

Breed Discrimination Laws: So Wrong in So Many Ways

IMAGINE SOMETHING OR someone you cherish being taken away from you for no good reason—all because of some baseless preconceived notion that, in the eyes of some third party who has no personal knowledge of your situation, what or

whom you love and hold dear is not “worthy.” Indeed, it is so unworthy that it is not entitled to live and should be taken from you and randomly exterminated.

For those of you who are dog lovers—and many of us are—that is exactly what can happen when your state or municipal government passes what has become known as a “breed discrimination law” (BDL). Also known as “breed specific legislation,” a BDL is an attempt by government to regulate dog ownership by reference to the type of breed of the animal or—remarkably enough—its mere appearance. If that seems at first blush to be a hopelessly unsupportable proposition, guess again. BDLs are more prevalent than you might imagine. It is hoped that, in some small part, this article can serve as a basis upon which to bring attention to, and the ultimate demise of, such ill-conceived and unfair legislation.

The problem of BDLs recently came to light in Oklahoma when, despite opposition, a bill was introduced in the state’s Senate (SB 362). The purpose of the bill was to repeal Oklahoma’s existing statute with a blanket delegation of authority to counties and municipalities allowing them to enact BDLs. At the time SB 362 was introduced, Oklahoma law expressly prohibited the enactment of laws that were directed at specific breeds. Fortunately, the bill was defeated in committee and never made it to the floor for a vote by the full Senate; there was no corresponding bill introduced in the state’s House of Representatives. Many other states have also had the foresight to refuse to enact, or allow the enactment of, breed discrimination laws. Some states, however, persevere in the misguided effort to regulate dog ownership by trying to punish an entire breed of animals for an incident that may involve only one animal instead of laying the blame where it typically rests: on the irresponsible owners who fail to train and control their animals.

Breed Discrimination in General

Various associations have taken a vocal public stance against breed discrimination laws. Among those organizations are the American Kennel Club, the American Veterinary Medical Association, the Best

Friends Animal Society, the American Society for the Prevention of Cruelty to Animals, the American Dog Owners Association, the Westminster Kennel Club, and the Humane Society of the United States.

The recent popularity of breed discrimination is not a new phenomenon. Historically, certain breeds of dogs have been targeted as “bad breeds.” In the 1960s, the Doberman pinscher was considered to be the most vicious dog. In the 1970s, the German shepherd was the target. In the 1980s, the Doberman was targeted again. In the 1990s, the Rottweiler was the object of public ire, and since the early 2000s, it has been the “pit bull.”

It can be surprising to see the list of the breeds of dogs that are the objects of BDLs across the United States today. A very small sampling of the breeds typically identified in a BDL includes dogs that most of us would not think of as being vicious enough to warrant the singular treatment of potential destruction just because of breeds or appearance. The list includes: the Saint Bernard; Great Pyrenees; Border collie; Great Dane; Akita; Siberian husky; Belgian sheepdog; Dalmatian; and Scottish deerhound. It is not surprising to find usual “bad breeds” on the list: the Doberman pinscher; the chow chow; the German shepherd; the Rottweiler; and, of course, the “pit bull,” the demon of all dogs.

At the outset, it is important to dispel some notions about dogs and their inherent temperaments. All dogs can bite, and they can do so for any number of reasons, the specifics of which need not be addressed at this time. I have been bitten by an AKC-papered beagle, a Border collie, a Scottish terrier, a Chihuahua, a schnauzer, and a kitten. The worst bite of all was from the Chihuahua nearly 30 years ago; I still have the scars on my hand from that bite. I have never been bitten by a chow chow, a “pit bull,” a German shepherd, an Akita, or a Great Pyrenees—even though I or close family members have owned all these breeds at various times.

The term “pit bull” is identified in quotation marks for a reason. In actuality, there is no such breed as a pit bull. Rather, “pit bull” is a generic term used to describe one of three specific breeds: the American pit bull terrier; the American Staffordshire terrier; and the Staffordshire bull terrier. According to A Best Friends Animal Society Press Release, “[i]t is estimated there are approximately 73.9 million dogs in the United States, of which five million (6.9 percent) can be described as pit bulls or pit bull mixes based solely on their appearance.” www.wctv/home/headlines/8337042.html.

Obviously, the pit bull is a popular breed. Spuds McKenzie, of the Bud Light beer commercials, was an English bull terrier. Pete the Pup, the friendly companion in the Our Gang movies and, later, the Little Rascals television program, was an American pit bull terrier. Sergeant Stubby fought with American troops in World War I and was the most decorated dog in military history; Sergeant Stubby warned the soldiers of gas attacks, located the wounded, and gave advance notice of incoming artillery fire. Indeed, despite the foregoing, so maligned is the pit bull that a heritage of being known as the “nanny dog,” because of its excellent disposition around children, has long been forgotten.

Statutes and Ordinances Included in Breed Discrimination Laws

BDL provisions are generally grounded in one basic theme—certain dogs are dangerous just because of their breed. Most BDLs go so far as to condemn an animal based solely on its appearance. Again, the pit bull is the most frequently identified and is supposedly the most vicious dog. Many BDLs identify a pit bull as any dog that (1) has “the appearance and characteristics of,” or (2) “resembles,” or (3) displays the “majority of physical traits of,” or (4) exhibits “the distinguishing characteristics of,” or (5) “contains as an element of its breeding” a Staffordshire bull terrier, an American Staffordshire terrier, or an American pit bull terrier. The overbreadth of the statutes should be apparent because virtually any breed of “mutt” can be subject to the law and the subjective, thus arbitrary, decisions of enforcement officials.

Glaring examples of the potential that a BDL will result in an arbitrary decision to euthanize an animal is found in Miami-Dade County’s breed discrimination law, which essentially permits profiling of dogs as pit bulls. In 2008, “approximately 800 ‘pit bulls’ were picked up and destroyed simply because of their looks.” *Id.* After Denver, Colo., enacted its BDL, more than 2,000 dogs were confiscated and destroyed. Contrary to what the sponsors of BDLs would have us all believe, there is no such thing as a vicious breed of dog, and a dog’s behavior has absolutely nothing to do with its appearance.

The Problems with BDLs

Where to begin? The pit bull is used only by way of example. There is a website that contains in excess of 20 photographs of various dogs and asks you to attempt to identify the pit bull. If you take the test, you will be amazed at how poorly you score. Indeed, many of the breeds that typically end up on BDL lists have the general appearance of a pit bull. Take a look at the cover of the book *Oogy, The Dog Only A Family Could Love*, written by Larry Levin, and you will conclude that Oogy is a pit bull. He certainly looks like one. In fact, Levin acknowledges in his book that he “thought” that Oogy was a pit bull. But you would be wrong—he is a Dogo, a breed that is on many BDL lists and, according to

Levin, is the best dog you could ever know. The same holds true for German shepherds; one can only imagine how many German shepherd cross-breeds would be subject to the fate of a BDL, as worded as above. Mixed-breed boxers, American bulldogs, and huskies would also suffer the same fate.

But the problems do not end there. Under the typical BDL, a dog that does not necessarily exhibit “bad” behavior is punished just for being a dog or for the way it looks. Punishment should fall on the shoulders of irresponsible owners who allow a dog of any breed to run loose and to cause harm. Laws should be and, in fact, are enacted to regulate and respond to human behavior—not canine behavior. The inherent failure of a BDL is in its failure to recognize that people should be responsible for controlling their animals. I will never forget the day when, at my good friend’s 10th birthday party, he was so happy with the new puppy that his parents had given him that he hugged the dog so hard around the mid-section that the dog bit him. You might suspect that the boy was not punished for hurting the dog, but both the boy and the dog were punished by the removal of the dog from the household. Now, 45 years later, it seems clear to me that the parents were at fault in the first instance for not providing the proper guidance to their son. A BDL demonstrates the same paradox. All dogs can bite and have countless reasons for doing so, many of which frequently represent a reaction to improper human behavior. Should the dog be trained? Absolutely. But should the dog be euthanized simply because it behaved in a predictable manner? No. Should an owner be refused the pleasure of a chosen friend and companion simply because of a dog’s breed or appearance? Certainly not.

The problems with BDLs are compounded when one considers the expertise of the individuals charged with enforcing these vague laws. Without question, the person assigned as the jurisdiction’s dog catcher is not an expert in the area of breed identification. Neither is the individual charged with making the decision of whether or not a dog is actually a breed to be targeted in a BDL. Indeed, statistics establish that veterinarians resoundingly agree that there is no way to identify certain animals as purebred or of mixed breed. In *American Dog Owners Ass’n v. City of Lynn*, 533 N.E.2d 642 (Mass. 1989), the court declared that the defendant’s BDL was unconstitutional, in part, because animal control officials used conflicting standards by which to identify the pit bulls that were subject to the ordinance. Again, using the pit bull as an example, the general physical characteristics shared by pit bulls are shared by no fewer than 20 other breeds that do not fall within the definition of the “bully breeds.” Indeed, more than 11 different breeds overtly resemble pit bulls.

The statistics given above do not even begin to reflect the number of mixed-breed animals that appear to have the physical characteristics of a pit bull. In that

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regard, the pit bull does not stand alone; numerous other breeds, particularly the German shepherd, share characteristics with other breeds that are not shepherds. Therefore, every dog owner should be concerned that his or her dog might be subject to the enforcement of a vague and discriminatory BDL.

There are additional ramifications of BDLs that are not related directly to a dog's behavior. The cost of enforcement may be prohibitively high. Enforcement is difficult, at best, and BDLs have resulted in diverting resources from the enforcement of simple leash laws. Many kenneling facilities are (thankfully) "no-kill" facilities, which involves an increase in the municipality's cost of care. The BDL can result in the loss of licensing revenue because owners of targeted dogs simply choose not to register their animals and animal rights associations have chosen to take their events to locales that do not have BDLs.

To avoid violating local laws, travelers who want to take their dogs along should take into account the existence of a BDL in their destination when making travel plans. When traveling, individuals should be aware that some jurisdictions can confiscate and execute a pet for nothing more than its appearance, whereas others simply require visitors with pets to take extra precautions, such as muzzling. Local enforcement officials should be able to provide assistance in identifying the nature and extent of any BDL that might be encountered when the family pet accompanies travelers who are on vacation.

Finally, regulations in some states may result in the denial of a petition to adopt a child because the adopting parents own particular breeds that are considered dangerous, regardless of the dog's actual history of behavior. This actually happened in Massachusetts.

The Effectiveness of BDLs

Breed discrimination laws have proven to be ineffective. In Miami-Dade County, for example, a ban on pit bulls was passed in the late 1980s, but it was estimated that as many as 50,000 pit bulls were living in Dade County in 2002. Denver has experienced a similar result and has seen a growth in the popularity of the pit bull. A truly tragic case occurred in Denver, where Snow, a blind and deaf three-year-old pit bull, was lost and later determined by her family to have been picked up by animal control workers and destroyed. At the time, the Denver ordinance required owners of pit bulls to surrender their dogs to the authorities or face a \$999 fine and up to one year in jail.

More important for the purposes of this discussion is the question of whether a BDL is necessary to protect the public safety and welfare. As noted, the problem is frequently not the dog but, rather, the owner who allows the dog to run free and thus be placed into situations that trigger its defense mechanisms. The dog can only bark, run, or bite. Looking at the big picture, however,

one is left to wonder how dog bites stack up against other common causes of injury. Statistics vary, but there appears to be a certain consistency in connection with average annual incidents related to accidental injuries of various types. Approximately 500,000 reported dog bites occur annually. Indeed, dog bite incidents are comparatively low when juxtaposed to other categories of accidental injuries: each year, trip and fall incidents exceed 10 million, vehicular accidents number nearly 5 million, drug-related injuries account for more than 3 million, and accidents related to sports and bicycling approach nearly 4 million. In an effort to reduce the causes of such accidental injuries, do public health and safety officials engage in equally preposterous analyses that are reflected in the thought process that underlies the enactment of a BDL? Clearly, the answer to that rhetorical question is a resounding "NO!"

Alternatives to BDLs

Effectively written and consistently enforced leash laws are the most obvious—and least burdensome—means by which to ensure that dog bites are reduced and, it is hoped, prevented. Despite media reports that only focus on the worst—and on the rare—cases of serious injury or worse, the number of serious dog bites is comparatively low when seen in relation to the number of dogs in the United States. Unfortunately, the more popular the breed, the more likely the occurrence of dog bites—it is a matter of sheer mathematical probability. This has consistently been the case with bites by German shepherds, as was expressly predicted in the late 1990s as the popularity of the Dalmatian increased. And, quite unfortunately, the most frequent victims of dog bites are children, who may not have been properly taught how to interact with a dog, or the incident is the result of human behavior that is totally unrelated to the dog. A dog will bite when provoked or injured. BDLs are not appropriate responses to the vast majority of dog bite incidents and have no practical effect on limiting dog bites. In fact, at least one municipality has concluded that its BDL did nothing to prevent dog bites and that a rise in dog bites was seen after the enactment of its breed discrimination law.

As is true in so many other contexts, education is a key consideration. The American Kennel Club offers a Canine Good Citizen program—an education and certification program that emphasizes responsible dog ownership and training for dogs and owners alike. Governmental entities across the United States have endorsed this program as a means by which to reduce the incidence of dog bites. Programs such as this are useful in dealing with insurance companies that consider (generally without supporting underwriting criteria) the ownership of certain breeds of dogs to increase the "risk" of an incident, thus justifying higher premiums for homeowners who own such breeds or even an outright refusal to issue a policy. Two prepos-

terous examples can serve to indicate how a BDL can have an unforeseen consequence. The first is the case of Bukarus, a 12-year-old Rottweiler who was riddled with arthritis and was deaf and partially blind. Yet, because a local BDL deemed Bukarus a vicious or dangerous dog, his owners' insurance company declined to renew their homeowners' insurance. "Dog Owners' New Policy: Bite Back," *USA Today* (May 20, 2003). The second example is the case of a pit bull's owners who lied on their insurance application because of the insurance company's perspective on the risk associated with the ownership of a pit bull. As a result, based on the misrepresentation, the insurer brought a declaratory judgment action and denied responsibility for a claim that the dog had bitten a mother and her son. *Mutual Benefit Ins. Co. v. Lorence*, 2003 WL 1354845 (4th Cir. 2003).

Good training is not limited to programs such as those offered by the American Kennel Club. There are interesting and educational television programs that focus on various breeds, not the least of which is the pit bull. The program, "Dog Whisperer," which is broadcast on the National Geographic Channel, features training techniques developed by Cesar Milan. Shows on the Animal Planet Network include "Pit Boss," which features a rescue service run by Shorty Rossi; "Pit Bulls and Parolees," which shows the efforts undertaken by a pit bull rescue and rehabilitation service that helps both the dogs and ex-convicts; "It's Me or the Dog" demonstrates training techniques used by Victoria Stilwell, whose projects are more broadly based than the focus on pit bulls that are at the root of the other programs. All these television broadcasts are entertaining and educational, and the host of each of them has an informative website as well. More importantly, each program is designed to focus on the interactions between animals and humans, wherein much of the problem lies. Indeed, the American Veterinary Medical Association has stated that a dog's tendency to bite depends on at least five interdependent factors; heredity, early life experience, later socialization with humans and training, medical and behavioral concerns, and the behavior of the human victim in the specific context in which the biting incident occurred.

Legal Ramifications and Issues Surrounding BDLs

Legal challenges to the enforceability of BDLs have been generally unsuccessful. Constitutional challenges based on violations of substantive and procedural due process, the "takings" clause, equal protection, and the "void for vagueness" doctrine have failed in various jurisdictions. The courts have found that a breed discrimination law is rationally related to the exercise of police power, that a breed of dog is not a "suspect class," and that a reasonably intelligent dog owner should be able to determine if the animal falls into the categories of dogs covered by a jurisdiction's BDL.

At least one decision has held that a BDL is unconsti-

tutional. In *American Dog Owners Ass'n v. City of Lynn*, 533 N.E.2d 462 (Mass. 1989), the Supreme Judicial Court of Massachusetts found that the municipality's BDL regulation of pit bulls was unconstitutional. The ordinance contained the overly broad language noted above and included a ban on mixed-breed dogs that contained any mixture of pit bull. The court affirmed the trial court's finding that "[t]here is no scientific means, by blood, enzyme, or otherwise, to determine whether a dog belongs to a particular breed, regardless of whether 'breed' is used in a formal sense or not." *Id.* at 644. In so noting, the court also upheld the trial court's findings that enforcement officials had not been trained in breed identification and that there were no standards by which to identify a pit bull. *Id.* In holding that the ordinance violated the "void for vagueness" doctrine, the court found that it was "impossible to ascertain" whether a dog is a mixed-breed pit bull and that the ordinance failed to pass constitutional muster because it attempted to define pit bull as including any breed that, according to "common understanding and usage," compelled a conclusion that the dog was, in fact, a pit bull.

Conclusion

To a dog owner, the issues that have been given such cursory treatment in this column are real and important. To the unfortunate victims of dog bites, the issues are equally important, but their perspectives may be different. In any event, the issues raised in this discussion are not just practical questions; they also present important legal issues that implicate serious concerns about the exercise of police power. My position on the issue should be obvious and I urge those who are inclined to do so to support the campaigns that are being waged against the enactment of breed discriminatory legislation. We can only hope that enumerating some of the problems related to the average breed discrimination law will result in a simultaneous debunking of the reasons advanced in favor of such laws. **TFL**

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