

1-1-1988

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Recommended Citation

Sullivan, Sallyanne K. (1988) "Banning the Pit Bull: Why Breed-Specific Legislation Is Constitutional," *University of Dayton Law Review*. Vol. 13: No. 2, Article 6.

Available at: <https://ecommons.udayton.edu/udlr/vol13/iss2/6>

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BANNING THE PIT BULL: WHY BREED-SPECIFIC LEGISLATION IS CONSTITUTIONAL

I. INTRODUCTION

Pit bulls—a breed that accounts for only two percent of the United States' dog population—have killed twenty people in four years, most frequently children and the elderly.¹ Dr. Randall Lockwood, Director of Higher Education Programs for the Humane Society of the United States, analogizes having a pit bull as a pet to “keeping a loaded gun around.”² Reports of pit bull attacks have led to extensive concern and debate,³ and have prompted municipalities and state legislature to take steps to protect individuals from this potentially deadly breed of dog. Some municipalities have chosen to completely ban the pit bull from within city limits,⁴ despite claims by opponents that such

1. Cantu, *Efforts to Ban Pit Bulls Spark Arguments over Residents' Safety and Civil Liberties*, Wall St. J., July 6, 1987, at 13, col. 4.

2. *Id.*

3. See, e.g., Watson, *A Mean Breed or a Defamed Pooch?*, INSIGHT, July 27, 1987, at 54; Sager, *A Boy and His Dog in Hell*, ROLLING STONE, July 2, 1987, at 36; Swift, *The Pit Bull: Friend and Killer*, SPORTS ILLUSTRATED, July 27, 1987, at 72; Brand, “Time Bomb on Legs,” TIME, July 27, 1987, at 60; Newman, *No Justice for Victims of Pit Bull Dogs*, Dayton Daily News and Journal-Herald, Sept. 22, 1987, at 15, col. 1; *Pit Bulls: Regulate Owners, Not Dogs*, Wall St. J., Aug. 17, 1987, at 14, col. 3; *Pit Bulls—Best Friend or Time Bomb?*, USA Today, Aug. 10, 1987, at 1, col. 3; Pierce, *It's Time to Put Bite in Dog Laws*, Dayton Daily News and Journal-Herald, July 29, 1987, at 19, col. 1; *Group Defends Pit Bulls*, Dayton Daily News and Journal-Herald, July 20, 1987, at 1, col. 1; *Pit Bull Owners Don't Like Being Singled Out*, Dayton Daily News and Journal-Herald, July 12, 1987, at B3, col. 6; *Owners, Foes in Dogfight Over Pit Bulls*, Cleveland Plain Dealer, May 10, 1987, at 1-A, col. 1.

4. Some states and municipalities have strengthened their vicious dog legislation without specifically prohibiting pit bulls. See, e.g., OHIO REV. CODE ANN. § 955.11(A)(4)(a) (Anderson 1987). The Ohio statute states:

“Vicious Dog” means a dog that, without provocation and subject to Division (A)(4)(b) of this section, meets any of the following: (i) Has killed or caused serious injury to any person; (ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog; (iii) Belongs to a breed that is commonly known as a pit bull dog. The ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping or harboring of a vicious dog.

See also R.I. GEN. LAWS § 4-13.1-1 (Supp. 1986) (defining “Vicious Dog” as “(4) Any dog owned or harbored primarily or in part for the purpose of dog fighting or any dog trained for dog fighting”); DAYTON, OHIO, REV. CODE OF GEN. ORDINANCES §§ 91.01, .50, .99 (1987); CENTERVILLE, OHIO, MUNICIPAL CODE § 505.01(a) (1984); FARMERS BRANCH, TEX., CODE OF ORDINANCES §§ 6-65 to -80 (1987); EVERETT, WASH., MUNICIPAL CODE ch. 6.08 (1986); Midland, Pa., Ordinance 540 (Sept. 8, 1987).

Other authorities have chosen to completely ban the pit bull from within city limits. See, e.g., CINCINNATI, OHIO, MUNICIPAL CODE § 701-24 (1987). The Cincinnati ordinance provides:

No person shall own, keep, or harbor a pit bull terrier, as defined herein, within the municipal limits of Cincinnati. “Pit Bull terrier” as used herein is hereby defined as any Stafford-

action is unconstitutional.⁵ This comment considers a number of constitutional challenges to a breed-specific ban, and argues that a ban on pit bulls can survive such challenges.

II. ANALYSIS

Statutes banning pit bulls have been challenged on three constitutional bases: Substantive due process, equal protection, and vagueness. This analysis considers the grounds and the validity of each such challenge.

A. *Substantive Due Process*

The due-process clauses of the fifth and fourteenth amendments to the Constitution⁶ require that the statute in question "bear a rational relation to a legitimate legislative goal or purpose,"⁷ unless the statute implicates a "fundamental right" entitled to constitutional protection, which would require a narrower fit between the goal and the statute.⁸

shire Bull Terrier or American Staffordshire Terrier breed of dog, or any mixed breed of dog which contains as an element of its breeding the breed of Staffordshire Bull Terrier or American Staffordshire Terrier as to be identifiable as partially of the breed of Staffordshire Bull Terrier or American Staffordshire Terrier.

See also Tijeras, N.M., Ordinance 32 (May 14, 1984) (discussed *infra* notes 119-24 and accompanying text), *upheld*, *Garcia v. Village of Tijeras*, No. CV 84-04162 (N.M. Dist. Ct., Bernalillo County May 29, 1985), *aff'd*, No. 9424 (N.M. Ct. App. Oct. 11, 1988); Eufala, Okla., Ordinance 87-7-1 (July 6, 1987); Maumelle, Ark., Ordinance 37, § 19 (June 16, 1986). In addition, as of October 15, 1987, 44 cities in Kansas have enacted partial bans and 34 cities have enacted complete bans on pit bulls. See League of Kansas Municipalities, *Pit Bull Dog Ordinances in Kansas Cities* (Oct. 15, 1987) (on file with the University of Dayton Law Review). The constitutionality of the Pittsburg, Kansas, and Shawnee, Kansas, complete bans were upheld by their respective municipal courts. *City of Pittsburg, Kan. v. Usher*, No. 86-2599 (Pittsburg, Kan., Mun. Ct. —, 1987); see also *Kansas Cities Take Action to Ban Pit Bulls*, *Hutchinson News*, Mar. 2, 1986, at 5, col. 1.

5. See Comment, *The New Breed of Municipal Dog Control Laws: Are They Constitutional?*, 53 U. CIN. L. REV. 1067 (1984) (contending that breed-specific ordinances are unconstitutional). The University of Cincinnati Comment formed the basis for the legal opinion provided by Dayton, Ohio, Director of Law J. Anthony Sawyer to the Dayton City Commission on May 28, 1987, that a ban on pit bulls would be unconstitutional. Memorandum from J. Anthony Sawyer, Director of Law, Dayton, Ohio, to Richard B. Helwig, City Manager, Dayton, Ohio, May 28, 1987; see also *City Commissioners Back Stiffer Vicious-Dog Law*, *Dayton Daily News and Journal-Herald*, June 4, 1987, at 4, col. 1; Telephone Interview with J. Anthony Sawyer, Dayton, Ohio, Director of Law, Aug. 10, 1987 (notes on file with the University of Dayton Law Review).

6. The fourteenth amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

7. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), cited in *Garcia v. Village of Tijeras*, No. 9424, slip op. at 5 (N.M. Ct. App. Oct. 11, 1988).

8. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Since dog ownership is not a "fundamental right," courts have had no trouble in determining that bans on pit bulls are rationally related to the legitimate legislative goal of public safety.⁹

1. The State's Police Power

It is clear that dog ownership is not a fundamental right.¹⁰ "No proposition is more firmly entrenched in the law than that dogs are subject to the police power of the state and that their regulation and control is a proper and necessary function of the state."¹¹ In the seminal case of *Sentell v. New Orleans & Carrollton Railroad*,¹² the United States Supreme Court, in considering a state's power to regulate dogs, declared:

Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state and might be destroyed or otherwise dealt with as in the judgment of the legislature is necessary for the protection of its citizens.¹³

Indeed, the Court emphasized that a dog "holds its life at the will of the legislature";¹⁴ even an absolute ban on ownership would be permissible.¹⁵

Dogs are subject to an especially broad application of the police power because of their nature. In *Thiele v. City & County of Denver*,¹⁶ the Colorado Supreme Court explained:

Through all the progress in its status, however, and though now accorded a full property status in our state, the original term of 'qualified property rights' in dogs still has a valid standing. The term qualified is

9. *Garcia*, No. 9424, slip op. at 5-6.

10. *Id.* at 5 (by implication).

11. Shurtliff, *Nature of Property in Dogs*, 4 IDAHO L. REV. 105 (1967).

12. 166 U.S. 698 (1896) (upholding the constitutionality of a Louisiana law requiring dogs to be placed upon the assessment rolls in order to be recognized as property).

13. *Id.* at 702.

14. *Id.* at 704.

15. *Id.*; accord *Garcia v. Village of Tijeras*, No. 9424, slip op. at 12-13 (N.M. Ct. App. Oct. 11, 1988).

In *McGlone v. Womack*, 129 Ky. 274, 275, 111 S.W. 688, 689 (1908), the Kentucky Supreme Court stated:

That dogs are an appropriate subject of regulation under the police power of the state is established by an overwhelming weight of judicial authority; and unquestionably it is entirely within the power of the Legislature to prohibit the ownership of dogs at all, and to provide, where their ownership is allowed, any regulation which the legislative discretion may impose.

Id. at 275, 111 S.W. at 689; Shurtliff, *supra* note 11, at 109. See generally 7 E. McQUILLIN, MUNICIPAL CORPORATIONS § 24.284, at 135 (3d ed. 1981).

16. 135 Colo. 442, 312 P.2d 786 (1957) (ordinance providing for impounding of dogs found running at large did not deny dog owners due process of law even though the law did not provide for prior notice to the owners).

used because a dog as property is subject to a different application of the state's police power than most other kinds of personal property. This is due to the nature of dogs and the problems confronting society in how to establish a *modus vivendi* therewith. All property is held by its owners subject to the inherent police power of the state and cannot be used or held in such a way as to injure others or their property.¹⁷

The Colorado court agreed with the *Sentell* Court's evaluation that dogs have no intrinsic value,¹⁸ noting that dogs "are not considered as being upon the same plane with horses, cattle, sheep, and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds, and similar animals, kept for pelasure [sic], curiosity, or caprice."¹⁹

2. The Nature of the Pit Bull: A Clear Threat to Public Safety

That the pit bull is a clear threat to public safety can best be shown through an examination of the history, physical characteristics, and traits of the breed. The term "pit bull" is a generic term for a group of dogs whose ancestry can be traced to the bulldogs of the nineteenth century.²⁰ Historically, these animals were used in the "sport" of bull baiting.²¹ After bull baiting was outlawed, owners of these fierce and indefatigable dogs chose to make use of their dogs' die-hard tendencies in organized dogfights.²² Owners began to genetically mix their dogs to produce smaller, faster dogs such as the Bull and Terrier Dog, Pit Dog, and Staffordshire Bull Terrier.²³ When these dogs came to America, they were known as Pit Dogs, Pit Bull Terriers, American Bull Terriers, or Yankee Terriers.²⁴ In 1898, the United Kennel Club began registering American Pit Bull Terriers.²⁵ The American Kennel Club (AKC) did not recognize the American Pit Bull Terrier as a breed until 1935,²⁶ at which time, not wanting the dog's name to include the word "pit," it renamed the dog "Staffordshire Terrier," since so many of the dogs came from that coal-mining, dogfighting region of England.²⁷

17. *Id.* at ___, 312 P.2d at 789.

18. *Sentell*, 166 U.S. at 701-02.

19. *Thiele*, 135 Colo. at ___, 312 P.2d at 790.

20. R. LOCKWOOD & P. MILLER, "PIT BULL" REPORT 2 (Jan. 21, 1986) (on file with the University of Dayton Law Review).

21. *Id.*

22. *Id.*; see also Kroll, *The Savage Pit*, 1 GEO. Nov. 1979, at 60 (discussing the continued popularity of organized dogfighting in the United States).

23. R. LOCKWOOD & P. MILLER, *supra* note 20, at 2.

24. *Id.* at 3.

25. *Id.*

26. *Id.*

27. Swift, *supra* note 3, at 78.

Despite the fact that dogfighting is outlawed in all fifty states,²⁸ and classified as a felony in thirty-six,²⁹ illegal dogfighting involving pit bulls continues today.³⁰ The very reasons dogfighters choose pit bulls for this arena highlights the qualities of these dogs that make them unfit to live in residential communities.³¹ First, the pit bull possesses capabilities beyond those of other dogs. Biting with a force of 1800 to 2000 pounds per square inch, twice the force of the average Doberman Pinscher or German Shepherd,³² pit bulls possess jaws so specialized that the jaws lock onto the object bitten.³³ At a 1986 Tufts University School of Veterinary Medicine symposium entitled "Animal Aggression: Dog Bites and the Pit Bull Terrier,"³⁴ Sheryl Blair, Special Programs Administrator at the Center for Animals at Tufts University, pointed out that pit bulls do pose a more serious problem than other types of dogs, because "[t]he injuries these dogs inflict are more serious than other breeds because they go for the deep musculature and don't release; they hold and shake."³⁵ Second, the pit bull has been selectively bred to fight without provocation and to continue to fight until it is near death.³⁶ The dogs' genetically-based insensitivity to pain³⁷ also helps to explain why it is often very difficult to beat them off of their victims.³⁸ Most frightening, pit bulls do not give any warning sig-

28. E.g., OHIO REV. CODE ANN. § 959.16 (Anderson 1988); see also Kroll, *supra* note 22, at 76.

29. E.g., CAL. PENAL CODE § 597 (West Supp. 1989); Kroll, *supra* note 22, at 76 (discussing dogfighting penalties and laxity in application of the laws); see also Brand, *supra* note 3, at 60.

30. Brand, *supra* note 3, at 60.

31. The Humane Society of the United States notes that "[o]ver a century of breeding for bull-baiting and fighting [has] had a profound effect on the genetics of many of these breeds." R. LOCKWOOD & P. MILLER, *supra* note 20, at 5. The Humane Society advises:

In view of the lack of uniform standards of temperament, the lack of inhibition of aggression, the strength and tenacity of attacks and the failure to show appropriate warning signs of aggression, most animal control officers have come to regard these animals as potentially dangerous unless proven otherwise. Even pit bulls with no prior history of aggression have been known to become highly aggressive when at large, when in a pack, when confronted by any aggressive dog or under other unpredictable situations.

Id. at 9.

32. Cantu, *supra* note 1, at 13, col. 4; see also Sager, *supra* note 3, at 36, 40; Brand, *supra* note 3, at 60.

33. "Pit Bulls can bite with greater force than most dogs and once in a hold they do not simply maintain the 'bite,' but continue to grind their premolars and molars into the tissue while the canine teeth stabilize the hold." Clifford, *Observations on Fighting Dogs*, 183 J. AM. VETERINARY MED. A. 654-57 (Sept. 1983).

34. Swift, *supra* note 3, at 72, 75.

35. *Id.* at 75; R. LOCKWOOD & P. MILLER, *supra* note 20, at 8.

36. R. LOCKWOOD & P. MILLER, *supra* note 20, at 6.

37. *Id.* at 7.

38. For example, in the case against the owners of pit bulls that attacked and killed Dr. William Eckman in Dayton, Ohio, on April 6, 1987, one witness testified that "his automobile was
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nals before an attack, and they do not stop attacking even when their victim submits. In fact, pit bulls have been known to disembowel other dogs that have rolled over to indicate defeat.³⁹

Defenders of the pit bull assert that the problem lies not with the breed, but with irresponsible owners.⁴⁰ Owners have been known to cruelly mistreat their animals so that they excel either as savage fighters,⁴¹ as vicious sentinels over illegal or illegally-obtained goods,⁴² or as lethal weapons in the perpetration of crimes.⁴³ Nevertheless, owners alone cannot be blamed for the vicious behaviors of this particular breed, since cases have also been reported where the family pet pit bull has suddenly turned on its *owners*.⁴⁴ Hence, the regulation of the pit bull cannot simply be left to the discretion of the individual because the breed's behavior is too unpredictable.⁴⁵ No pit bull can ever be completely trusted to remain a docile family pet.⁴⁶ As one judge put it,

American Pit Bull Terriers have been known to be friendly and docile at one moment, willing to sit on your lap and lick your face, and at the next moment to attack in a frenzied rage. . . . [S]uch berserk frenzies do not occur in other breeds of dog.⁴⁷

There can be no question that a ban on the breed would bear a rational relation to the legitimate legislative goal of public safety.⁴⁸

rocked as Eckman clung to the bumper and the dogs pulled at him in the street." *Deliberations Begin in Pit Bull Case*, Dayton Daily News and Journal-Herald, Oct. 15, 1987, at 3, col. 3. A Baltimore police officer fired his gun at a pit bull that had bitten him, "[b]ut a colleague had to club the dying dog on the head and then use a nightstick to pry its jaws loose." Pierce, *supra* note 3. Tina Harper, chief of animal disease control for the District of Columbia's Department of Human Services noted, "They have very strong jaws, once they latch onto something, they don't let go." Watson, *supra* note 3, at 54.

39. R. LOCKWOOD & P. MILLER, *supra* note 20, at 7-8.

40. See *Pit Bull Owners Don't Like Being Singled Out*, *supra* note 3, at B3, col. 6.

41. See Kroll, *supra* note 22, at 60.

42. "Some law-enforcement authorities say the pit bull has become the watchdog of choice among drug dealers." Cantu, *supra* note 1, at 13, col. 4.

43. For example, a thief used a pit bull as his weapon in robbing a fast food restaurant; a woman ordered her pit bull to attack two policemen. *Id.*

44. See *infra* note 88 and accompanying text.

45. See *infra* note 89 and accompanying text.

46. See Cantu, *supra* note 1, at 13, col. 4.

Investigating a dog's family history may be one way for would-be owners to avoid problems. "Temperament is 70% hereditary," says Janice Price, an official at the American Kennel Club. "If you want to get a pit bull, make sure you meet the father and grandfather if you can." But she adds that even the best animals may have a checkered lineage. "If you shake the family tree hard enough," she says, "you're going to have some biting dogs."

Id. at 13, col. 6.

47. *Garcia v. Village of Tijeras*, No. 9424, slip op. at 7 (N.M. Ct. App. Oct. 11, 1988).

48. *Id.* at 5-6. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 525 (3d ed. 1986) [hereinafter J. NOWAK].

B. Equal Protection

The second argument advanced against the banning of pit bull dogs is that such a ban violates the equal-protection clauses of the fifth and fourteenth amendments,⁴⁹ which require that legislative classifications be proper ones. So long as no suspect classification or fundamental interest is involved—and ownership of pit bulls is not such a classification or interest⁵⁰—the court need only find that there is a rational relationship between the statute as drafted, and its ultimate purpose.⁵¹ Under this minimum-rationality test, “classifications are set aside as violative of equal protection only if they are based solely on reasons totally unrelated to pursuit of the state’s goals and only if no grounds can be conceived to justify them.”⁵² In other words, the minimum rationality standard requires the challenger to prove that the legislature acted in an arbitrary and irrational manner in passing the law.⁵³ 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.

1. Equal-Protection Challenges to Animal-Control Laws

Courts considering regulation of animals have consistently upheld such laws against equal-protection challenges under a rational-relation test, finding no suspect classification or fundamental right implicated. Upheld regulations include bans on the ownership of lions,⁵⁴ pigs,⁵⁵

49. The equal-protection clause of the fourteenth amendment is quoted *supra* note 6. In *Lindsley v. Natural Carbonic Glass Co.*, 220 U.S. 61 (1911), the Supreme Court stated that [t]he equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and is therefore arbitrary.

Id. at 78; see also *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974) (“[S]o long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.”); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“It is enough that the State’s action be rationally based and free from invidious discrimination.”). See generally J. NOWAK, *supra* note 48, at 523–28.

50. See *supra* notes 11–20 and accompanying text.

51. *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Duke Power Co. v. Carolina Env’t Study Group*, 438 U.S. 59 (1978).

The rational-relation test provides that “classifications are set aside as violative of equal protection only if they are based solely on reasons totally unrelated to pursuit of the state’s goals and only if no grounds can be conceived to justify them.” *Clements*, 457 U.S. at 963; see also J. NOWAK, *supra* note 48, at 530.

52. *Clements*, 457 U.S. at 963.

53. *Duke Power Co.*, 438 U.S. at 82–83.

54. *Kent v. Polk County Bd. of Supervisors*, 391 N.W.2d 220 (Iowa 1986) (homeowner was denied a permit to keep a pet lion) (discussed *infra* notes 59–62); *City of Warren v. Testa*, 461
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goats,⁵⁶ ponies,⁵⁷ and bears.⁵⁸

For example, in *Kent v. Polk County Board of Supervisors*,⁵⁹ the Iowa Supreme Court upheld a Polk City ordinance that prohibited individuals “from owning, sheltering, harboring, or keeping certain species of animals in Polk County, Iowa, with exceptions for those who can qualify for a permit.”⁶⁰ The plaintiff claimed the ordinance violated the equal-protection clause because individuals who possessed a lion for research or education could obtain a permit, while an individual who simply wished to keep a lion as a pet could not. Unpersuaded by this argument, the court stated that “[b]ecause no fundamental right or suspect class was involved in Kent’s challenge, the proper level of scrutiny is rational basis.”⁶¹ Thus, for Kent to prevail, the burden was on him to show that no conceivable set of facts existed to justify the legislative classification. In holding that “Kent failed to meet this heavy burden,” the court stated:

The ban on private ownership of “dangerous animals” is rationally related to the board’s duty to promote the public safety and welfare. Moreover, the [County Board of Supervisor’s] distinction between holding these animals as pets and holding them for other purposes is rationally related to the legitimate goal of public safety. The board could reasonably determine the benefit to society gained from limited exceptions for research, education, and reproduction of endangered species outweighs the threat to public safety. Similarly, the board could determine the same societal benefit cannot be derived from individual pet ownership, and therefore, such ownership does not outweigh the potential threat to public safety.⁶²

In another case involving a pet lion, *City of Warren v. Testa*,⁶³ an Ohio common pleas court found a city to be justified in prohibiting the

N.E.2d 1354 (Ohio C.P. 1983) (constitutional to prohibit the keeping of a lion in a city residence) (discussed *infra* notes 63–69 and accompanying text).

55. Borough of Lincoln Park v. Cullari, 15 N.J. Super. 210, 83 A.2d 233 (1951) (ordinance limiting the number of pigs that could be kept did not offend the equal-protection clause of the fourteenth amendment) (discussed *infra* notes 72–75).

56. Town of Atlantic Beach v. Young, 307 N.C. 422, 298 S.E.2d 686 (1983) (defendant was prohibited from keeping her two goats and one small pony, even though they were house pets).

57. Wells v. Finley, 260 S.C. 291, 195 S.E.2d 623 (1973) (ordinance requiring owner to remove ponies from his lot was not unconstitutional).

58. Cannady v. North Carolina Wildlife Resources Comm’n, 30 N.C. App. 247, 226 S.E.2d 678 (1976) (statute making it unlawful to own a black bear did not deny bear owner equal protection).

59. 391 N.W.2d 220 (Iowa 1986).

60. *Id.* at 221.

61. *Id.* at 224–25.

62. *Id.* at 225.

63. 461 N.E.2d 1354 (Ohio C.P. 1983).

keeping of a pet lion within city limits. Though the defendant was able to produce witnesses who said they liked and admired the animal, and one who even said he had hugged and played with the lion, the court would not allow the owner to keep his pet.⁶⁴ The court reasoned that

city property, residential or otherwise, and particularly a residential home . . . is not a proper, safe, or legal place to own, keep, or harbor a lion; that a lion, domesticated or not, is a potentially dangerous animal, capable of doing harm, if loose, and even if attended; that a lion is capable of doing harm to its owner or handler. No one can guarantee or predict the behavior of this animal, in the opinion of the Court; and I do so find from the evidence.⁶⁵

The defendant also claimed that the ordinance was unconstitutional because it “banished” rather than “regulated.”⁶⁶ Rejecting that argument, the court point out that

[a]lthough almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property . . . an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.⁶⁷

The *Testa* court was persuaded that the city had the authority and responsibility to prohibit keeping the lion under any circumstances, despite the hardship an outright ban would work on the defendant, who consistently maintained that his pet was harmless and tame. Thus, although the defendant believed that his pet would never hurt him, the court decided that the possibility of someone’s being injured outweighed the defendant’s right to keep the animal.⁶⁸

The keeping of pit bull dogs should be viewed as analogous to the keeping of wild animals such as lions⁶⁹ and bears,⁷⁰ and the state’s power to regulate pit bulls should be similarly expansive. Not unlike the lion, the pit bull is an unpredictable and “potentially dangerous animal, capable of doing harm, if loose, and even if attended . . . capable of doing harm to its owner or handler.”⁷¹

64. *Id.* at 1357–58.

65. *Id.* at 1358.

66. *Id.* at 1360.

67. *Id.* (citing *Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957)).

68. *Id.* at 1361.

69. *Id.* at 1357–61.

70. *See Cannady v. North Carolina Wildlife Resources Comm’n*, 30 N.C. App. 247, 226 S.E.2d 678 (1976).

71. Compare *Testa*, 461 N.E.2d at 358 (describing lions) with *supra* notes 20–48 and accompanying text (describing similar propensities in pit bulls).

Not only violent animals like lions and pit bulls are subject to prescription on ownership. For example, in *Borough of Lincoln Park v. Cullari*,⁷² the defendant argued that an ordinance prohibiting a person from keeping more than a certain number of pigs unconstitutionally violated the equal-protection clause because the number selected was an arbitrary one.⁷³ A New Jersey appellate court disagreed, holding that the ordinance did not offend equal protection because the limitation on the number of pigs was “reasonably calculated to achieve the stated purpose.”⁷⁴ The court explained, “The right of private property must yield to the common good, and when interfered with or restrained the assumed injury to the individual is presumed to be offset by the benefit accruing to him as one of the public at large.”⁷⁵

In a similar fashion, the rights of owners of pit bulls should yield to the greater goal of protecting the public from vicious attacks.

2. Banning the Pit Bull: Equal-Protection Arguments

Whether or not classifications of dog owners based upon ownership of pit bulls will stand up under constitutional attack depends upon whether the classifications are reasonable. One way in which their reasonableness is examined is on the basis of “underinclusiveness” and “overinclusiveness.”

a. Underinclusiveness

Opponents assert that it is unconstitutional to treat differently the owners of one breed of dogs when many kinds of dogs have injured people.⁷⁶ This line of reasoning suggests that a ban on pit bulls should be deemed unconstitutional because it is “underinclusive.”

Underinclusive laws fail to fully accomplish the drafter’s goals because not all potential subjects of the legislation are included in the legislative category.⁷⁷ For example, pit-bull owners argue that other kinds of dogs are just as likely to be involved in vicious attacks;⁷⁸ thus,

72. 15 N.J. Super. 210, 83 A.2d 233 (1951).

73. *Id.* at 213, 83 A.2d at 234.

74. *Id.* at 214, 83 A.2d at 235.

75. *Id.* at 215, 83 A.2d at 235.

76. *Pit Bull Owners Don't Like Being Singled Out*, *supra* note 3.

77. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *see also* J. NOWAK, *supra* note 48, at 527. For the classic discussion of what is meant by “overinclusive” and “underinclusive,” *see* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

78. *See Owners, Foes in Dogfight Over Pit Bulls*, *supra* note 3, at 18-A, col. 3.

There are no reliable national statistics on non-fatal bites. However, a 1985 study in Lucas County attributed 41 bites to a pit bull population of 421—a rate of 9.7%. Comparable rates for other breeds were 4.5% for Dobermans, 3.5% for German Shepherds, and 2.8% for St. Bernards.

since the purpose of the law is to prevent vicious attacks, these other dogs should be included in the ban as well.

A law does not fail to be constitutional, however, simply because it is underinclusive. Such a law does not become any less rational because other dogs could also be banned.⁷⁹ “It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”⁸⁰ The legislature may choose to address one phase of the problem at a time.⁸¹ In 1986, an ordinance specifically regulating the keeping of pit bulls survived an equal-protection challenge brought by pit-bull owners. In *Starkey v. Township of Chester*,⁸² a United States district court judge in the Eastern District of Pennsylvania found that a township could reasonably determine that it was necessary to impose special restrictions on the keeping of pit bull dogs and held that it did “not have to regulate every dangerous animal at the same time in the same way to pass constitutional muster.”⁸³

Thus, although drafters of vicious-dog legislation hope to eliminate the possibility of all severe attacks, their law would not fail because it could not completely accomplish that objective. All that is required is that some conceivable set of facts exists at the time of the law’s enactment to justify the categorization of pit bulls as posing a threat to the public.⁸⁴ With all the evidence of pit bulls, in particular, being involved in severe and even fatal attacks,⁸⁵ it is evident that the classification bears a rational relationship to the legitimate goal of protecting the public.

b. *Overinclusiveness*

Pit bull advocates also contend that a total ban on pit bulls would be “overinclusive” in sense that the classification chosen encompasses owners of more dogs than is necessary to accomplish the goal of protecting the public.⁸⁶ Some owners insist that their pit bulls are gentle and loyal pets who would never harm anyone, and that it would be

Id.

79. *Id.* at 10 (“To satisfy equal protection tenets, it is not necessary that the Village address all potential threats from all breeds of dog; instead, the Village was entitled to address a phase of the problem that was of acute concern.”).

80. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

81. *Id.*; see also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (legislature may take a “one-step-at-a-time” approach).

82. 628 F. Supp. 196 (E.D. Pa. 1986).

83. *Id.* at 197.

84. See *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

85. All five people killed by dogs from January 1, 1987, to August 17, 1987, were killed by pit bulls or pit bull mixes. See *Pit Bulls: Regulate Owners, Not Dogs*, *supra* note 3.

86. *Pit Bull Owners Don't Like Being Singled Out*, *supra* note 3, at B3, col. 6.

unfair to outlaw dogs that have never shown vicious tendencies.⁸⁷ This view ignores the evidence that pit bulls may suddenly turn on their owners.⁸⁸ Even breeders concede that one cannot tell what a pit bull might do because its hereditary strains cannot be perfectly ascertained.⁸⁹

Although opponents of a total ban on pit bulls argue that it is “unfair” to take someone’s dog away before the dog has done anything wrong, such a law is not inherently unconstitutional.⁹⁰ Constitutionality is not determined by a “fairness” standard.⁹¹ Legislatures are permitted to act to protect the public from the debilitating or possibly fatal⁹² attacks by pit bulls, even if it means taking steps that sweep more broadly than that which would be sufficient to accomplish this important goal.⁹³ Arguably, some families own docile pit bulls who have never threatened anybody; possibly their violent instincts have been effectively diluted over succeeding generations.⁹⁴ The undeniable fact remains, however, that a disproportionate number of pit bulls have been involved in very serious attacks.⁹⁵ Clearly, a ban on ownership of pit bulls, whether underinclusive or overinclusive, bears a rational relation

87. *Id.*

88. *See, e.g., Father of Mauled Boy Calls for Ban of Pit Bulls*, Kansas City Times, May 9, 1985, at B-1, col. 1 (reporting that on April 6, 1987, a sixteen-month old girl was killed by the family’s pet pit bull). Between 50 and 100 pit bulls were put to sleep by owners in Des Moines, Iowa, in the first six months of 1987 because the owners feared that their pets might attack them. *Pit Bulls: Best Friend or Time Bomb?*, *supra* note 3.

89. “[O]ne former dog breeder says the killer instinct is in their blood. ‘If you pick them up when they’re 3 days old, they’ll growl at you. I’ve never known any other dogs to do that.’” Watson, *supra* note 3, at 54. The Humane Society of the United States will not guarantee that these animals make good pets, because “[t]he extent to which the original temperaments of these breeds has been altered by breeding is often difficult to predict.” R. LOCKWOOD & P. MILLER, *supra* note 20, at 5.

90. *Cf. Testa*, 461 N.E.2d at 1361 (city council can prohibit keeping of a dangerous animal even though the representation can be made that the animal is harmless or tame).

91. *See generally* J. NOWAK, *supra* note 48, at 525–37.

92. *See supra* note 1 and accompanying text.

93. The University of Cincinnati law review article, which maintains that breed-specific laws are unconstitutional, does concede that an underinclusive law is not necessarily unconstitutional:

The pit bull dog laws raise an additional equal protection question when the ordinances define vicious dogs to include all pit bull dogs. These ordinances appear to be overly inclusive because, it may be argued, not all pit bull dogs are indeed vicious. This line of reasoning would be easily dismissed, however, by the general rationale of the seminal canine control case, *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897). In *Sentell*, the Court acknowledged that canine control laws affect dogs that are “harmless” but stated that the broad reach of the law was necessary to accomplish protection of public safety.

Thus, the argument that laws controlling pit bull dogs are unfair in their affect upon harmless members of the breed would appear to be easily refuted.

Comment, *supra* note 5, at 1077–78 n.67 (citations omitted).

94. *But see supra* note 89.

95. *See supra* note 1 and accompanying text.

to the legitimate legislative goal of public safety.

C. *Vagueness*

Opponents protest that a law banning pit bulls is unconstitutionally vague because it does not clearly indicate what is being banned. They argue that the term "pit bull" is imprecise and includes a wide variety of dogs.⁹⁶ To overcome a vagueness challenge, the state must show that the law clearly notifies an ordinary individual that an activity is prohibited.⁹⁷ Using reference manuals and expert witnesses, courts have generally upheld such laws against vagueness challenges. Since a law banning pit bulls does not inhibit the exercise of any constitutionally-protected right, the more-stringent vagueness test applicable to "fundamental rights" situations is inapplicable and such laws are judged under a rational-relation standard.⁹⁸

In *City of Lima v. McFadden*,⁹⁹ an Ohio appellate court stated that an ordinance banning pit bulls was neither vague nor indefinite, but rather, "pertain[ed] to a particular breed of dog with characteristics generally conforming to the characteristics set forth in . . . [specific] references."¹⁰⁰ The court explained that "[w]hether any particular animal falls within this classification is an issue of fact to be determined by the evidence presented."¹⁰¹ Similarly, in *Garcia v. Village of Tijeras*,¹⁰² the New Mexico Court of Appeals court also upheld a ban on pit bulls against a void-for-vagueness challenge, finding that the "breed [could be] recognized by its physical characteristics."¹⁰³

In a paper presented at the October 1986 annual meeting of the Washington State Association of Municipal Attorneys,¹⁰⁴ Michael E.

96. The term "pit bull" is a generic term for a group of dogs whose ancestry can be traced to the bulldogs of the 19th century. The United Kennel Club and the American Dog Breeders Association refer to this kind of dog as the American Pit Bull Terrier, while the American Kennel Club knows it as the American Staffordshire Terrier. "Pit bull" also includes mixtures of these dogs with one another and with the Staffordshire Bull Terrier, the Bull Terrier, and the bulldog. See R. LOCKWOOD & P. MILLER, *supra* note 20, at 1.

97. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (enunciated standards for evaluating vagueness).

98. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

99. No. 1-85-22 (Ohio Ct. App., Allen County June 30, 1986) (LEXIS, States library, Ohio file).

100. *Id.* at 5 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981); W. BRUETTE & K. DONNELLY, COMPLETE DOG BUYER'S GUIDE (1983); AMERICAN KENNEL CLUB, THE COMPLETE DOG BOOK 377 (15th ed. 1977); W. FLETCHER, DOGS OF THE WORLD 99 (1983)).

101. *Id.*

102. No. 9424 (N.M. Ct. App. Oct. 11, 1988).

103. *Id.* at 4.

104. M. Weight, *City Bites Dog: Regulating Vicious Dogs/Pit Bull Terriers* (Oct. 1986) (unpublished manuscript) (on file with the University of Dayton Law Review).

Weight, Assistant City Attorney for the City of Everett, Washington, explained how the vagueness challenge can be overcome:

The average person can identify a collie or German shepherd. For those persons who have had contact with pit bulls, their identification is equally as simple. A definition of the breed that anticipates visual identification of those dogs we know as the American Pit Bull Terrier, the American Staffordshire Terrier and the Staffordshire Bull Terrier gives sufficient notice to the average person.¹⁰⁵

One court has struck down a pit-bull law on vagueness grounds. In *Holder v. City of Hollywood*,¹⁰⁶ a Florida trial court found such a law unconstitutionally vague because owners had no way of knowing whether their dog was addressed by the statute.¹⁰⁷ The "Everett Ordinance,"¹⁰⁸ advocated by Mr. Weight, attempts to overcome such a deficiency by placing the burden of proof as to notice on the prosecution.¹⁰⁹ The dog owner must know that his or her dog is a pit bull to be found guilty of violating the ordinance.¹¹⁰ The prosecution is able to prove such knowledge because the city has instituted a formal procedure to give notice to pit bull owners.¹¹¹ As long as means of identifying pit bulls are made available to citizens, laws banning these dogs should not be found to be unconstitutionally vague.

The mere fact that determining whether a dog is a pit bull requires factual analysis does not mean that a law banning pit bulls is unconstitutionally vague.¹¹² "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."¹¹³ Thus, it is imperative that a statute banning pit bulls sufficiently describe the breed, so that citizens know what is being prohibited.¹¹⁴ Trained investigators, who can determine by sight whether or not a

105. *Id.* at 12.

106. No. 81-13968-CR (Fla. Cir. Ct., Broward County Nov. 9, 1982) (cited in Comment, *supra* note 5, at 1079).

107. Comment, *supra* note 5, at 1079.

108. EVERETT, WASH., MUNICIPAL CODE § 6.08 (Dec. 1986).

109. M. Weight, *supra* note 104, at 12.

110. EVERETT, WASH., MUNICIPAL CODE § 6.08 (Dec. 1986).

111. M. Weight, *supra* note 104, at 7-8; *see also infra* notes 123-28 (discussing similar proposal made by Mayor Edward I. Koch of New York City).

112. *United States v. Harriss*, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which a statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.").

113. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

114. *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (law not unconstitutionally vague if an ordinary person can understand what is being prohibited).

given dog is a pit bull,¹¹⁵ should be consulted in drafting definition sections and enforcing bans. If a legislature or town council, with the help of capable advisors, enacts legislation banning pit bulls, courts should be willing to give a reasonable construction to such statutes so that the laws are not found to be unconstitutionally vague.¹¹⁶

Even more importantly, a person who acknowledges owning a pit bull cannot attack a breed-specific statute for vagueness at all. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."¹¹⁷ quoted at gar 5 Thus, a statute providing for notice before seizure or other penalty should eliminate most complaints that the law should not be enforced because of vagueness.

III. RECENT DEVELOPMENTS

Two recent developments indicate growing support for upholding breed-specific bans. In New Mexico, a municipal pit-bull ban challenged on virtually every conceivable due-process and equal-protection basis was upheld; across the country, in New York City, Mayor Edward I. Koch proposed a tough, yet *constitutionally-sensitive* pit-bull ban.

In *Garcia v. Village of Tijeras*,¹¹⁸ the New Mexico Court of Appeals affirmed the district court judge's decision upholding a municipal pit-bull ban against due process, equal protection, and vagueness challenges.¹¹⁹ Adopted after a tragic accident in which a pit bull attacked and severely injured a young child, the Tijeras ordinance specifically provides:

It is unlawful to own or possess in the Village any dog of the breed known as American Pit Bull Terrier. Any such dog may be impounded by the Mayor or Animal Control Officer to be destroyed as provided herein. It shall be held until a determination is made by a court of competent jurisdiction that the animal is an American Pit Bull Terrier and shall accordingly order that the dog be destroyed.¹²⁰

115. The Humane Society of the United States indicates that "[e]xperienced investigators can often successfully determine the state of origin of a particular bloodline on the basis of the dogs' overall appearance." R. LOCKWOOD & P. MILLER, *supra* note 20, at 5.

116. *United States v. Harriss*, 347 U.S. 612, 618 (1954) (quoted *supra* note 112).

117. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

118. No. 9424 (N.M. Ct. App. Oct. 11, 1988).

Numerous legislatures and jurisdictions have requested copies of the Tijeras ordinance banning pit bulls. The Tijeras Village Clerk presently receives two or three requests every day. Telephone interview with Teresa Jaramillo, Tijeras, N.M., Village Clerk, August 17, 1987.

119. *See, e.g., Garcia*, No. 9424, slip op. at 3, 5, 9-10, 12.

120. Tijeras, N.M., Ordinance 32 (May 14, 1984), *upheld*, *Garcia v. Village of Tijeras*, No. CV 84-04162 (N.M. Dist. Ct., Bernalillo County May 29, 1985), *aff'd*, No. 9424 (N.M. Ct. App.

The New Mexico Court of Appeals, in a persuasive and well-reasoned opinion, highlighted carefully the presumptions of constitutionality that favor the drafter under a rational-relation analysis.¹²¹ More significantly, determining that the pit bull has an identifiable “phenotype,” or “typical physical appearance,” the court held that owners of dogs either admitted to be pit bulls or recognized by the court as such have unquestionably violated the statute—and thus have no claim of vagueness.¹²²

Also illuminating is New York City Mayor Koch’s 1987 proposal of “local legislation requiring the registration of pit bulls already owned and a ban on the possession or sale of any pit bulls in the city.”¹²³ The Mayor declared that, under the proposed law, the Department of Health would assist owners in determining whether their dogs are pit bulls.¹²⁴ The legislation would provides that

“[a]ny owner violating the provisions of the law will be subject to a civil penalty of not more than \$500 per violation for each day that any violations continue. Anybody who knowingly violates the law will be guilty of a misdemeanor and subject to a fine of not more than \$5,000 or imprisonment for one year, or both.”¹²⁵

This proposal should overcome the constitutional challenges discussed in this article. The proposal provides a workable method for a citizen to determine whether or not his or her animal falls within the proscribed category, so that he or she knows what is being prohibited; thus, the law is not unconstitutionally vague.¹²⁶ Furthermore, the proposal distinguishes between a civil penalty and a criminal sentence, so that if a citizen is unaware that his or her dog is a pit bull, he or she is only civilly liable.¹²⁷ This is important, as the constitutional test for vagueness is less stringent when a civil rather than a criminal law is involved.¹²⁸

Oct. 11, 1988).

121. *E.g.*, *Garcia*, No. 9424, slip op. at 2–3, 10.

122. *Id.* at 5.

123. Office of the Mayor, N.Y. City, Press Release No. 277 (Aug. 17, 1987) [hereinafter Press Release] (on file with the University of Dayton Law Review).

124. *Id.* at 2.

125. *Id.* at 3.

126. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). For an example of an ordinance that provides notice of ownership of the type of dog prohibited by the law, see EVERETT, WASH., MUNICIPAL CODE § 6.08 (Dec. 1986).

127. Press Release, *supra* note 123, at 3.

128. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982).

IV. CONCLUSION

States and municipalities must better appreciate the full breadth of the police power in situations involving the regulation of dangerous animals. Carefully-drafted laws that clearly define the type of animal being prohibited can survive constitutional challenges. Furthermore, a statute can sufficiently describe the term "pit bull" to defeat a void-for-vagueness challenge. Moreover, so long as a community can show that the ban on pit bulls bears a rational relationship to the safety of its citizens, the law will survive an equal-protection challenge as well.

Even legislators who, for some reason, do not support a ban on ownership of pit bulls must ensure that licensing and regulating statutes are strict enough to provide for the prohibition of any dog that poses a serious threat to the public.¹²⁹ Lawmakers and law enforcement officials have a duty to see that people need no longer live in fear of "man's best friend."¹³⁰

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129. See R.I. GEN. LAWS § 4-13.1-1 (Supp. 1986) (governing vicious dogs) (discussed *supra* note 4).

130. Watson, *supra* note 3, at 54-55.
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