *See, e.g.*, Toledo v. Tellings, 114 Ohio St. 3d 278, 282 (2007); Am. Canine Found. v. City of Aurora, Colo., 618 F. Supp. 2d 1271, 1277 (D. Colo. 2009); Colorado Dog Fanciers, Inc. v. City and County of Denver, 820 P.2d 644, 653 (Colo.1991) (citing Stone v. Mississippi, 101 U.S. 814, 818, 25 L.Ed. 1079 (1879)).

⁵ *Id.*

the legislation no longer justifies the potential collateral damage it may cause. This is especially true when legislation fails to achieve its stated goals and in extreme cases, overlooks or even exacerbates the underlying problem it seeks to address. Breed-specific legislation aimed at the generally alluded-to yet poorly defined classification of canine known commonly as the “pit bull”, and extended to “pit bull type dogs”, is a prime example of such a situation. The negative consequences of these laws have come to far outweigh the intended benefit to society on account of being ineffective and severely harmful where it has caused grave collateral damage. A new solution to the underlying problem is sorely needed.

This article will explore the concept of BSL in general, including its roots and aims, but will focus on breed bans against “pit bulls” and “pit bull type dogs”, as the clearest and most relevant example of how misguided and damaging manifestations of BSL tend to be. In its relatively short history, BSL has likely done more harm than good, and an alternative approach to the issue of vicious dog attacks is needed in its place.

Section 2 will examine the history of the vicious dog problem as it relates to the origin of breed bans on pit bulls. In order to understand the extent to which breed bans are not an appropriate solution to today’s vicious dog problem, it is important to understand the conditions under which the concept of BSL was promulgated. Additionally, this Section will briefly examine the history of the pit bull and the unfortunate path which has led to its current understanding in the eye of the media-led public.

Section 3 will examine various case law treatment of BSL across a variety of jurisdictions. This examination will illustrate the legal underpinnings of BSL and how it

has generally withstood various legal challenges for the past thirty or so years. Most importantly, this examination will illustrate the fact that our legal system is failing to protect innocent citizens of the United States of America and their innocent canine companions from persecution at the municipal and state levels. Under current legislation in many states and municipalities, a dog can be seized, and in some cases destroyed, by police if the animal appears to be a pit bull or pit bull-type dog. Given the deference allowed to our legislators when they enact a law in an attempt to address a perceived health or safety issue, legal challenges to BSL have been largely unsuccessful. There is little or no legal defense against the discrimination suffered by the citizens who own and love these animals.

Section 4 will consist of an examination of the various treatments BSL and dog bite problems have received at the state level across various jurisdictions. While most states have upheld their municipalities' rights to legislate autonomously where animal control laws are concerned, there is a growing list of states that have passed anti-BSL legislation. This is typically done at the state level in order to ensure that their constituents do not fall victim to overly broad and destructive lawmaking. Opinions vary widely on how to best address the dog bite problem. It seems there are always communities seeking to enact BSL in order to address a perceived growing problem. Conversely, other communities are moving away from BSL in favor of other measures which tend to be less assumptive and less damaging.

Section 5 will include that what appears to be missing from the conversation about pit bulls and BSL since its inception: examination of accurate scientific facts regarding dog attack statistics, breed propensities, and the hysteria the media has generated with regard to the pit bull. The intent of this Section will be to demonstrate on a factual basis that the image of the pit bull as an inherently vicious animal is a shameful mischaracterization. The facts do not appear to

support the idea that pit bulls are any more dangerous than other breeds or types of large dogs. People's positions as either pro-BSL or anti-BSL seem to depend on how educated and experienced a person is on the facts of the issue. These animals should be understood to be the product of their owners' training, or lack of training. The cause of the vicious dog problem - it is argued here - is people, and it will continue to be so until a new approach to the issue addresses that cause in a more appropriately targeted manner.

Further, Section 5 will also illustrate why BSL is such a thoroughly problematic policy. In addition to being an ineffective solution to the problem it seeks to address, BSL imposes harsh, unflinching, and inhumane penalties across a definable class of innocent people. Such persons are left with no means to defend themselves or their canine companions from what amounts to a highly prejudicial form of persecution.

Section 6 will offer alternatives to BSL and breed bans as the solution to the dog bite problem from a variety of perspectives. This article will demonstrate that BSL itself is problematic and damaging, as well as ineffective at solving the dog-bite problem. In order to truly address such a complex problem, a carefully planned and comprehensive solution is required in order to address the underlying causes and risk factors which contribute to the situations in which certain dogs become violent. An appropriate solution must also address carefully how these contact with people and other dogs so as to ensure those people and other dogs are not placed under risk of attack.

II. A Brief History of Breed-Specific Legislation in the United States

A. The Problem of Dog Bites

It is widely known that man and dog have generally enjoyed a mutually beneficial

symbiotic relationship as they've evolved alongside one another over the ages.⁶ In fact, it has recently been hypothesized that the connection between man and the animal he has most domesticated was a key factor in man's evolution and survival as a species.⁷

Some archeologists have concluded that dogs were first domesticated approximately 10,000 to 20,000 years ago.⁸ Over the past thirty years, however, advances in modern science such as genetic testing have led scientists to discover that dogs were most likely domesticated as early as 100,000 years ago, when wolves began following ancient packs of human hunter-gathers before eventually traveling and living together as a unit.⁹ This process of domestication has included turning the wolf and its teeth into our tool, or our weapon in many cases.¹⁰ The domesticated dog as we know it assumed the character and place within human culture which it bears today around the time when human society turned towards a more agrarian farm-based culture and began selective breeding practices in order to best suit their companions for herding livestock and guarding territories.¹¹

As with most relationships, this apparently well-suited marriage between the human and canine species has not been without its problems. As man's relationship with *canis lupus* (the wolf) has evolved into today's relationship with *canis domestics* (the domesticated dog), he has sought to take away the wolf's natural instincts and control over its potential for biting in favor of the command of its human owner.¹² This phenomenon, in combination with man's reliance on his control of the domesticated dog, has resulted, somewhat inevitably, in instances of dangerous

⁶ JIM GORANT, *THE LOST DOGS: MICHAEL VICK'S DOGS AND THEIR TALE OF RESCUE AND REDEMPTION*, Introduction, Gotham (2001).

⁷ Pat Shipman, *The Animal Connection and Human Evolution*, CURRENT ANTHROPOLOGY, Volume 51, Number 4, August 2010.

⁸ Christine Milot, *Stalking the Ancient Dog: Man's Best Friend May go Way Back*, SCI. NEWS ONLINE, June 28, 1997, www.sciencenews.org/sn_arc97/6_28_97/bob1.htm.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

dogs, including incidents of dogs biting humans.¹³

The collateral damage which has resulted from man's relationship with dogs has enough to deter man from continuing the valuable relationship. Since the time dogs were domesticated combined with the realities of modern human civilization¹⁴, the problem of dangerous dogs has perplexed communities for ages.¹⁵ In the U.S. alone, approximately people visit emergency rooms annually for dog bites.¹⁶ So, from a statistical perspective, there are enough domesticated dogs living in society alongside humans that there is no denying that the negative repercussions of the interspecies relationship warrants consideration and careful action to minimize incidents of violence and attack between the two.

In the late twentieth century, the on-going issue of dog bites appeared to rise to "epidemic" status when public health officials reported an observed increase in dog-bite injuries and fatalities.¹⁷ As with most issues subject to public opinion, the issue has generated much interest due to media coverage of specific incidents. News media sources have covered and often sensationalized injuries inflicted by dogs on humans or other animals in a variety of situations, including criminal activities such as dog fighting, responses of dogs to mistreatment, dogs acting as attack or guard animals, and the "unexpected" and "random" neighborhood attack.¹⁸

This apparent epidemic compelled countless cities and counties, a majority of states, and the District of Columbia to enact vicious-dog legislation or to intensify

¹³ *Id.*

¹⁴ GORANT, *supra* note 6.

¹⁵ Dana M. Campbell, *Pit Bull Bans: The State of Breed-Specific Legislation*, GPSOLO MAGAZINE, July/August 2009, https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pitbull.html

¹⁶ ASPCA Position Statement on Breed-Specific Legislation [hereinafter ASPCA Position Statement], (citing J. Bradley, *Dog Bites: Problems and Solutions*. Animals and Society Institute, (2006)), found at <http://www.aspc.org/About-Us/policy-positions/breed-specific-legislation-1>.

¹⁷ Kristen E. Swann, *Irrationality Unleashed: The Pitfalls of Breed-Specific Legislation*, 78 UMKC L. REV. 839, 847 (2010).

¹⁸ Weiss, *supra* note 2.

existing regulations.¹⁹ These reflexive attempts by government officials to prevent or minimize these types of attacks have included a number of reasonable and appropriate measures, such as licensing laws, statutes that outlaw organized dogfights and leash laws,²⁰ More significantly, they have also spurred a new movement towards more sweeping legislative practices.

B. Breed Specific Legislation – The Legislative Panic Button

Notwithstanding relative stability in the number of dog bites over the past several decades²¹, coupled with the fact that the U.S. Centers for Disease Control and Prevention (CDC) has indicated that only two percent of the reported emergency room visits each year result in hospital admissions,²² some communities have decided that restrictions upon harmful deeds alone are insufficient to protect the public. During the past 20 years many state and local governments have felt it necessary to enact legislation on a more targeted level, and to adopt a new tactic for eliminating dog aggression. This legislation has become known as Breed-Specific Legislation (BSL).²³

These efforts to purge certain breeds are perhaps perceived by legislators as the easiest or simplest ways to attempt to reduce the probability of an attack. By simply reducing the presence of certain types of dogs in a community which are perceived to be the most dangerous, probabilities for attacks are theoretically reduced.²⁴ In order to understand how inappropriate BSL is, it is important to recognize that such laws and regulations are also often enacted to convince constituents that local officials care about “dangerous dogs” and want to reduce the

¹⁹ Swann, *supra* note 17.

²⁰ *Id.*

²¹ ASPCA Position Statement, *supra* note 16.

²² *Id.* (citing Centers for Disease Control and Prevention Web-based Injury Statistics Query and Reporting System (WISQARS) (2009) National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Available at: www.cdc.gov/ncipc/wisqars).

²³ ASPCA Position Statement, *supra* note 16.

²⁴ *Id.* (citing American Veterinary Medical Association (AVMA) Task Force on Canine Aggression and Human-Canine Interactions, *A community approach to dog bite prevention*. J. AM. VETERINARY MED. ASS'N 218, 1732-1746 (2001)).

number of serious injuries inflicted by whatever means necessary.²⁵ Unfortunately, this willingness to undertake such drastic needs does not actually guarantee a successful

However, these measures tend to garner a certain amount of public support because they generally responses to a particularly violent individual dog attack. In a pattern similar to in which the media has intensified public concern over dog-bites, in general, the public perception of breed identities and the ensuing breed-specific laws are, as some hypothesize, results of media campaigns that negatively portray a particular breed, often for interest value.²⁶

There are many breeds (generally large-breeds) which have been restricted or banned in various areas, including Rottweiler's, American Staffordshire Bull Terriers (the American Kennel Club's officially recognized breed which is generally understood to refer to "Pit Bulls"²⁷), Chow Chows, German Shepherd Dogs, and Doberman Pinschers, to name a few²⁸. Other communities have not banned any specific breeds outright, but have employed modified versions of BSL. They often place restrictions on the owners of certain breeds without completely banning the breeds or calling for the destruction of the animals. In these instances, breed-specific legislation might be said to approach the dog-bite issue from a realistic perspective which acknowledges that human behavior plays a role in the problem. There could conceivably be some validity to the idea of deterring irresponsible or dangerous owners from ownership of or unsafe activities with a certain breed which has become the favored tool of violence. Rather than banning breeds

²⁵ Norma Bennett Woolf, *Dogs and the Law: When Emotion Enters the Door, Good Sense Often Flies out the Window*, Dog Owner's Guide, at <http://www.canismajor.com/dog/laws1.html> (last visited Dec. 3, 2012).

²⁶ ASPCA Position Statement, *supra* note 16 (citing D. Capp, *American Pit Bull Terriers: Fact or Fiction? The Truth Behind One of America's Most Popular Breeds*, Doral Publishing, Inc. 2004).

²⁷ John Bastian, *How did Pit Bulls Get Such a Bad Rap?* Cesar's Way – Achieving Balance Between People and Dogs. <http://www.cesarway.com/dogbehavior/basics/How-Did-Pit-Bulls-Get-a-Bad-Rap>.

²⁸ Weiss, *supra* note 2.

entirely, some cities simply make it difficult to own a certain breed, or seek to place limits on the people who own dogs of that breed.²⁹

Today, the phenotype of the “pit bull” is the “breed” most frequently restricted by ordinance. This is largely due to the fact that around the time the dog bite issue began to become understood as an “epidemic”³⁰, a drug crisis surged in the United States in the 1970s and 1980s which drew a great deal of negative attention towards the pit bull.³¹

The American perception of the pit bull became one of a menace and the face of the epidemic; synonymous with all the things United States had declared war against under Ronald Reagan.³²

When Sports Illustrated ran a 1987 cover photo of a particularly vicious and riled looking pit bull with the warning title “Beware of This Dog”, there had already been a number of high-profile attacks which had the country wary of the pit bull, but this attention was the proverbial coup de grâce to its reputation. Interestingly, the article itself indicated that the problem was almost definitely a problem of ownership, rather than genetics, but it played into the hysterical notion that the animals were simply too powerful and capable to be trusted with so many irresponsible owners seeking out such weapons.³³ This article was sadly prophetic where it proffered that the state of the breed in the United States was “a reflection of ourselves that no one cares very much to see”.³⁴

Soon thereafter, courts began to regard pit bulls as such common tools of drug dealing that ownership could be admitted at trial as evidence of possessing “‘tools' of the drug trade.”³⁵

In holding a Toledo pit-bull ban constitutional, the Supreme Court of Ohio relied heavily on the

²⁹ *Id.*

³⁰ Swann, *supra* note 17.

³¹ *Id.*

³² *Id.*

³³ E.M. Swift, *The Pit Bull: Friend And Killer – Is The Pit Bull a Fine Animal, as its Admirers Claim, or is it a Vicious Dog, Unfit for Society?* SPORTS ILLUSTRATED, July 27, 1987 at 74.

³⁴ *Id.*

³⁵ Swann, *supra* note 17, at 844-45.

breed's association with “problem circumstances” such as drug raids. It is quite possible the justices of that opinion had read the Sports Illustrated article which quoted a Los Angeles narcotics officer that had read an unnamed study which indicated pit bulls were present as guard dogs in two thirds of all drug raids.³⁶ Of course, public opinion, and even the legislative process do not always take the time to stop and consider how attenuated a proffered “fact” might be. This is just one instance among many which has burdened pit bulls with a reputation of criminality, but the effects of each article and each holding echo throughout the legal universe. Progeny of this concept include the fact that the alleged presence of a pit bull can justify police officers' no-knock entry in serving a warrant,³⁷ and the idea that mere possession of a pit bull supports an inference that an individual carries drugs.³⁸

Unfortunately, the pit bull's physical prowess and historical link to blood sports and gambling has made it a natural target for exploitation via dog fighting, which pervades gang culture in the United States. This associative connection to the unpredictable desperation and anger the outside community associates with gangs has only increased public fear towards the breed.³⁹

Breed-specific legislation emerged in response to this fear, targeting pit bulls but often including other purportedly “high-risk” breeds such as Akitas, Rottweilers, and Great Danes, possibly in an attempt to prevent those breeds from becoming the criminal element’s next weapon of choice.⁴⁰ In this way, Breed Specific Legislation should be seen as attempt to control animals where lawmakers have failed or given up in controlling

³⁶ See Swift, *supra* note 33.

³⁷ Swann, *supra* note 17 (citing United States v. Jewell, 60 F.3d 20, 23 (1st Cir. 1995)).

³⁸ Swann, *supra* note 17 (citing United States v. Farmer, 289 F. App'x 81, 82 (6th Cir. 2008)).

³⁹ *Id.*

⁴⁰ *Id.*

people.

In recent years, BSL has been the subject of an increasing amount of scrutiny. Numerous well-regarded canine-focused interest and advocacy groups, have voiced their opposition including: The National Animal Control Association (NACA)⁴¹, The American Humane Association (AHA)⁴², The Humane Society of the United States (HSUS)⁴³, The American Veterinary Medical Association (AVMA)⁴⁴, The Association for the Prevention of Cruelty to Animals (ASPCA)⁴⁵, The American Kennel Club (AKC)⁴⁶, The National Animal Interest Alliance (NAIA)⁴⁷, and the National Canine Research Council (NCRC)⁴⁸, not proper sentence. In its position statement on BSL, the ASPCA cites multiple studies conducted over the past fifteen years which indicate that BSL has not been an effective tool to address the problem of vicious dog attacks, whereas communities with “carefully crafted, breed-neutral laws” have seen positive effects.⁴⁹ The failure of BSL coupled with the unfair and inhumane effect it has on responsible dog owners and their canine companions has caused the ASPCA to reject BSL in favor of a more comprehensive and issue-based enforcement solution.⁵⁰ Numerous organizations have been formed across the country with the specific purpose of opposing BSL and pressuring legislators to educate themselves on the facts about dangerous dogs before they enact ineffective

⁴¹ National Animal Control Association Policy Statement, *Extended Animal Control Concerns – Dangerous/Vicious Animals*, found at <http://www.understand-a-bull.com/BSL/BSLPositionStatements/NACABSL.pdf>

⁴² American Humane Association, *Breed Specific Legislation*, <http://www.americanhumane.org/animals/stop-animal-abuse/factsheets/breed-specific-legislation.html>.

⁴³ Humane Society of the United States, *Breed Specific Legislation: Laws banning or strictly regulating certain breeds won't solve the problem of dog bites and aggression*, August 1, 2012, http://www.humanesociety.org/animals/dogs/facts/statement_breed_specific_legislation.html

⁴⁴ American Veterinary Medical Association, *State & Local Issues - Dog Bite Prevention/Breed-specific Proposals*, <https://www.avma.org/advocacy/stateandlocal/pages/state-issues-dogbite.aspx>

⁴⁵ ASPCA Position Statement, *supra* note 16.

⁴⁶ American Kennel Club, *Breed Specific Legislation*, http://www.akc.org/pdfs/canine_legislation/toolbox_bsl.pdf

⁴⁷ National Animal Interest Alliance, “The Verdict is In: Breed-Specific Laws Don't Work. They're costly and unenforceable; they punish law-abiding pet owners, and they kill innocent family pets.” <http://www.naiaonline.org/pdfs/BSL.pdf>

⁴⁸ National Canine Research Council, *Ineffective Laws*, <http://nationalcanineresearchcouncil.com/dog-legislation/effective-v-ineffective-laws/> (last visited 4/18/13).

⁴⁹ ASPCA Position Statement, *supra* note 16.

⁵⁰ *Id.*

laws which would harm thousands of responsible constituents.⁵¹

On the other side of the argument are groups who generally identify themselves as advocates for dog-bite victims.⁵² These groups make a basic empirical argument that many people who have been attacked by vicious pit bulls and draw a rather unsupported conclusion that this fact indicates pit bulls are inherently dangerous (or more dangerous other breeds).⁵³ Such groups focus a great deal of criticism on the groups which oppose tend to characterize opponents of BSL as fanatical owners who are too emotionally their pets to have legitimate opinions about the legislative aspect of animal control.⁵⁴ The general argument which seems to be made over and over by these pro-BSL groups is founded in the assertion made in Swift's 1987 Sports Illustrated article: these animals are simply too dangerous to be allowed to exist.⁵⁵ However, this stance completely disregards the fact that the overwhelming majority of the animals they seek to persecute are "dogs with an almost ridiculously amiable disposition"⁵⁶ which have done nothing to warrant adverse treatment of any kind, let alone destruction. Amid the raging arguments and, as this comment will explore further below, the legal battles surrounding BSL, one cannot help but wonder where fairness factors in. If it is truly an ineffective measure, it would seem that BSL is not actually fair to owners of typical, friendly, pit bulls, nor to dog-bite victims, whose concerns are not being addressed appropriately by a quick and over-assumptive legislative process.

I. BSL in the courts – An Unsettled Debate

⁵¹ See generally Understand-a-Bull, <http://www.understand-a-bull.com/>; StopBSL.org, <http://stopbsl.org/>; Dogwatch.net, http://www.dogwatch.net/bsl_links.html.

⁵² See generally Dogsbite.org, <http://www.dogsbite.org/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Swift, *supra* note 33; see also Dogsbite.org, generally

⁵⁶ See Swift, *supra* note 33 (quoting Richard F. Stratton, *This Is the American Pit Bull Terrier* (1976)).

Dog owners affected by BSL have challenged the ordinances in court, and some have met with marginal success. The overwhelming trend, however, is to uphold laws that impose special restrictions on certain breeds or ban them outright. The U.S. Supreme Court has refused to disturb at least three decisions of state supreme courts, upholding ordinances that regulate the ownership of pit bulls.⁵⁷ One such case, *Tellings v. City of Toledo*, effectively paved the way for the enactment of BSL across the state of Ohio, where the State Supreme Court overturned the State Court of Appeals' finding that the town's BSL ordinances were unconstitutional. It is important to note, however, that although the State Supreme Court upheld the constitutionality of the ordinance based on the municipality's police powers, the lower court's finding was an encouragingly positive set of factual findings for owners of pit bulls. Here, the lower court had actually found that ownership of a pit bull is not prima facie evidence of ownership of a vicious dog, *because pit bulls are not inherently dangerous or vicious*. That court noted that there is no scientific evidence to confirm that a pit bull's bite is any more powerful in PSI than other large breed dogs.⁵⁸ There is little, if any, evidence that the breed itself is a dangerous breed when trained and socialized appropriately.⁵⁹ There is also no statistical evidence that indicates that pit bulls bite more frequently than some other breeds of dogs.⁶⁰

Interestingly, both the New York⁶¹ and Alabama⁶² state appeals courts seem to agree with the Appellate Court's finding in *Tellings*. In *Carter*, The Supreme Court of New York ruled that courts cannot take judicial notice of a dog breed's particular behavior when a dog's

⁵⁷ See *State v. Anderson*, 57 Ohio St. 3d 168, 566 N.E.2d 1224, cert. denied, 501 U.S. 1257, 111 S. Ct. 2904 (1991); *Hearn v. City of Overland Park*, 244 Kan. 638, 772 P.2d 758, cert. denied, 493 U.S. 976, 110 S. Ct. 500 (1989), *Toledo v. Tellings*, 871 N.E.2d 1152, 1154 (Ohio 2007), cert. denied, 552 U.S. 1225, U.S. Ohio, Feb. 19, (2008), Rehearing Denied, 552 U.S. 1333, U.S., Apr. 14, (2008).

⁵⁸ *Toledo v. Tellings*, 2006-Ohio-975 rev'd, 871 N.E.2d 1152 (Ohio 2007).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Carter v. Metro North Associates*, stating trial court erroneously took judicial notice of vicious nature of breed of pit bulls as a whole, 680 N.Y.S.2d 239 (N.Y. App. Div. 1st Dept. 1998).

⁶² See *City of Huntsville v. Tack*, 843 So. 2d 168 (Ala. 2002).

"propensities" are not "authoritatively settled." Actual substantive proof of the dog's dangerous propensities must be offered.⁶³ Similarly, in *Tack*, the Supreme Court of Alabama affirmed a lower court's ruling that pit bulls are not inherently dangerous.⁶⁴

A. BSL versus the ADA

In 2010, a class-action lawsuit was brought against the cities of Denver and Colorado, as a result of the cities' refusal to allow exceptions to its respective bans on pit bulls for service dogs.⁶⁵ The litigant whose situation sparked the controversy was a veteran of the Vietnam War who suffered from post-traumatic stress disorder and claimed his 8-year-old trained service dog was essential in helping him cope with his disability.⁶⁶ Aurora officials seized the dog in 2009 under the city's then three-year-old pit bull ban.

The U.S. Department of Justice stepped in with a clear message that the denial of a city's residents' ability to own pit bulls as service dogs is in violation of the American Disability Act.⁶⁷ City officials in Denver and Aurora did not immediately assent to the Department of Justice's position, and voted to uphold the ban, citing likely difficulties in administration of waivers for service dogs. In March of 2011, the U.S. Department of Justice's new rules took effect, prohibiting dogs from being banned as service dogs because of their breed.⁶⁸ City officials eventually returned the veteran's dog, but the reunion came with restrictions, including a requirement to muzzle the dog in public.⁶⁹ Because even these apparently relaxed restrictions make it impossible for the animal to work as a service dog, the plaintiff next alleged that they, too, are violative of the

⁶³ See *Carter*, *supra* note 61.

⁶⁴ *Tack*, *supra* note 62.

⁶⁵ 9News, Class-action Lawsuit Filed Against Denver and Aurora Over Pit Bull Ban, <http://www.9news.com/news/story.aspx?storyid=168539&catid=339>.

⁶⁶ Arin Greenwood, *Nuisance or Necessity? ADA Suit May Overturn Pit-Bull Bans*, AM. BAR ASSOC. J., available at http://www.abajournal.com/magazine/article/nuisance_or_necessity_ada_suit_may_overturn_pit-bull_bans/.

⁶⁷ See 9News, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ Greenwood, *supra* note 66.

ADA.⁷⁰ After years of lawsuits over the issue, Denver finally opted to relent on April 5, 2011.⁷¹

The city's animal control division quietly decided it will no longer enforce the anti-pit bull law in cases where the dogs are being utilized as a service animal for a disabled person.⁷²

B. Constitutional Challenges to BSL

The majority of cases opposing BSL have centered largely on constitutional issues of due process and equal protection.⁷³ Because animal control is a health, safety, and welfare concern regulated through a state's police powers, the threshold question in each analysis of the constitutionality of challenged legislation is whether it is rationally related to furthering a legitimate government interest.⁷⁴ Under this deferential standard of review, municipalities and counties are able to pass breed-specific legislation based on brief explanation of the cause of their local dog-bite problems, apparently without fear of successful challenge.⁷⁵ In a general sense, BSL is presumed to be constitutional as long as there is a rational relation between the means of the regulation and its intended purpose.⁷⁶ If enacted at the municipal level, BSL is also afforded support by virtue of the inherent police power, so long as the regulation does not conflict with the superior laws of that state.⁷⁷

1. Due Process Challenges

In general, BSL has withstood challenge, satisfying the rational basis analysis allowed by the Constitution's Fifth and Fourteenth Amendments, because animal ownership is not

⁷⁰ *Id.*

⁷¹ Jared Jacang Maher, *Pit bulls as Service Animals: Denver Quietly Changes its Policy*, DENVER WESTWORD, Apr. 29 2011, http://blogs.westword.com/latestword/2011/04/pit_bulls_service_animals_denver_policy_change.php (last viewed 4/19/13).

⁷² *Id.* See also Michael Roberts, *Pit bull Service-dog Ban in Denver Violates Federal Law, says Attorney Suing City*, DENVER WESTWORD, Dec. 8 2010, Attorney representing plaintiffs pointed out that Denver's attempted use of "home rule" argument to preempt the ADA was akin to Denver attempting to revoke women's voting rights or other established federal laws. Home rule is only a valid argument against state law. *Id.*

⁷³ Campbell, *supra* note 15.

⁷⁴ Russell G. Donaldson, *Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Breeds, Such as "Pit Bulls" or "Bull Terriers."* 80 A.L.R. 4th 70, § 2[a] (2008).

⁷⁵ *Id.*

⁷⁶ Heather K. Pratt, *Canine Profiling: Does Breed-Specific Legislation Take a Bite Out of Canine Crime?*, 108 PENN ST. L. REV. 855, 861-62 (2004).

⁷⁷ *Id.*, citing *Vanater v. Vill. of S. Point*, 717 F. Supp. 1236, 1241 (S.D. Ohio 1989) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)).

considered a fundamental right.⁷⁸ Therefore, all that is required to uphold its constitutionality is that the law being challenged be rationally related to a legitimate government goal.⁷⁹ So, courts tend to support BSL, easily finding it is rationally related to the goal of protecting the public from allegedly dangerous breeds.⁸⁰ For example, in *Peters*, a pit bull owner argued that an ordinance requiring owners of pit bulls to carry increased insurance amounts violated his right to due process.⁸¹ The trial court agreed, calling the insurance requirement “unconstitutionally oppressive” because evidence demonstrated that no insurance company would write a policy covering the potential harms the law sought to address.⁸² The appellate court disagreed, however, relying on *Sentell*, and noted that even if the requirement were oppressive, it was not a violation of the plaintiff’s fundamental rights, and therefore only needed satisfy the rational basis analysis.⁸³

Stronger arguments have been made regarding due process rights where such laws result in the taking of property without just compensation, but they often fail when relied on in opposition of BSL. In *Altman v. City of High Point*, the United States Court of Appeals for the Fourth Circuit held that dogs qualify as property protected by the Fourth Amendment of the United States Constitution.⁸⁴ Even though the court upheld the qualified immunity of the police when they shot dogs in a relatively reckless pattern, their ability to do so was held to be limited to situations in which the dogs posed a legitimate

⁷⁸ Campbell, *supra* note 15.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVA L. REV. 415, 432 (2003) (citing *Peters*, 534 So. 2d at 765).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Altman v. City of High Point*, N.C., 330 F.3d 194, 212 (4th Cir. 2003).

safety risk (in this case they were loose and showed signs of being aggressive).⁸⁵ Thus, it held that taking or destroying a person's dog required due process.⁸⁶ Theoretically, if owners are not given the opportunity to dispute or offer proof that their dog is not dangerous before it is taken, they are being deprived of the constitutional right of due process of law. While this appears to be a good foundation against laws which deem all dogs of a particular breed as "dangerous" or "vicious", it tends to fail on factual grounds. It has thus become primarily limited to situations where dogs are taken or destroyed without any notice to an owner, in which case the damage has been done prior to any opportunity to assert one's rights, which limits its protective value.⁸⁷

New Mexico courts have held that such objections are without merit because when there is a legitimate exercise of police power, deprivations of private property are permissible.⁸⁸ Specifically, the court in *Garcia v. Village of Tijeras* found that there had been no taking based on the fact that all of the village residents had been notified of its enactment prior to enforcement of the ordinance. Moreover, they had also been given an opportunity to remove their dogs themselves.⁸⁹ The court managed to avoid the issue of whether the ordinance's "destruction provision" could rise to the level of a taking because no dogs had actually been destroyed.⁹⁰

Similarly, the Colorado Supreme Court struck down an owner's claim that Denver's ordinance prohibiting pit bulls constituted an unconstitutional taking of property because there were options under which the owner's animal could be retained.⁹¹ There, the ordinance allowed

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ It is important to recognize the distinction that such claims would constitute procedural due process claims, where the argument against the government's action is not that the legislation is overbroad in a way that necessarily deprives the fundamental rights of the public, but rather that a specific action fails to follow proper adjudicative processes.

⁸⁸ See Pratt, *supra* note 76 (citing *Garcia v. Vill. of Tijeras*, 767 P.2d 355, 356 (N.M. Ct. App. 1988)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (citing *Colorado Dog Fanciers, Inc. v. City & Cnty. of Denver By & Through City Council*, 820 P.2d 644, 653 (Colo. 1991)).

for a “Pit Bull License” in tandem with other minimum requirements upon owners which would provide an opportunity to keep one’s dog within the city limits.⁹² The result of this ruling has been that communities can effectively implement bans moving forward, so long as the factual issue of giving owners an option to retain the pets which currently reside within the jurisdiction of the ordinance.

2. Equal Protection Challenges

Challenges based on equal protection arguments are similarly difficult to sustain and can arguably be said to stand even less chance of overturning BSL ordinances. In an examination of a law’s constitutionality under the Equal Protection Clause, a court again requires only a rational purpose for the legislation unless it involves a fundamental right or a suspect class.⁹³ So, under an equal-protection analysis, the question is not whether a ban on pit bulls is rationally related to public safety, but whether discrimination between owners of pit bulls and owners of other dogs bears such a rational relation.⁹⁴

Dog owners have often sought relief under the rational purpose requirement by arguing that BSL is over-inclusive where it bans all dogs of a breed when only certain individuals within the breed have proven to be vicious.⁹⁵ Conversely, there can also be argument that BSL is under-inclusive, where all types of dogs have injured people and BSL fails to include the members of those other breeds which have acted viciously and are a danger to society.⁹⁶ However, again under minimum scrutiny review, BSL survives both arguments, when the government establishes that it maintains a rational relation to

⁹² *Id.*

⁹³ Campbell, *supra* note 15.

⁹⁴ Sallyanne K. Sullivan, *Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional*, 13 U. DAYTON L. REV. 279, 285 (1988).

⁹⁵ *Id.*

⁹⁶ *Id.*

its purpose, regardless of being over-inclusive or under-inclusive.⁹⁷

Under this minimum-scrutiny rationality test, “classifications are set aside as violative of violative of equal protection only if they are based solely on reasons totally unrelated to pursuit pursuit of the state's goals and only if no grounds can be conceived to justify them.”⁹⁸ A challenger can only prevail under this standard if he proves that the legislature acted in an arbitrary and irrational manner in passing the law.⁹⁹

A good illustration of this analysis is found in *Hearn*, in which the Supreme Court of Kansas struck down a claim that a city ordinance regulating the ownership of pit bulls was unconstitutional because it “single[d] out” a particular breed of dog.¹⁰⁰ The court held that the equal protection clause is offended only if the classification rests on grounds which are entirely irrelevant to the achievement of the state's objective.¹⁰¹ Further, it stated that merely some minor measure of inequality in a law's application does not render the law unconstitutional; rather, the law must be upheld if it is reasonable and does not affect a suspect class or infringe upon fundamental rights.¹⁰²

In a similar opinion, the Supreme Court of Colorado held that Denver’s ordinance which banned pit bulls outright did not violate a dog owner's right to equal protection by virtue of the same reasoning.¹⁰³ Since the government had a legitimate interest in protecting the health and safety of its citizens, the court found that a legal ban was reasonably related to that end. It decided that pit bull attacks were unique in that they tend to be more serious than attacks by

⁹⁷ *Id.*

⁹⁸ See Sullivan, *supra* note 94.

⁹⁹ *Id.*

¹⁰⁰ See Pratt, *supra* note 76.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Colo. Dog Fanciers*, 820 P.2d at 652).

other breeds, occur more often, and are more likely to result in death than attacks by other breeds.¹⁰⁴

Other courts have reached similar conclusions. In *Starkey*, Pennsylvania courts held that the proper constitutional test is the rational basis test, and that the township in question acted reasonably when it enacted an ordinance that applied only to pit bulls, justified in its definition of them as dangerous per se.¹⁰⁵ Additionally, in *Peters*, the District Court of Appeal of Florida for the Third District asserted that “the constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike; at most, the only guarantee is that all owners of defined pit bulls will be treated alike.”¹⁰⁶

Not surprisingly, New Mexico Court of Appeals in *Garcia*, followed the same principle as the Florida courts, finding that a legislature is entitled to address threats in a piecemeal fashion, as they arise.¹⁰⁷ Once again, the court here found that as long as an ordinance does not challenge fundamental rights or involve a suspect class, it will be presumed to be constitutional, if it is rationally related to a legitimate state interest.¹⁰⁸ Undoubtedly, preventing dog bites and attacks remains a legitimate concern of the state.

3. Void for Vagueness Challenges

Claims that BSL ordinances are unconstitutionally vague have met with equal shares of success and failure. Vagueness claims¹⁰⁹ typically rest on the general notion that procedural due process requires laws to 1) provide the public with sufficient notice of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *Starkey v. Chester Township*, 628 F. Supp. 196, 197 (E.D. Pa. 1986)).

¹⁰⁶ The challenge that an ordinance’s requirement for insurance or bond from pit bull owners violated the equal protection clauses where it “irrationally differentiates between owners of pit bulls and owners of other . . . dogs” was rejected. The court stated that “a law is not constitutionally defective simply because it contains classifications which are underinclusive.” See *Grey*, *supra* note 77.

¹⁰⁷ See *Pratt*, *supra* note 76 (citing *Garcia v. Vill. of Tijeras*, 767 P.2d 355, 361 (N.M. Ct. App. 1988)).

¹⁰⁸ *Id.*

¹⁰⁹ “Void for vagueness” claims are procedural due process claims based on fundamental fairness, based on one’s inability to ascertain what a contested law actually restricts.

the activity or conduct being restrained and 2) establish minimal guidelines for law enforcement, ensuring that enforcement is neither arbitrary nor discriminatory.¹¹⁰ Owners of pit bulls argue that the breed ban laws do not adequately define what constitutes a “pit bull” for purposes of the ban, which not only fails the notice requirement, but also fails to give law enforcement adequate direction in how to apply the law.¹¹¹ For example, in *Lynn*, the Supreme Judicial Court of Massachusetts, Essex, held that the town of Lynn, Massachusetts’ BSL ordinance was unconstitutionally vague because it depended on “the subjective understanding of dog officers of the appearance of an ill-defined ‘breed.’ Therefore, it ” leaves dog owners to guess at what conduct or dog ‘look’ is prohibited ... [and] gives unleashed discretion to the dog officers charged with its enforcement.”¹¹²

By contrast, many courts are far more deferential to legislative bodies when interpreting and assessing such laws. The Colorado Supreme Court, for instance, in upholding the Denver pit bull ban, found that the general characteristics describing behavior and certain physical attributes in the law were enough to provide dog owners with fair notice. The court stressed that for a law to pass constitutional muster it needed only to give dog owners *some* standard of conduct, even if the standard was not precise.¹¹³ Similarly, the Washington Supreme Court in *American Dog Owners Association v. City of Yakima* ultimately relied on the same standard.¹¹⁴

In the Florida case of *Peters*,, mentioned above, the plaintiff also claimed that the local ordinance was unconstitutionally vague in that it included “alternative and sometimes inconsistent definitions of ‘pit bull.’”¹¹⁵ In response, the court ruled that absolute certainty was

¹¹⁰ Pratt, *supra* note 76 (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

¹¹¹ Campbell, *supra* note 15.

¹¹² *American Dog Owners Ass’n, Inc. v. City of Lynn*, 404 Mass. 73, 533 N.E.2d 642 (1989).

¹¹³ *Colorado Dog Fanciers, Inc. v. City and County of Denver*, 820 P.2d 644 (Colo. 1991).

¹¹⁴ *American Dog Owners Ass’n, Inc. v. City of Yakima*, 113 Wash. 2d 213 (1989).

¹¹⁵ *State v. Peters*, 534 So. 2d 760, 762 (Fla. Dist. Ct. App. 1988).

not necessary for constitutionality, finding that the ordinance’s reference to the American Staffordshire Terrier and Staffordshire Bull Terrier (the American Kennel Club’s recognized breed which most closely fits the definitively of the pit bull phenotype) was a sufficient description. Further, this court asserted a factual inference that pit bull owners generally had a sufficient understanding of the ordinance terms to determine if their dogs were subject to it,¹¹⁶ thereby completely undermining the legal concept of vagueness challenges—at least in Florida.

Similarly, the New Mexico case, *Garcia*, also cited above, the plaintiffs claim that an ordinance’s use of the term “American Pit Bull Terrier”¹¹⁷ as an identifier also failed.¹¹⁸ Even though the court recognized “American Staffordshire Terrier” as the proper technical term, it nevertheless found that “American Pit Bull Terrier” was acceptable because it contained the term “pit bull”, which it found to be a generic term for a type of dog which is readily identifiable from its physical appearance.¹¹⁹

Again, in a similar finding in Ohio, the United States District Court for the Southern District of Ohio, Western Division, reasoned that an ordinance banning “pit bulls” was not unconstitutionally vague because an ordinary person could easily find guidance from readily available sources in order to determine whether the ordinance applied to his pet.¹²⁰ Further, it held that the government is not required to craft legislation with mathematical precision, and in order for a plaintiff to prevail under a challenge for vagueness, that plaintiff must prove that the law lacks any standard at all.¹²¹

II. The State of BSL – by State

¹¹⁶ *Id.*

¹¹⁷ “American Pit Bull Terrier” is a breed name generally not recognized in the United States.

¹¹⁸ *Garcia v. Vill. of Tijeras*, 767 P.2d 355, 357-58 (N.M. Ct. App. 1988).

¹¹⁹ *Id.*

¹²⁰ *Vanater v. Village of S. Point*, 717 F. Supp. 1236, 1244 (S.D. Ohio 1989).

¹²¹ *Id.*

It is fair to say that, presently, opinions on breed bans continue to vary greatly. These variations are reflected in the great deal of variation in the extent to which BSL has been employed or rejected between different communities.¹²² While some communities seek to adopt BSL in response to a perceived problem, others seek to do away with it as a failed experiment which is costly in terms of human and canine suffering, and also financial terms.¹²³ Moreover, a number of state legislatures have taken direct positions against BSL by preempting the right of municipalities to enact such legislation.¹²⁴

At present, over 650 municipalities across 40 states and the District of Columbia have some form of breed specific legislation.¹²⁵ The different levels of restriction upon owners of pit bull type dogs vary greatly in the degree of restriction, and in the methods used to control ownership of these dogs. Generally, it can be said that towns employing BSL call upon various mixes of registration and insurance requirements¹²⁶, confinement and control requirements¹²⁷, breed definitions as “per se” dangerous¹²⁸, and all-out breed bans¹²⁹.

In contrast, with the recent addition of Massachusetts, a total of thirteen states have passed laws at the state level prohibiting the passage of BSL by local municipal governments, including: California, Colorado, Florida, Illinois, Maine, Massachusetts, Minnesota, New Jersey, New

¹²² See Understand-a-bull, *United States BSL Locations*, <http://www.understand-a-bull.com/BSL/Locations/USLocations.htm>.

¹²³ See ASPCA Position Statement, *supra* note 16, citing studies in Prince George’s County, MD, which found:

1. The county spends more than \$250,000 annually to enforce its ban on Pit bulls;
2. Public safety was not improved as a result of the ban; and
3. There was no transgression committed by owner of animal that was not already covered by another non-breed specific portion of the Animal Control Code (i.e. vicious animal, nuisance animal, leash laws).

¹²⁴ See Understand-a-bull, *supra* note 122.

¹²⁵ Dogsbite.org, *BSL state-by-state*, <http://www.dogsbite.org/legislating-dangerous-dogs-state-by-state.php>.

¹²⁶ See HOLLYWOOD, FL CODE § 6-25 (1980).

¹²⁷ See CINCINNATI, OH MUN. CODE § 701-25 (1983).

¹²⁸ See OVERLAND PARK MUNICIPAL CODE, TITLE VI, CHAPTER 6.10 – DANGEROUS ANIMALS, OVERLAND PARK, KANSAS, <http://www.opkansas.org/wp-content/uploads/downloads/610-dangerous-animals.pdf?&redir=1>

¹²⁹ See, e.g., IRONDALE, ALA., CODE ORDIN. DIV. 8, § 3-90 (1997) (prohibiting pit bull ownership); MIAMI-DADE COUNTY, FLA., CODE ART. II, § 5-17.6 (1989) (banning ownership of any pit bulls new to the county after the provision’s enactment); TOPEKA, KAN., CODE CH. 18, § 18-144 (1981) (prohibiting pit bull ownership).

York, Oklahoma, Pennsylvania, Texas, and Virginia.¹³⁰ The legislative complexion in Massachusetts may be short-lived. At the time of this comment, State Senator Michael Rush has proposed Senate Docket 1247 in his “priority package” of bills for 2013, which would allow an exemption from the prohibition on breed specific legislation if a municipality can prove through statistical analysis of local bite data that one breed of dog bites more often than others.¹³¹ It has not been specified who would be responsible for the analysis and how they would assign breed descriptors, but one can only assume the proposed legislation will allow for visual identification, which is the only means available beyond DNA testing.¹³² Once it is “proven” that one breed poses more of a risk than another, the ordinance must then go through the normal channels in order to be voted into law.¹³³

The mechanics of how each of these states has attempted to block BSL varies.¹³⁴ For example, the New Jersey statute seeks to specifically supersede any municipally enacted BSL. It states “the provisions of this act shall supersede any law, ordinance, or regulation concerning vicious or potentially dangerous dogs, any specific breed of dog, or any other type of dog inconsistent with this act enacted by any municipality.”¹³⁵ By contrast, some states, such as Texas, attempt to block BSL via the insertion of a qualifier within the provision of the statute which extends the state’s legislative power to municipalities.¹³⁶ Texas asserts: “A county or municipality may place additional requirements or restrictions on dangerous dogs if the requirements or restrictions (1) are not specific to one breed or several breeds of dogs; and (2) are more stringent than

¹³⁰ Understand-a-bull, *supra* note 122..

¹³¹ Stopbsl.org, *SD1247 filed to allow BSL in Massachusetts*, <http://stopbsl.org/2013/01/22/sd1247-filed-to-allow-bsl-in-massachusetts/>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Understand-a-bull, *supra*. note 122.

¹³⁵ N.J. STAT. ANN. § 4:19-36 (West)

¹³⁶ *See* TEX. HEALTH & SAFETY CODE ANN., *infra* note 137.

restrictions provided by this subchapter.”¹³⁷ California has taken a modified position which allows that no specific dog breed or mix shall be declared potentially dangerous or vicious as a matter of breed, but that mandatory spay and neuter programs can be breed specific.¹³⁸

Despite the apparently valid legislative action taken to prevent BSL in the states mentioned above, there are a number of municipalities which have prevailed in legal challenges to have their BSL ordinances held valid under home rule considerations.¹³⁹ As the prime example of how litigious the topic can be, the city of Denver has a long and complicated history with BSL. Denver originally enacted BSL in 1989, but the Colorado State Legislature later outlawed BSL statewide in 2004. Denver went on enforcing its BSL ordinances, and successfully challenged the state’s prohibition as a home rule exception.¹⁴⁰ Denver’s BSL ordinance states: “It [is] unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the city any pit bull.”¹⁴¹ The statute defines a "pit bull" as “any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one (1) or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds.”¹⁴² The Denver law allowed for owners of pit bulls living in Denver in July 1989 to keep them provided the owner 1) Registered the dog with the city and allowed the city to tattoo it with the registration number, 2) was at least 21 years old, 3) carried at least \$100,000.00 in liability insurance coverage, 4) Kept the dog confined, 5) did not sell or otherwise transfer the dog to

¹³⁷ TEX. HEALTH & SAFETY CODE ANN. § 822.047.

¹³⁸ *Id.*

¹³⁹ Campbell, *supra* note 15.

¹⁴⁰ *Id.*, “Home rule” cities exist only in a few western states. In most states the city does not have the state constitutional power to ignore a state statute.

¹⁴¹ REV. MUN. CODE, CITY AND COUNTY OF DENVER, COLORADO § 8-55.

¹⁴² *Id.*

anyone except someone in the owner's immediate family, and 6) posted a sign of specified dimensions and lettering ("PIT BULL DOG") at every possible entrance to the property where the dog was kept in order to notify would-be visitors to the property of the animal's presence on the property.¹⁴³

Miami-Dade County, Florida, is another example of a local body that has enacted BSL despite a state prohibition on such legislative action.¹⁴⁴ Similar to Denver, Miami-Dade enacted BSL in 1989, and has declared it to be illegal to own any dog which substantially conforms to a Pit Bull breed dog unless it was specially registered with Miami-Dade County prior to 1989. Acquisition or keeping of an unregistered pit bull dog is met with a \$500.00 fine and a County Court action to force the removal of the animal from the County.¹⁴⁵ In the case of Miami-Dade, however, the state legislature of Florida allowed its ordinance to stand as a pre-existing law, where the state statute contains an exception to the anti-BSL exception of the municipal powers provision which states "This section shall not apply to any local ordinance adopted prior to October 1, 1990."¹⁴⁶ Miami-Dade's BSL is the only example of such an ordinance in the state of Florida which predates the year 1990.¹⁴⁷

In 2009, proposals for state-wide BSL came before the state legislatures of Hawaii, Montana, and Oregon.¹⁴⁸ In Oregon, two proposed bills would ban pit bulls from Oregon unless a person has obtained a permit within 90 days of the bill's passage¹⁴⁹ and

¹⁴³ *Id.*

¹⁴⁴ MIAMI DADE COUNTY, FL, CODE 89-22 §§ 5-17.6(b) (2007).

¹⁴⁵ *Id.*

¹⁴⁶ FLA. STAT. ANN. § 767.14 (West).

¹⁴⁷ Laura Allen, *Miami-Dade County Voters Reject Pit Bull Ban – Maybe*, Animal Law Coalition, August 14, 2012, <http://www.animallawcoalition.com/breed-bans/article/1902>.

¹⁴⁸ Campbell, *supra* note 15.

¹⁴⁹ See LC2571, dated 2/24/09 viewable at http://media.kval.com/documents/090227_pit_bull_bill.pdf.

require minimum liability insurance coverage of \$1 million for pit bull owners.¹⁵⁰ Oregon's insurance requirement would be the first requirement of such a large amount, which would result in some dog owners being unable to keep their dogs due to limited finances.¹⁵¹ Neither bill has had enough support to date to pass the legislative process as of the date of this comment.¹⁵²

Recently, however, some previously long-standing supporters of BSL¹⁵³ have changed their tune. In Ohio, on February 21, 2012, Governor John Kasich signed HB 14 into law which removed the language which declared pit bulls to be per se vicious dogs from the state code. While the revised statutory language did not prohibit communities from enacting their own forms of BSL, it outlines a much more fact-driven determination to be made regarding characterization of a dog as "vicious" or "dangerous" based on the animal's deeds and history, and also increases penalties against owners of dogs deemed to be dangerous.¹⁵⁴

III. Why BSL is Problematic

While passing constitutional muster in most cases, BSL remains highly problematic from a number of other perspectives. It is the opinion of this author that BSL represents nothing more than a desperate attempt by local officials to address a complex and difficult issue. Such attempts have proceeded in a grossly oversimplified manner that, in theory, should guarantee an improvement in bite statistics by removing the dogs most commonly involved. This theory is not only irresponsibly employed in a manner that will hurt the innocent by design, but it is based on two major of fallacies.

The first fallacy is the idea that pit bull dogs are more inclined to attack than other breeds based on limited statistics which appear to indicate they are involved in more attacks that most

¹⁵⁰ See HB2852, <http://www.leg.state.or.us/09reg/measures/hb2800.dir/hb2852.intro.html>.

¹⁵¹ *Id.*

¹⁵² See Understand-a-bull, *supra* note 122.

¹⁵³ *Id.*

¹⁵⁴ *Id.*, see also OHIO REV. CODE ANN. § 955.11 (West).

other breeds and are inherently more dangerous. This is an irresponsible assumption and adoption of media hysteria with no supporting evidence and loads of evidence to the fact, bite statistics in the United States tell a different story which indicates that the dog which is most prevalent in the United States during a given time period will be responsible for the highest incidence of bites.¹⁵⁵

The second fallacy upon which the legitimacy of BSL relies is the idea that vicious dogs are the cause of the dog bite problem, when in fact dogs that bite are the effect of a large complex pattern of irresponsible ownership and ineffective legislation and enforcement of laws designed to regulate both human and canine behavior.

Furthermore, BSL is both difficult¹⁵⁶ and extremely expensive¹⁵⁷ to enforce. Additionally, it is fundamentally unfair and discriminatory in a way that causes a great deal of trauma to responsible dog owners and their innocent family pets.¹⁵⁸ Perhaps most important of all, BSL has not proven to be an effective solution to the problems posed by dangerous dogs because it does not address the cause of the dangerous dog problem, which is people.¹⁵⁹

Upon close examination, it becomes clear that BSL is not only ineffective, but rather it exacerbates the problem it purportedly seeks to address and also causes new problems related to public health and safety. It thus constitutes a totally indefensible

¹⁵⁵ Dr. Bonnie V. Beaver et al., *A Community Approach to Dog Bite Prevention*, 218 J. AM. VETERINARY MED. ASS'N 1732, 1733 (2001), <http://www.avma.org> (last visited Apr. 30, 2013). Dr. Bonnie Beaver is a board-certified veterinary behaviorist and chair of the American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interaction. *Id.* The Task Force was created to help communities address dog bite problems. *Id.*

¹⁵⁶ See Diane Blackman, *Practicality of Breed Specific Legislation in Reducing or Eliminating Dog Attacks on Humans and Dogs* (1995), <http://www.dog-play.com/pitbull.html>; see also The Humane Society of the United States, *Breed Specific Legislation: Laws banning or strictly regulating certain breeds won't solve the problem of dog bites and aggression*, http://www.humanesociety.org/animals/dogs/facts/statement_breed_specific_legislation.html.

¹⁵⁷ ASPCA Position Statement, *supra* note 16; American Humane Association, *Breed-Specific Legislation*, <http://www.americanhumane.org/animals/stop-animal-abuse/fact-sheets/breed-specific-legislation.html>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

“solution” to the dog bite problem , and a more effective and manageable solution is required.

A. Enforcement Problems

The issue of enforcement of BSL begs the question: Who determines whether a dog is one of the banned or regulated breeds, and what is the procedure for that determination?¹⁶⁰ In North Salt Lake, Utah, the city manager has sole authority to make that call.¹⁶¹ In Livingston County, Michigan, the animal control officers and employees of the county shelter previously made all determinations regarding breed type, which would disqualify any recovered pit bull from being eligible for adoption following the mandatory holding period. Interestingly, Livingston County has since revised its policies to both eliminate the breed-based disqualification and also employ qualified behavior assessment practices in evaluating recovered animals.¹⁶² Considering that no special training in breed identification is required in order to become an animal control officer,¹⁶³ this seems like a logical move.

There are many challenges and difficulties inherent in breed identification in general which are compounded when one attempts to identify a pit bull.¹⁶⁴ The pit bull is not an actual breed, but rather a phenotype, and it is difficult to determine which mix and proportion of physical and genetic features constitutes an actual pit bull.¹⁶⁵ Some jurisdictions which employ BSL use physical descriptions of a pit bull which are very broad. These descriptions often name features that are shared by many breeds. A great deal of litigation has arisen from situations where a community tries to enforce a breed ban against a dog that the owners claim is not a pit

¹⁶⁰ Campbell, *supra* note 15.

¹⁶¹ *Id.* (citing North Salt Lake City, *Utah* Animal Control Ordinance § 13-20-16 (1987))

¹⁶² Livingston County, Michigan Resolution # 2010-04-133, RESOLUTION TO AMEND RESOLUTION# 2008-05-156, WHICH CREATED A POLICY PROHIBITING THE ADOPTION OR PLACEMENT OF CERTAIN MIXES, BREEDS, OR ANY

KNOWN AGGRESSIVE ANIMALS, TO ESTABLISH AN “AGGRESSIVE ANIMAL” POLICY, available at <http://co.livingston.mi.us/PDF/Policies/Law/LCAC/Control/100413.pdf>

¹⁶³ Campbell, *supra* note 15.

¹⁶⁴ Jamey Medlin, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DEPAUL L. REV. 1285, 1312-13 (2007).

¹⁶⁵ *Id.*

bull.¹⁶⁶ Accordingly, application of breed specific ordinances presents heightened legal and practical difficulties when applied to mixed breed dogs.¹⁶⁷ For example, in Kansas City, Kansas, Mike and Amy Johnson’s dog Niko was seized in 2007 for violating the city’s ban against harboring pit bulls.¹⁶⁸ After an eight-month legal battle which finally culminated in a DNA test, the city finally agreed with the owners’ statements and documentation and Niko was declared a boxer mix.¹⁶⁹ According to the American Pet Products Association, out of 73 million pet dogs, 31 million are classified by their owners as bearing a mixed breed composition.¹⁷⁰ While almost all BSL refers to “pit bulls,” many breeds of dogs have the facial and body characteristics of a “pit bull,” but bear no genetic relation to pit bulls (besides also being dogs) at all, including boxers, Labrador retrievers, bulldogs, Rhodesian ridgebacks, mastiffs and many others. Whether it is possible for even an expert to identify the breed origins of a mixed-breed dog is very much open to debate.¹⁷¹ Since greater specificity would aid enforcement and understanding of what is necessary to comply with a given regulation, dog behavior represents a much more practicable approach than breed specific regulation.¹⁷²

B. Ineffective Policy

Largely as a result of the enforcement issues listed above, or perhaps a quiet avoidance of enforcement by those charged with its implementation, there is evidence which suggest that BSL may not be enforceable at all. Denver city officials estimate that 4,500 pit bulls still live in the city, and Miami-Dade County remains home to an estimated 50,000 pit bulls, despite the local

¹⁶⁶ *Id.*

¹⁶⁷ Blackman, *supra*, note 156.

¹⁶⁸ Animal Legal Defense Fund, *Pit Bull Bans: The State of Breed-Specific Legislation*, <http://aldf.org/article.php?id=1029>.

¹⁶⁹ *Id.*

¹⁷⁰ Humane Society of the United States. *National Pet Related Statistics - Shelter Pages* (2005).

¹⁷¹ Blackman, *supra*, note 156.

¹⁷² *Id.*

bans.¹⁷³ Given evidence that the bans dissuade responsible, law-abiding owners from owning a banned breed within a given locale, the logical conclusion is that the pit bull populations in these areas are largely, if not mostly, composed of irresponsible owners.¹⁷⁴ Besides pushing responsible owners away from a breed, the banning of a specific breed arguably reinforces the dangerous reputation which is actually sought out by people in search of a status symbol, who tend to be the owners least qualified to own and properly maintain an animal.

Empirically, BSL has not been effective where it has been employed. In many situations, officials tasked with identifying the animals which fall into the banned breed category have not had the time, funding, expertise, not inclination to carry out their charge. In cases where they have succeeded in effectively removing a particular breed from an a particular jurisdiction, bite statistics have never been shown to decline. In fact, it appears that BSL may even exacerbate the problem. The UK has seen an increase in dog bites of 50% since it enacted Breed Specific Legislation¹⁷⁵, and Scotland has weathered an increase of 160%¹⁷⁶. In these cases, it appears that BSL has not only failed, but it has possibly made the problem worse. Either way, this suggests that there are other factors which drive dog bite statistics that warrant greater consideration than what breeds we perceive to be most dangerous. After what amounted to a 15-year test run, the Dutch government realized this and repealed its ban on the breed in 2008 because their dog bite statistics saw no improvement under BSL.¹⁷⁷

C. Misguided and Factually Unsupported Policy

¹⁷³ Medlin, *supra* note 164.

¹⁷⁴ *Id.*

¹⁷⁵ Paws and Learn Humane Education Center, citing <http://www.easier.com/view/Finance/Insurance/Pet/article-182721.html>, found at https://pawsandlearn.org/uploads/Breed_Specific_Legislation.pdf

¹⁷⁶ Paws and Learn Humane Education Center, citing <http://news.scotsman.com/politics/Attacks-by-dogs-soar-to.3628834.jp>, found at https://pawsandlearn.org/uploads/Breed_Specific_Legislation.pdf

¹⁷⁷ National Canine Research Council, *The Worldwide Failure of Breed Specific Legislation*, http://nationalcanineresearchcouncil.com/uploaded_files/tinymce/World-wide%20Failure%20of%20BSL.pdf.

Further support for the concept that pit bulls are not inherently dangerous animals, but rather the most unfairly characterized type of domesticated canine comes from scientific study of behavior. Statistically, temperament evaluations by the American Temperament Test Society, a nationally recognized not-for-profit organization for the promotion of uniform temperament evaluation of purebred and spayed/neutered mixed-breed dogs, give American Pit Bull Terriers an above average passing rate compared to other breeds.¹⁷⁸ Based on their published breed statistics, 82.6 percent of the American Pit Bull Terriers tested passed a standard behavior and aggression evaluation.¹⁷⁹ Such an evaluation assesses different aspects of temperament such as stability, shyness, aggressiveness, and friendliness as well as the dog's instinct for protectiveness towards its handler and/or self-preservation in the face of a threat.¹⁸⁰ The average passing rate for the other 121 breeds of dogs tested was 77 percent.¹⁸¹

Neutral, behavior-based statistics such as this strongly suggest that, even if pit bulls attack more frequently than other dogs (which is not something that has or even can be demonstrated¹⁸²), we need to more closely examine the situations they are put in and the ownership aspect of their behavior in order to address the problem. While it could be said that BSL attempts to target pit bull owners by taking away their dogs, this is not an effective means of nullifying the damaging effect these individual owners have on society via their irresponsible ownership practices.

From a behavioral perspective, the problem of dog bites is generally not attributable to breed characteristics in a way that might suggest pit bulls are more prone to attack. There are several reasons a dog will bite, and many of them have nothing to do with being mean. More

¹⁷⁸ See <http://atts.org/about-atts/>.

¹⁷⁹ See <http://atts.org/tt-test-description/>.

¹⁸⁰ *Id.*

¹⁸¹ See <http://atts.org/breed-statistics/statistics-page1/>.

¹⁸² See American Veterinary Medical Association, *Breeds of Dogs Involved in Fatal Human Attacks in the US between 1979 and 1998*, September 15, 2000.

often than not, a dog will bite out of fear, rather than aggression, when they feel threatened, unsure or challenged, and feel they are acting in self-defense.¹⁸³ In this way, the way a dog is reared and trained, which dictates how it will perceive the world, is key to how likely a dog will be to bite. Dogs that haven't been spayed or neutered are more likely to display aggressive behavior related to their sex drive or territorial impulses which tell them to protect resources such as food, toys, or their young.¹⁸⁴ Further, unfixed animals tend to be more “high-strung” (perhaps due to the reasons stated above) and are more likely to be accidentally surprised, which leads to many dog bites.¹⁸⁵ A separate but related tendency is that dogs that haven't been properly behavior-trained and socialized are more likely to bite.¹⁸⁶ In instances where there is a low-level of owner vigilance, as exhibited by owners in many resource-strained communities, these two characteristics often overlap, creating dangerous situations.¹⁸⁷ Owner vigilance also extends beyond the points mentioned above.¹⁸⁸ It includes controlling the community's exposure to any animal, on private property or when approached on the street.¹⁸⁹ Constant vigilance is required in order to prevent unfamiliar people to put one's animal charges in situations which might be inherently dangerous, including contact with small children and other dogs, especially those unfamiliar to the animal.¹⁹⁰ Consequently, biting has more to do with circumstances, behavior, training (or lack thereof), and ignorance on the part of human beings.¹⁹¹

In the study performed by the American Veterinary Medical Association, the CDC, and the Humane Society of the United States, which analyzed dog bite statistics over a twenty-year

¹⁸³ CBSnews, *If Aggressive Dog Threatens You, Know What to Do*, June 22, 2010, http://www.cbsnews.com/2100-500199_162-6605829.html.

¹⁸⁴ *Id.* citing http://www.healthypet.com/PetCare/DogCareArticle.aspx?title=Dog_Bite_Safety.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Author's opinion based on handling, behavior testing, and participating in placement of dogs in foster and permanent homes in a volunteer capacity from 2003 to 2013.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See CBSnews, *supra*.

period, it was found that the statistics don't show that any breeds are inherently more dangerous than others.¹⁹² In general, the study showed that the most popular large breed dogs at any one time were consistently on the list of breeds that bit fatally.¹⁹³ There were a high number of fatal bites from Doberman pinschers in the 1970's, for example, because Dobermans were very popular and numerous at that time.¹⁹⁴ Obviously, a Dobermans' size makes their bites more dangerous than that of a smaller breed. The number of fatal bites from pit bulls rose in the 1980's for the same reasons of size and popularity, and the number of bites from Rottweilers did the same in the 1990's¹⁹⁵. Perhaps most importantly, the study concluded that there are no reliable statistics for nonfatal dog bites, since most go unreported; thus there is no way to know how often any breeds are biting.

A distinction should be made here between dog bites in general and fatal dog bites. Both are important issues, and the two are clearly intertwined, to a certain extent, but they retain separate statistical profiles. Typically, the pro-BSL faction's response to the fact that pit bulls are no more likely to bite than other dogs is generally that when pit bulls bite, it's often more serious than other dog bite scenarios, and that they have a "killer instinct that makes them prone to killing."¹⁹⁶ Such myths regarding the bite power and bite force of the pit bull being greater than other dogs are frequently accepted by the public, even though they lack proof¹⁹⁷ and tends and have been disproven scientifically.¹⁹⁸

D. Fundamentally Unfair/No Recourse

¹⁹² *Id.*

¹⁹³ *Id.*, citing (J. AM. VET. MED. ASSOC.; 217:836-840 (2000)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See generally dogsbite.org, and http://www.mlive.com/opinion/flint/index.ssf/2009/12/pitbulls_are_killers_the_entir.html.

¹⁹⁷ *City of Toledo v. Tellings*, 2006 Ohio 975, 984 (Ct. App. 2006), rev'd, 2007 Ohio 3724 (2007).

¹⁹⁸ See generally, Jennifer Lynn Ellis et al., *Calibration of Estimated Biting Forces in Domestic Canids: Comparison of Post-Mortem and In Vivo Measurements*, 212 J. ANATOMY 769 (2008).

Fundamental fairness is probably the most simple and glaring reason why BSL has met with such intense opposition. It has been called an “ethical failure” by most canine welfare organizations,¹⁹⁹ because there is no consideration given to the fact that dogs, like all creatures, are individuals.²⁰⁰ Instead, any dog fitting a relatively vague physical description is treated as a menace, with no regard for what characterization of the animal is actually warranted or whether the individual animal poses a threat to the community.²⁰¹ In this way, BSL is tantamount to a legislative body closing its eyes to reality and blindly prescribing a clearly over-zealous tool without regard for the harm it will impose on a substantial portion of the population with will be subject to the law. In many cases, this type of legislation hinges on the belief that dogs such as pit bulls possess inherently pronounced traits such as strength and aggression which make all members of the group dangerous.²⁰² These kinds of generalizations are highly reminiscent of the racially-based laws of the pre-civil rights era. As explored in Section 3, legal technicalities allow these harmful and troubling laws to be imposed against decent people and their canine companions based on the same type of flawed logic which promulgated atrocious concepts such as lawful slavery. In this way, BSL and its foundations in prejudice and stereotypes represents a massive failure of a legal system which prides itself on its focus on the protection of the innocent from persecution.²⁰³

Even in the “happy ending” case of Niko, during the time this dog’s owners fought with the city to prove he was not a member of a restricted breed, Niko was forced to live in an animal control kennel, separated from his family. His quality of life was poor enough that he lost weight and fur, and contracted various respiratory illnesses which are pervasive in animal

¹⁹⁹ StopBSL.org, *Punishment of the Innocent: BSL places unreasonable burdens on responsible dog owners, tears families apart, and kills innocent dogs*, available at <http://stopbsl.org/bsloverview/the-punishment-of-the-innocent>.

²⁰⁰ Burstein, *supra* note 1.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See generally, Constitution of the United States of America.

shelters.²⁰⁴ He basically sat in jail, removed from all things familiar to him, without the ability to understand why he was there, which tends to make animal imprisonment extremely traumatic. It's easy to draw comparisons between Niko's case and the Innocence Project, which has used DNA evidence to free hundreds of wrongly convicted humans from prison. However, there are fewer mechanisms in place to buffer the negative effect of a wrongful application of the characterization of a "dangerous animal", and in most cases an animal will not be allowed to live long enough for its owners to challenge an application of BSL. The animals are treated as if they have caused the same level of harm on a person or animal as an animal which, traditionally, would have seriously attacked or killed someone to receive such a classification. The stakes are high enough for these animals and their owners that BSL is simply too inequitable a concept for it to survive as part of United States Law.

Some manifestations of BSL appear less draconian and more equitable than others by operating in a purportedly regulatory manner. However, they often impose a "de facto" ban on a breed by creating a circumstance where it is essentially not possible for residents to meet the requirements of ownership for that breed. The end result tends to be the same as with a straightforward ban that threatens the destruction of all members of a prohibited breed. For example, in Ohio, due to the state law that statutorily classifies all pit bulls as "vicious" dogs and imposes various requirements on their guardians, pit bull guardians have great difficulty locating housing and obtaining homeowners' or renters' liability insurance.²⁰⁵ Further, most Ohio shelters have a pit bull non-adoption policy, which has had disastrous consequences.²⁰⁶ In her

²⁰⁴ Animal Legal Defense Fund, *supra* note 168.

²⁰⁵ ASPCA Position Statement, *supra* note 16.

²⁰⁶ *Id.*, citing Lord, L.K., Wittum, T.E., Ferketich, A.K., Funk, J.A., Rajala-Schultz, P., Kauffman, R.M., 2006. Demographic trends for animal care and control agencies in Ohio from 1996 to 2004. *Journal of the American Veterinary Medical Association* 229, 48-54: In 1996, 101 Ohio animal control agencies reported handling 2,141 dogs deemed to be pit bulls, in 2004, 68 agencies reported handling 8,834 such dogs, of whom only 1,425 (16 percent) were reclaimed by their original guardians or adopted by new ones, and 7,409 (84 percent) were killed.

article “Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?” Karyn Grey provides an emotionally charged example of the painful helplessness such a legislative framework can impart:

Mary Rodgers wept as her dog was dragged away by animal control workers. She could barely stand to watch as Sasha struggled with the workers, trying to break free to run up the familiar porch steps to her owner. There was confusion in her eyes as she looked at Mary. Mary's instincts had told her to run after Sasha, to bring her back to the house where she had lived for years. But she did not. Instead, Sasha was forced into the back of a van and driven to animal control where she would be put to death. One might think Sasha committed a grievous act to receive such a harsh punishment. But she did not. She had never bitten nor hurt anyone. Her sole infraction was that she was an American Staffordshire Terrier. Mary had no choice but to let Sasha go. The county required Mary to have an extensive insurance policy in order to keep Sasha, and although Mary continuously tried, no insurance company would insure her.²⁰⁷

Given the confusion and difficulty inherent in breed identification without DNA evidence, it is not a stretch to say that virtually any dog could be mistakenly taken and destroyed in BSL territories where animal shelters become stressed and/or have non-adoption policies regarding pit bulls.

E. Other Collateral Damage

Besides the overwhelmingly unfair and painful situations created by BSL when innocent, responsible dog-owning families are forced to suffer the destruction of their canine companions, there is a great deal of other collateral damage wrought by BSL. First, and perhaps most

²⁰⁷ Karyn Grey, *Breed-Specific Legislation Revisited: Canine Racism or the Answer to Florida's Dog Control Problems?*, 27 NOVA L. REV. 415, 416-17 (2003)

importantly, BSL tends to drive people and their dogs into hiding.²⁰⁸ When pets of otherwise responsible owners become the subject of intense regulation such as a breed ban, the natural response by the owners is often to limit their dog's interaction with the outside world, so as to avoid detection. This often results in a decrease in outdoor exercise and socialization, and often eliminates the owner's ability to properly spay/neuter, microchip, vaccinate, and license their animals.²⁰⁹ Not only does this trend negate what could be said to make up the majority of the standard societal control mechanisms used to regulate animal ownership, it creates scenarios where an attack is more likely to happen. The damage wrought by such an attack would arguably be that much greater if the attacking animal is unaltered or at a higher risk for carrying a communicable disease.

Further, breed-specific laws tend to compromise rather than enhance public safety by forcing limited animal control resources to focus on whatever targeted breed of dog is locally restricted. In doing so, it limits their abilities to focus on actual risk factors and routine, effective enforcement of laws that we know make our communities safer.²¹⁰ These laws include leash laws, animal fighting/cruelty laws, anti-tethering laws, and laws facilitating spaying and neutering, as well as laws that require all owners to control their dogs, in general.²¹¹

There is another counterproductive effect which canine and humane interest groups often emphasize when discussing the failure of BSL as a remedy to dog bites. Labeling a particular breed as problematic, uncontrollable, or dangerous makes them more attractive to the irresponsible members of society. The result is that gang members with criminal tendencies, dog fighters, or people who feel the role of the dog is just one of protection and intimidation, all of

²⁰⁸ ASPCA, *What's Wrong with Breed Specific Legislation?*, found at <http://www.aspc.org/fight-animal-cruelty/dog-fighting/breed-specific-legislation.aspx>

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

whom are traditionally problematic owners, seek out these animals. All of the aforementioned groups of people want dogs which are mean and make them appear tough as the owners of such dangerous and powerful animals. Further, the fact that a breed has been outlawed makes it more appealing to those same groups who often feel disenfranchised and desperately want to demonstrate and believe that the rules of society don't apply to them.²¹² Banning a particular breed will not prompt the people who are already engaged in criminal behavior to start abiding by laws which offer even less penalty to them personally than the laws they break on a regular basis.²¹³ Additionally, if a breed ban was somehow theoretically effective in removing a certain breed from society, these bad owners will simply move on to find other dog breeds which can be trained to be vicious or to be used for fighting.²¹⁴ It is no coincidence that the popularity of pit bulls in the 1980's came on the heels of the first implementations of BSL.²¹⁵

IV. Addressing the Cause - Alternative solutions

Whatever one's opinion of pit bull dogs or one's position on the legitimacy of BSL as a just or effective concept, one thing is undeniable: the advent of BSL points to a major dissatisfaction with the breed-neutral statutory framework surrounding responsible pet ownership, or perhaps the gaps in the enforcement thereof. This author tends to share that dissatisfaction, but one cannot ignore the facts. The facts point towards better options which, especially taken together as a comprehensive approach, provide a much sounder foundation for safer human-canine interactions and do not attack innocent, law-abiding families.

²¹² *Id.*

²¹³ Grey, *supra* note 81.

²¹⁴ *Id.*

²¹⁵ ASPCA, *supra*.note 208.

A. Spay and Neuter Requirements

This simplest piece of the real solution to the dog bite issue involves an emphasis on spay and neuter practices. More than 70% of the dogs involved in attacks were unaltered males.²¹⁶ Statistically, an unaltered male dog is 2.6 times more likely to bite than is a neutered dog.²¹⁷ This is a significant statistic which unavoidably singles out a major risk factor that needs to be addressed. It may well be that there is significant overlap between generally irresponsible owners who impose risk factors in other categories and those who fail to fix their pets, but given the observable behavioral effects, this should not be ignored.

Two appropriate solutions to mitigate this risk factor would be an enforced breed-neutral spay/neuter requirement and also better support for government subsidized spay/neuter programs. This would act to both drive and assist owners to have their pets fixed help prevent dangerous dog scenarios by making dogs more behaviorally stable. Additionally, it would reduce the tendency of male dogs to wander and reproduce, thus reducing the number of “unwanted” stray dogs in society. These such dogs which remain largely unregulated until they end up in the shelter system, where they often sustain great stress due to crowding and limited shelter resources which can destabilize even the steadiest animal.²¹⁸

The ASPCA supports the imposition of a surcharge on owners for ownership of unaltered dogs.²¹⁹ This practice would likely work to create a new standard within society.²²⁰ It would act as a deterrent to would-be lawbreakers, and over time the public would arguably accept the

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ According to some experts' projections, just one unaltered dog and her progeny can produce an estimated 67,000 puppies in a six-year period, and there is theoretically no limit to the number of offspring an unaltered male dog can foster. Phyllis Coleman et. al., *It's Raining Cats and Dogs . . . Government Lawyers Take Note: Differential Licensing Laws Generate Revenue, Reduce Costs, Protect Citizens, and Save Lives*, 40 Stetson L. Rev. 393-394 (2011) (citing PETA, *Spay and Neuter*, <http://www.peta.org/issues/companion-animals/spay-neuter.aspx> (last accessed Apr. 18, 2013)).

²¹⁹ ASPCA, *supra* note 208, *see also* Coleman, *infra* note 228.

²²⁰ ASPCA, *supra* note 208.

concept of altering dogs as a standard practice. Fines imposed would help fund the spay/neuter programs in the process.

B. Improved Enforcement of Existing Laws

Better enforcement of existing license laws would bolster the effectiveness of spay/neuter requirements. It would also deter irresponsible owners and maintain better control of dogs in society. Existing laws which require more effective enforcement include leash laws and anti-tethering laws, both of which should already address another central issue in the risk factor mix – control. Leash laws require owners to maintain control of their animals when they are in public, and anti-tethering laws prevent people from leaving their dogs unsupervised and accessible to the outside world in a state that might lead to a greater chance of aggression. Not only are dogs more appropriately controlled (and protected) by fences if they are to be left outside of the home on the owner’s property, the practice of tethering is often taken to inhumane lengths which make dogs more agitated and likely to bite when approached.²²¹

Clearly, in this proposed legal framework, the issue of vicious dogs needs to be addressed more appropriately, as well. The main drawback with current manifestations of dangerous dog laws is that they require a dog to attack someone before it is even on the radar of law enforcement. The concept of supplemental “potentially dangerous dog” legislation is intriguing, as it seems that it would help identify and control behaviorally vicious or aggressive animals before they do damage.²²² However, such legislation would rely very heavily on accurate assessment and reporting of at-risk dogs, as well as behavioral science. Both are relatively subjective and not universally understood as “hard science” in a way that would allow for a successful incorporation it into our legal framework.

²²² Safia Gray Hussain, *Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous-Dog Dilemma*, 74 *FORDHAM L. REV.* 2847, 2886-87 (2006).

Given that these types of laws exist already in many areas, but apparently are not effective in gaining compliance by owners, stiffer penalties are in order, especially for repeat offenders.²²³ The success of such a plan would depend on increased vigilance on the part of law enforcement. Obviously, this would place a strain on the resources of what are typically already strained resources. In concept, however, increased penalties and increased incidence of citation would result in additional inflow of resources. On a longer timeline, such increased penalties would “settle out” into society and function as a deterrent of irresponsible behavior, particularly in the context of criminal penalties.

C. Individualized Exemptions

Some states and communities which already have enacted breed bans and other forms of BSL might be unwilling or feel they are unable to change course and repeal their BSL laws for fear of appearing soft on crime. In the face of public outcry following an highly publicized attack or rampant media hysteria, this is a reasonable concern. A simple alternative for such communities which would do a great deal to mitigate the collateral damage from BSL is the provision of exemptions for dogs that meet certain criteria. Among these criteria could be clean records, passing a state or municipally approved behavior test, sterilization, purchase of a reasonable liability insurance policy by owners, or obedience training courses.²²⁴ Akin to a variance to real estate zoning ordinances²²⁵, individualized exemptions would enable the legislative body to make a blanket rule that draws in all members of a certain classification (i.e. owners of pit bulls) without allowing large sections of that population to fall through the legislative crack and suffer undue hardship or unreasonable penalty. This approach would make the concept of BSL somewhat more palatable, and would also go hand-in-hand with identifying

²²³ *Id.*

²²⁴ Pratt, *supra* note 76.

²²⁵ *Id.*

the dogs which actually pose a threat to the public prior to them biting. In that way it would help fill the hole that typical dangerous dog laws are often said to have by being purely reactive rather than proactive and preventing harm in the first place. Overall, this kind of process would be an improvement over current manifestations of BSL. Such laws are generally problematic and have given rise to situations such as the drawn out legal battle in Denver, where the city is fighting the ADA's demand for service dogs to be exempt purely because the city wants to preserve its right to legislate. If the city is truly interested in better control of and contact with the pit bulls within its limits, the procedure of accepting applications for exemption makes perfect sense.

D. Community Approach

Communities with such grave concerns over dog control that they would consider such a top-down type approach as BSL would also likely be better served with the exact opposite approach. A grassroots, or ground-up approach to involve the community via special groups to address the issue would be far more effective. Getting people involved is often a very effective way to utilize an often untapped resource - "the power of the people". When properly organized, citizens can work together to raise community awareness, raise funds for the various programs mentioned above, and leverage what is arguably the strongest asset a community has at its disposal. This approach is also attractive in that it can be tailor-made based on what the governing body feels needs to happen and can work with that body to meet its goals. Responsible dog owners will continue to be responsible, and many might prove valuable assets in the fight against irresponsible dog ownership.²²⁶ The worst of the bunch won't likely be turned to the good side by this method, but it might serve to address another problematic class of owners who contribute to the problem of dogs biting. This class comprises owners who, given

²²⁶ Beaver, *supra* note 145.

the choice, would choose to be responsible but don't know how to go about doing it.²²⁷ It is difficult, if not impossible, to gauge what percentage of problem situations would be remedied by this solution, but it is important to empower people to improve themselves, especially when the costs of doing so would be so low.

E. Education

Overall, education of the public and the legislative bodies at all levels of government is should be a main priority for opponents of BSL. When viewed in light of the facts surrounding dog attack patterns and the facts surrounding the behavior of the dogs involved in those patterns, it is undeniable that BSL is cannot be effective. Better education of the public is key to preventing the harms wrought by BSL itself by exposing its failures and removing support for it in our communities. Perhaps more persuasive is the fact that better education about dog safety and handling would be effective in preempting the harms BSL seeks to address, thereby reducing the perceived need for such drastic measures as breed bans.

Further, increased education about the secondary benefits to important practices such as spaying and neutering would make the public far more likely to engage in the practice.²²⁸ In addition to making one's pet less likely to be involved in an attack from a statistical perspective²²⁹, there are a number of other direct benefits to owners who sterilize their pets. Such owner benefits include: increased life expectancy of the pet, reduced chance of illness (including cancers of the reproductive organs), reduced management efforts (particularly where females would no longer go into heat) and a generally reduced desire to roam.²³⁰ Knowledge of these benefits would encourage dog owners to have their dogs fixed in order to avoid to keep the

²²⁷ *Id.*

²²⁸ Coleman, *supra* note 217 at 394. See also Spay USA, *Benefits of Spay/Neuter for Cats and Dogs*, <http://www.spayusa.org/benefits.php> (accessed Apr. 17, 2013) (listing the benefits of spay/neutering).

²²⁹ See Sect. VIA, *supra* at p. 41.

²³⁰ Spay USA, *supra* note 228. 85% of the animals hit by cars are unaltered.

animal as healthy as possible, but also to reduce the need for management efforts and to reduce the overall cost of ownership. Of course, the major drawback of this approach is that it is unreasonable to assume that all of the current “bad owners” would suddenly start making responsible decisions. In many cases, the worst owners will not be motivated by the promise of improved animal health and longevity, because they either won’t listen to reason or they don’t really care about the well-being of their pets. Accordingly, avoiding medical costs is probably not a great motivator for such an owner because he or she would be unlikely to seek proper regular veterinary care either way.

F. A New Approach to Licensing Requirements

Ownership of companion animals is not the only facet of modern society which generates a potential clash between intensely personal rights within our communities. Many common activities which are totally germane to our daily existences carry the risk of catastrophic effect to health and well-being, if not properly regulated. Such practices and activities apparently possess enough inherent value to society, or are extensions of such fundamental freedoms, that we have elected to undertake the risks presented by potentially non-compliant individuals. Typically, these activities are regulated via a licensure process of some kind. Examples of such activities include operation of a motor vehicle, ownership of a gun, hunting, fishing, marriage, and, certain professional practices, including the practices of medicine and law. To varying degrees, engagement in any one of these activities in an improper fashion could prove devastatingly harmful to the unfortunate victims of that activity. Sadly, people lose their lives as the result of accidents involving the operation of motor vehicles and the use of firearms. Sometimes these accidents are the result of improper undertaking of these activities, and sometimes accidents happen to even the most careful. In an attempt to minimize the risk of such accidents,

requirements for licensure to undertake these activities include education, mandatory hands-on experience, and passing certain written and practical examinations. In the case of certain gun licenses and purchases, there background checks and character references are required. Perhaps most importantly, these requirements are enforced relatively strictly. The improper conduct of these licensed activities carries penalties such as loss of license rights and criminal penalties. Exercise of these licenses tend to happen somewhat foreseeably in defined areas where aberrant or in appropriate behavior can be observed by law enforcement. Further, the risks of noncompliance have been granted enough importance by society (more specifically, by legislative bodies and agencies) that there are active enforcement measures (patrols) by law enforcement officers taking place every day as a matter of course. The end result tends to be an apparently acceptable management of the risk presented by cars and guns in society.²³¹

To a lesser extent, fishing and hunting bear their own regulatory frameworks in order to prevent over-fishing and over-hunting, and (in the case of hunting, especially) to minimize accidents. There are time, place, and manner restrictions upon these activities which also make the exercise of the rights granted by the license relatively foreseeable from an enforcement perspective. As such, enforcement of laws related to licensing requirements is possible, and serves as a deterrent for non-compliance. Violation of these restrictions can result in loss of license rights, and criminal penalties (usually fines). Perhaps it can be said that, setting aside accident prevention²³² and decidedly “aesthetic” interests such as the existence of certain species of fish and animals²³³, humans have an interest in maintaining the balance of the food web. This is a relatively far-off concern that would be the result of the sum of many people undertaking the

²³¹ Although what constitutes an “acceptable” level risk is a matter of opinion, and is subject to adjustment from time to time, the presence of automobiles and firearms in society has been relatively stable over time.

²³² Accident prevention is regulated largely through firearm regulation, not regulation specific to hunting, with the exception of designated seasons, places, and weapons allowed.

²³³ These interests, though emotionally compelling, tend to be addressed more as a side effect to the more objective interest in avoiding adverse effects upon humans.

activity in an unbalanced way. Nevertheless, the activities are regulated at the state level by a regulatory licensing framework which can be actively enforced.

To an even lesser extent, marriage is an activity which requires licensure. The reasons for this are largely administrative and related to record-keeping concerns. As such, the requirements for licensure are low. This is likely because the level of risk of damage upon society by a given marriage is generally not considered to be great. Many people might argue that one can suffer great financial and emotional losses from poorly planned and managed marriages, but the extent of such damage tends to be mostly limited to the parties engaging in the activity. However, even this generally low level of concern has given rise to a more formalized process of licensure than the apparently pressing issue of the regulation of dog ownership.

Currently, dog licensure programs do exist in most municipalities. Generally they serve two very basic functions: to maintain records of who owns each dog within a community; and to require the dogs in the community to be vaccinated for rabies.²³⁴ Typically, one fills out a very simple form, pays a nominal fee²³⁵, and submits proof of rabies vaccination in order to receive the yearly license. There is no examination of the fitness of the owner. Given the potential for damage by an irresponsible dog owner, this is not a sufficient regulatory framework.

The first and most important change which needs to occur to make licensing of dog ownership an effective practice is to focus on the human owner, rather than on the dog. If dogs are to be treated as categories of potentially dangerous property, let us require increased vigilance and responsibility on the part of the owner. Human owners should be required to hold a license to own a dog, just as they are required to hold a license for the activities discussed above. The human owner is the cheapest cost avoider. He is in the best position to know when a

²³⁴ Based on author's experiences living in various New Jersey municipalities of different size and complexion, including New Brunswick, Bedminster, Cranford, and Harding Township.

²³⁵ Author's personal experience is that this fee is generally not more than \$20.00 per dog.

dog has a behavior issue, and should be responsible for managing the behavior of his dog. He also is the one making the decision to harbor the dog, and to derive whatever benefit is the goal of his ownership, so he should bear the responsibility of any consequences to his ownership of the dog. He should be required to educate himself in order to understand and identify potentially problematic behaviors of his dog. He should be required to demonstrate to a regulatory body that he is capable of handling, training, and maintaining his dog properly. In the event he fails to do so, he should face as severe a penalty as he would if he failed to manage his firearms or his automobile appropriately, without question.²³⁶ This approach which would be superior to the current programs because it actually addresses the fitness of the potential owner to manage the responsibilities of dog ownership.

Second, these licensure programs should be managed by the states, rather than by municipalities. This makes sense from a regional perspective, where it would provide a better consistency and foreseeability among municipal licensing regimes. It also would allow the program to wield more power through a more formalized approach, by giving the issue greater attention and possibly by assigning greater penalties for infractions. Moreover, given that the goals of the licensure programs suggested here are distinct from the goals of the typical municipal licensure programs, the two schemes could theoretically exist in a parallel or overlapping sense without conflict. Municipal license laws are aimed more towards keeping track of who is liable for a given dog, whereas the proposed scheme focuses more on preventing an unfit owner from ever obtaining a dog.

The current systems in place generally require self-reporting by owners. This is not the most effective enforcement scheme for two primary reasons. The first reason is that only in situations where a dog escapes its owner or is otherwise recovered without a license can the

²³⁶ This is to say nothing of the welfare of the animal, which, though important, is not the focus of this section.

authorities even be aware a particular dog is not licensed. Even then, identification of the owner requires the owner to present himself, unless there is cause for a resource intensive investigation. The second reason current license law are not effective is that there are no conspicuous milestone events which prompt the enforcement of such laws. There is no way for the government to reach into someone's life and impose itself if that person does not want to be detected. Due to the high number of dogs in society, entering the public domain by walking one's dog down the street is not even a conspicuous enough activity where regular license checks are a realistic option. Another major flaw in the current system is that the greatest penalty one might suffer for not licensing their dog is loss of ownership. This penalty is essentially negligible for many irresponsible people who own animals for the wrong reasons,²³⁷ which allows them to opt to simply ignore the law.

A better approach would impose the requirement for a person to be licensed prior to them being able to obtain a dog. For the reasons stated above, such an approach would require some kind of unavoidable event in the course of ownership which could require licensure. The most preemptive and arguably the only aspect of dog ownership which is mutual to all owners is the point of sale (or transfer of ownership via other means). To effectuate this, breeders, sellers, shelters, and foster groups would all have to act as the gatekeepers. Realistically, most reputable breeders, shelters, and especially foster groups would be glad to have a new mechanism with which to determine a potential owner's fitness. Of course, there will always be commercial breeders, dog-fighters, and generally unscrupulous individuals who would seek to benefit from skirting the system. To combat this, I would propose a penal system with a focus on individuals and companies who engage in the sale of dogs for profit, especially those who engage in a high

²³⁷ People who own animals for reasons such as dog-fighting, protection, or intimidation, as opposed to companionship or even working reasons, tend to view the dogs as disposable property.

volume of sales. Hopefully this focus would avoid creating disincentives for the non-profit rescue groups and shelters which provide a valuable service to the community and probably pose the lowest risk of infraction, anyway.

V. Conclusion

As mankind's relationship with canines continues to evolve, we find ourselves growing more opposed to the collateral damage and eager to find a solution to the problem of vicious dog attacks. As a result of our mass media consumption and the pressure our modern society can apply to legislators, we have jumped to certain convenient conclusions about certain kinds of dogs being the cause of the problem. In reality, these breeds are the victims of our failure to regulate ourselves. Perhaps humans have begun to devalue their canine companions as a result our relationship becoming less one of symbiotic interdependence, and more one of dependence of domesticated animal upon man. Perhaps as a result we have marginalized dogs in a way that certain breeds are now characterized as relics of our dark past, or worn out tools whose benefits no longer outweigh their risk. If that is the case, and BSL is allowed to stand as a common practice, then it is only a matter of time until we run out of breeds to blame for our failures as stewards and we sidestep to a position where we no longer allow ownership of dogs of any breed.

There are far better means to address the problem, the best of which address the people who are responsible for raising dogs to be the vicious tools we fear, be it by abuse, neglect, or simple ignorance. In order to address the true cause of the problem, we must employ a comprehensive plan which targets the pattern by which we allow dogs to become vicious. Ultimately it should be up to each community to decide how to address this problem, as their

power to do so has generally been protected by the courts, but that does not make BSL good law or even a legitimate concept in light of the facts.